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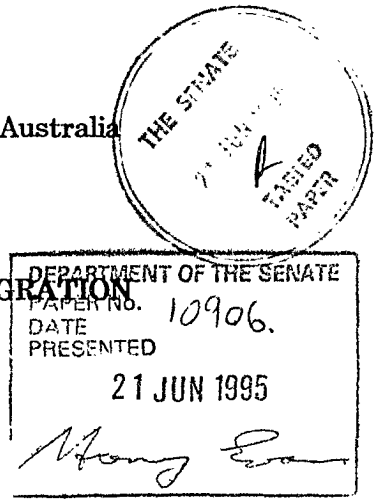

JOINT STANDING COMMITTEE ON MIGRATION

PROTECTING THE VULNERABLE?

The Migration Agents Registration Scheme

May 1995

Australian Government Publishing Service
Canberra

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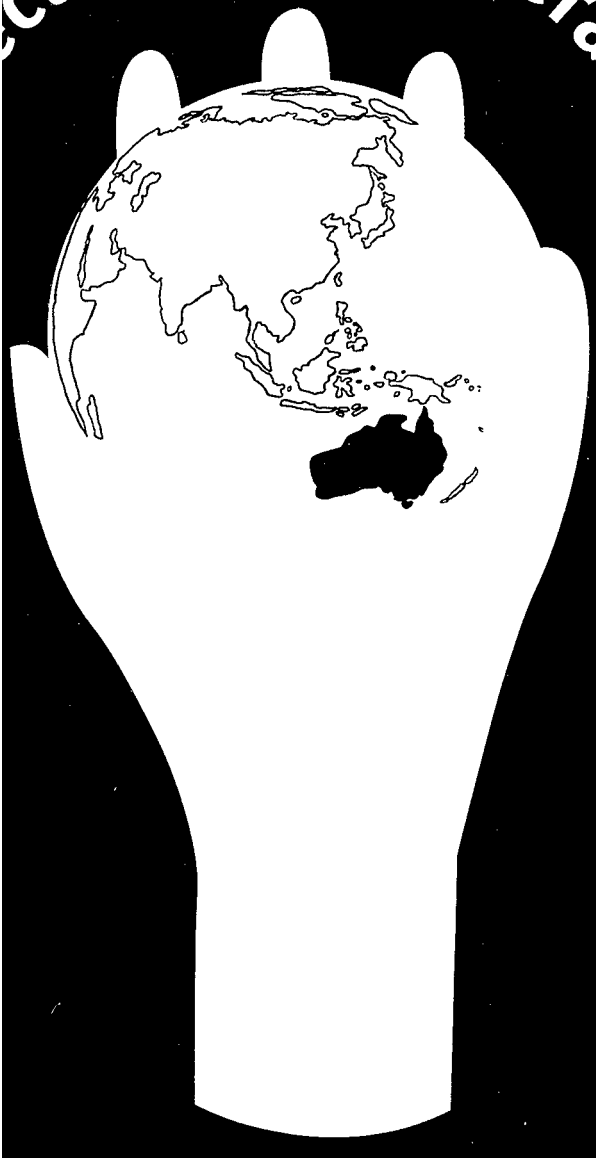

...igration Agents Registration Scheme
Standing Committee on Migration

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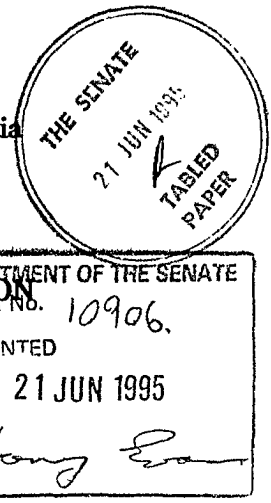

JOINT STANDING COMMITTEE ON MIGRATION

PROTECTING THE VULNERABLE?

The Migration Agents Registration Scheme

May 1995

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ISBN 0 644 45303 6

Produced by the Australian Government Publishing Service

FOREWORD

The Migration Agents Registration Scheme was established in 1992 in response to concerns about the conduct and competence of persons providing immigration advice and assistance.

Over the past year, the Joint Standing Committee on Migration has been investigating the operation and effectiveness of the Scheme. The inquiry was established in accordance with the Government's commitment to review the Scheme *two years after its commencement.*

As part of its inquiry, the Committee sought and received evidence from the major stakeholders in the Scheme, including migration agents, legal bodies, immigration advice centres, community organisations, government departments, review tribunals, legal aid commissions and members of the public. The broad evidence received by the Committee enabled a comprehensive analysis of the Scheme and its impact on the providers and receivers of immigration advice.

During the course of the inquiry, a constitutional challenge to the Scheme was defeated in the High Court. The High Court's majority judgement upholding the validity of the Scheme meant that the Scheme could continue to operate in its existing form. This Committee's principal task was to determine whether the Scheme should continue to operate and, if so, whether any improvements were necessary. This report presents the Committee's findings and recommendations in this regard.

The ultimate aim of this report is to ensure that a competent and professional migration advice industry operates in Australia for the benefit of those who need immigration advice and assistance.

SENATOR JIM McKIERNAN
CHAIRMAN

ACKNOWLEDGMENTS

The Committee expresses its appreciation to all those who contributed to the inquiry by providing submissions and attending public hearings. The evidence received was extremely valuable in the formulation of the Committee's findings and recommendations.

The Committee is grateful to the Committee Secretary, Mr Andres Lomp, and the secretariat for their high quality and professional work. The secretariat included the Committee's research officer, Mr Stephen Boyd, Mrs Tu Pham, who worked on the secretariat as part of the Australian Public Service's Executive Development Scheme, and the administrative officers at various points of the inquiry, Ms Sophia Konti, Mr Scott McClelland and Mr Peter Tighe.

Special thanks are also due to the Committee's legal adviser, Dr Kathryn Cronin, and to Mr Ian Branston, who was seconded from the Department of Immigration and Ethnic Affairs to work on the inquiry. Their valuable advice and support is gratefully acknowledged. The cooperation of the Department of Immigration and Ethnic Affairs in arranging the secondment is also appreciated.

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Adviser:	Mr Ian Branston
Inquiry Staff:	Mr Stephen Boyd Ms Sophia Konti Mr Scott McClelland Mrs Tu Pham Mr Peter Tighe

TERMS OF REFERENCE

(a) To inquire into the effectiveness of the Migration Agents Registration Scheme having regard to:

  (1) the scope of the scheme, including consumer protection;

  (2) standards of entry to practice and means to maintain standards;

  (3) fees;

  (4) the complaints mechanism/appeal provisions/sanctions;

  (5) administration of the scheme; and

(b) To consider whether any changes in existing arrangements are required or desirable.

ABBREVIATIONS

AAS	Accredited Agent Scheme
AAT	Administrative Appeals Tribunal
AFTA	Australian Federation of Travel Agents
Board	Migration Agents Registration Board
Code	Code of Conduct
Committee	Joint Standing Committee on Migration
Cunliffe case	*Cunliffe v The Commonwealth*, (1994) 124 ALR 120; (1994) 68 ALJR 791
DIEA	Department of Immigration and Ethnic Affairs
IARC	Immigration Advice and Rights Centre
IASS	Immigration Advisory Services Scheme
INS	Immigration and Naturalization Service
IRT	Immigration Review Tribunal
ITOA	Inbound Tourism Organisation of Australia
Minister	Minister for Immigration and Ethnic Affairs
MIRO	Migration Internal Review Office
RACS	Refugee Advice and Casework Service
RRT	Refugee Review Tribunal
Scheme	Migration Agents Registration Scheme
UKIAS	United Kingdom Immigrants Advisory Services
VIARC	Victorian Immigration Advice and Rights Centre

CONCLUSIONS AND RECOMMENDATIONS

Chapter Three: Overview of the Migration Agents Registration Scheme

To date, the Migration Agents Registration Scheme has achieved mixed results. Critics of the Scheme suggested that it has had little if any impact on the standard and conduct of persons providing immigration advice. They cited continuing problems with poor advice and unscrupulous practice as evidence of the Scheme's failure to make any discernible difference. In contrast, supporters of the Scheme argued that the registration requirements have resulted in the exclusion from practice of a significant number of persons who were unfit or not appropriately qualified and who otherwise may have been operating in the field. They also suggested that the Scheme is assisting to change attitudes within the migration advice industry by instilling among registered agents an enhanced awareness of the need to maintain knowledge and standards. On this basis, a significant number of those who made submissions to the inquiry supported the continuation of the Scheme with improvements.

Statistics obtained by the Committee support a finding that the achievements of the Scheme relevant to its objectives have been chequered. On the positive side, around 600 persons either have been denied the right to practise as migration agents or have decided to withdraw from seeking entry to the industry. In addition, the avenues for developing expertise in migration law have increased noticeably, with various courses and seminars now being conducted at a tertiary level and within the industry itself. On the negative side, disciplinary action taken against migration agents has been minimal, even though the number of complaints in relation to registered and unregistered practice has been increasing over time. In addition, public awareness of the Scheme remains at a relatively low level. The Scheme also has not achieved its objective of being self-funding and, according to DIEA, is unlikely to do so in the future.

During the inquiry, it was acknowledged that the Scheme has been in operation for just over two years. In this regard, it is relevant to note that, for virtually the entire operational life of the Scheme, the High Court challenge to the Scheme placed its validity and operation in doubt.

In coming to its conclusions on whether to retain the Scheme, a range of factors have influenced the Committee's decision. The Committee's examination revealed that the migration advice industry has been subject to some form of regulatory control since its early development. Many witnesses suggested that, as the migration advice industry is still developing in Australia, mechanisms to assess and monitor standards within the industry are important for ensuring a competent, professional and reputable industry. In this regard, while a self-regulatory professional body for migration agents, namely the Migration Institute of Australia, has been established recently, the Institute has not secured broad coverage of the industry. As such,

self-regulation is not a viable option at this time, particularly given the varied nature of the industry.

While there is continuing anecdotal evidence of poor advice and unscrupulous conduct, the Committee considers that, at this stage in the Scheme's development, such evidence does not necessarily indicate the failure of the Scheme. Statistical evidence about increasing use of the complaints mechanism established under the Scheme suggests that consumers increasingly have knowledge about the Scheme. Evidence of increasing complaints through the Scheme's formal mechanisms suggests a continuing need for some form of regulation of the migration advice industry in the interests of consumer protection. As noted by one witness to the inquiry, it was not expected that problems which led to the establishment of the Scheme could be resolved overnight. In the Committee's view, abolition of the Scheme, or its substantial diminution, could send an inappropriate signal to the community about the Government's commitment to the establishment of a competent and reputable migration advice industry in which the interests of those most in need of assistance are safeguarded.

Further, while some have suggested that the Scheme has been ineffective in curtailing the activities of certain incompetent and unscrupulous agents, it could be argued that such agents have been able to continue operating because of loopholes in the Scheme, such as the exclusion of advice to sponsors and nominators from the scope of the Scheme. This could be an argument for strengthening rather than abolishing the Scheme.

On the basis of all the evidence presented to it, the Committee concludes that the Scheme should be retained for the time being, but that it should be reassessed by the Committee after a further three years of operational experience. The Committee was swayed in particular by arguments that the Scheme only now is beginning to show results and that further time is required to achieve the Scheme's intended objectives.

In arriving at the conclusion that the existing Scheme should continue to operate, the Committee has taken into account both the statistical outcomes of the Scheme to date and the anecdotal evidence received during the inquiry. At the same time, the Committee has relied on that evidence to recommend improvements in relation to the scope of the Scheme, the criteria for registration, the administration of the Scheme, its Code of Conduct and its disciplinary processes. Those recommendations are detailed in subsequent chapters of this report.

In recommending that the Scheme be retained for the time being, but that it be reassessed in three years time, the Committee is of the view that the Migration Agents Registration Board should develop specific performance indicators which would assist in an objective assessment of the Scheme after a further three years of operation.

The Committee recommends that:

1. **the Migration Agents Registration Scheme continue to operate for a further three years, with a range of improvements as detailed in subsequent recommendations; and**

2. **the Migration Agents Registration Scheme be reviewed by the Joint Standing Committee on Migration after a further three years of operational experience, and that such a review be based on the outcomes which have been achieved in relation to objective performance indicators developed by the Migration Agents Registration Board.** (paragraph 3.90)

Chapter Four: Migration Agents

The legal profession

The debate on whether lawyers should be included in the Migration Agents Registration Scheme focused principally on the issue of whether there was a demonstrated need for lawyers to be registered as migration agents. Those opposed to the inclusion of lawyers argued that the legal profession itself has adequate controls for ensuring the competence and conduct of lawyers without the need for an additional registration scheme. Representatives of the legal profession referred, in particular, to comments by Mason CJ, who, in his dissenting judgment on the High Court challenge to the Scheme, intimated that the Scheme was unnecessary for lawyers because no evidence had been presented that there was a real problem of unscrupulous behaviour or incompetence among lawyers.

During the inquiry, the Committee received a variety of evidence to suggest that while a majority of lawyers undertake their duties with due competence and integrity, some lawyers practising in the immigration field do not have adequate knowledge of migration law, and a small percentage act in an unscrupulous manner. Particularly relevant in this regard was the evidence from the IRT and the RRT that, in proceedings before the tribunals, poor standards have been evident among lawyers and non-lawyers alike. Relevant also was the information from the Board that it has dealt with complaints about lawyers not under investigation by the legal profession's own disciplinary committees or tribunals.

In the previous chapter, the Committee recommended a continuation of the Scheme for three years, on the basis that further time is required for the Scheme to be assessed adequately. Given that the statistical and anecdotal evidence regarding the shortcomings of migration agents related to both lawyer and non-lawyer agents, the Committee is not minded at this time to exempt a significant proportion of the industry, namely lawyers, from the Scheme.

Clearly, the Government's original objective of raising professional standards across the migration advice industry has yet to be achieved. In the Committee's view, exemption of lawyers from the Scheme at this point in time would make the achievement of that objective even more difficult. Again, the Committee notes the evidence from the IRT and RRT regarding poor standards among lawyer and non-lawyer migration agents.

The Committee also is concerned that exemption of lawyers from the Scheme would remove an important avenue of consumer redress for persons who are given poor immigration advice by incompetent or unscrupulous lawyers. In this regard, community groups indicated that a large proportion of persons requiring immigration assistance would have little knowledge of the intricacies of the legal profession's complaints and disciplinary system. As such, it would be unlikely that persons who receive poor advice from incompetent or unscrupulous lawyers would be in a position to utilise those disciplinary processes. Exemption of lawyers from the Scheme would make it more difficult for such persons to achieve appropriate redress.

Accordingly, it is in the interests of the migration advice industry and the consumers of immigration assistance that the Committee at this time supports the continued inclusion of lawyers within the Scheme.

The Committee, however, is concerned that, in certain circumstances, the existing requirements of the Scheme are unduly onerous for lawyers and may result in persons unwittingly breaching the legislation. As detailed above, the current legislative drafting of the Scheme means that lawyers who are not registered as migration agents but who provide immigration advice on a casual basis to a friend or acquaintance or who occasionally provide pro bono immigration advice would be breaching the legislation. As this problem also affects other professional advisers, the Committee's proposals in this regard are detailed in the section dealing with non-fee charging advisers.

Another problem identified by the Committee concerns visa related immigration work before the AAT, which is not included within the existing definitions of immigration assistance or immigration legal assistance. When the Scheme was established, the then Minister indicated that broad definitions have been used to include all persons working in the migration area and all types of immigration work. The omission of reference to the AAT in the Scheme does not accord with this approach and should be rectified.

In considering whether all persons providing assistance on migration matters before the AAT should be required to register as migration agents, the Committee noted that the registration scheme is directed principally at the regulation of advice given in relation to visa matters. On this basis, the Committee is of the view that assistance given in relation to an AAT review of a business visa cancellation or a visa refusal on character or conduct grounds should be included in the definition of immigration assistance. Criminal deportation work, which results from successful criminal prosecutions, should remain outside the Scheme.

While the Committee considers that AAT visa work should be included within the scope of the Scheme, the Committee is aware that advocacy work undertaken in the AAT by lawyers, whether in respect of visa refusals or criminal deportation cases, is associated closely with advocacy work in court, for which lawyers are exempt from the requirement to register as migration agents. On this basis, the Committee is of the view that advocacy work undertaken by lawyers in the AAT likewise should be included in the definition of immigration legal assistance and, therefore, should constitute, along with court advocacy, areas of work for which lawyers are exempt from the requirement to register as migration agents. The effect of this proposal would be that non-lawyers would be required to be registered as migration agents when undertaking advocacy work before the AAT, but lawyers would be exempt from this requirement.

The Committee recommends that:

3. **subject to recommendations 5, 6 and 13, lawyers continue to be required to register as migration agents in order to provide immigration assistance;**

4. **the definition of immigration assistance be amended to include advice, assistance or representation given in relation to visa refusals or cancellations before the Administrative Appeals Tribunal, including business visa cancellations and visa refusals and cancellations under section 501 of the *Migration Act 1958*;**

5. **advice, representation and assistance given in relation to criminal deportations before the Administrative Appeals Tribunal continue to be outside the scope of the Migration Agents Registration Scheme; and**

6. **lawyers continue to be exempt from the requirement to register as migration agents when undertaking preparation or representation in relation to visa refusals or cancellations before the Administrative Appeals Tribunal.** (paragraph 4.47)

Non-fee charging migration agents

As stated previously, when the Migration Agents Registration Scheme was introduced, the Government made the deliberate decision to include virtually all providers of immigration assistance within the scope of the Scheme. Some have criticised the requirement that non-fee charging workers and members of non-profit organisations are required to register, suggesting that this requirement is extreme and has resulted in a reduced number of sources of advice for those who are unable to afford paid advice. Others have argued that the broad reach of the Scheme has helped to ensure that those providing advice in the non-profit sector are skilled and competent. In this regard, the Committee notes the high regard with which many non-profit immigration advisory services are held in the community.

In considering the scope of the Scheme, the Committee notes the differing views of the High Court regarding the registration arrangements. The Committee notes in particular the view of the majority of the High Court that the balancing of competing interests associated with the Scheme is a matter for the Parliament.

In this regard, the Committee agrees with the view of the Immigration Advice and Rights Centre that the principal issue is not whether the advice is paid for or is provided free of charge, but whether consumers, particularly those who are least able to shop around for advice, should be able to expect accurate advice from competent advisers, and whether they should be able to access appropriate avenues of redress should the advice which is provided prove to be negligent, inaccurate or dishonest. The need for access to information must be balanced against the right to appropriate and competent advice. While the exemption of non-fee charging advisers from the requirements of the Scheme may increase the sources of free advice, the Committee is concerned that any such move would dilute, to the detriment of the consumer, the overall objective of the Scheme to improve the quality of advice within the migration advice industry. Accordingly, the Committee is of the view that, in general, persons providing immigration assistance without charging a fee, when providing such assistance in the capacity of a non-fee charging advice service, or in the course of or in association with their business or profession, should continue to be required to register as migration agents.

At the same time, however, the Committee is sympathetic to the need for adequate access to immigration advice and the difficulties faced by non-profit organisations seeking to assist those with an immigration problem. The Committee acknowledges the limited resources with which they must operate, the increasing demand for their services, and the problems of staff turnover which continually trouble such organisations. To alleviate some of these difficulties, the Committee supports the suggestion for the introduction of an organisation based registration whereby the non-fee charging advice agency itself is registered without the need to register in their own right all persons working for that agency. In supporting this proposal, the Committee considers that the Board's concerns that persons can use such licensing arrangements or organisation based registrations as a back door method of gaining registration for the purposes of commercial practice need to be addressed.

In the Committee's view, organisation based registrations should be made available to those non-fee charging organisations which are able to demonstrate to the Board that they have:

- continuity of leadership within their management committees;
- supervision of workers by a permanent and experienced staff member who would qualify to register as a migration agent in his/her own right;
- adequate and appropriate resources;

- a regular and on-going training program for staff to ensure their continued competence in immigration law and practice; and
- a commitment to ethical conduct.

Individuals working for a registered organisation who provide immigration assistance either outside of the auspices of that organisation or after leaving the employ of that organisation would be required to register as migration agents in their own right. In addition, the Board should have the power to revoke organisation registrations where the organisation ceases to satisfy the prescribed standards of staff training, advice and/or conduct. Where an organisation ceases to be registered, individuals working for that organisation would need to register as migration agents in their own right in order to provide immigration assistance. This proposal would obviate the need for any provisional registration, as proposed by the Refugee Advice and Casework Service, and would overcome the Board's concerns about existing licensing arrangements being a back door method of registration. If the proposal to establish organisation based registrations is adopted, then the existing licensing arrangements should be amended accordingly.

The Committee acknowledges that, if the above proposals are implemented, some community organisations which currently operate under the licensing arrangements may not qualify for an organisation based registration and, therefore, may need to ensure that their staff are registered individually. To assist such organisations in getting staff registered, the Board should ensure that an appropriate training module for community workers is developed, with a view to such workers gaining registration as migration agents in their own right.

As for those professional advisers, such as lawyers and student advisers, who occasionally may provide advice free of charge to a family friend or acquaintance, the Committee is concerned that the current provisions of the Scheme unwittingly may bring them into a breach of the legislation by virtue of the fact that their advice is provided on the basis of their professional knowledge. Such persons may not be aware of the requirements of the Scheme and may be acting out of a genuine desire to provide assistance with a particular problem. It is unlikely that such persons would be prosecuted. Indeed, DIEA's advice to the Committee was that where such cases have come to its attention, the unwitting advisers simply were cautioned about the need for registration when providing immigration assistance. Nevertheless, under the existing legislation, such persons attract a potential liability and offend the penalty provisions. To overcome this anomaly, the Committee is of the view that the Migration Act should be amended to ensure that those persons who, in association with their business or profession, provide immigration assistance free of charge on an occasional, informal basis are exempt from the requirement to register as migration agents. In making this recommendation, the Committee is heeding the concerns expressed in the *Cunliffe* case by certain of the dissenting High Court judges regarding the ambit of the registration arrangements applying to voluntary advice.

The Committee recommends that:

7. **persons providing immigration assistance without charging a fee when providing such assistance in the capacity of a voluntary advice service or in the course of or in association with their business or profession continue to be required to register as migration agents, except for those persons under section 280 of the *Migration Act 1958* who currently are exempt from the requirements of the Migration Agents Registration Scheme, as well as those persons covered by recommendations 10 and 13;**

8. **for the purposes of allowing non-fee charging organisations to provide immigration assistance without requiring their employees or voluntary workers to register as migration agents in their own right, the Migration Agents Registration Board be empowered to implement a system of organisation based registrations under which the Board is able to register non-fee charging organisations which are able to demonstrate to the Board that they have:**

   - **continuity of leadership within their management committees;**
   - **supervision of workers by a permanent and experienced staff member who would qualify to register as a migration agent in his/her own right;**
   - **adequate and appropriate resources;**
   - **a regular and on-going training program for staff to ensure their continued competence in immigration law and practice; and**
   - **a commitment to ethical conduct;**

9. **pursuant to recommendation 8, the Migration Agents Registration Board be empowered to revoke the registration of registered organisations which cease to satisfy the prescribed standards of staff training, advice and/or conduct;**

10. **pursuant to recommendations 8 and 9, individuals who work for registered organisations not be required to register as migration agents in their own right unless or until they provide immigration assistance outside the auspices of the organisation, or they leave the employ of the organisation, or in circumstances where the organisation ceases to be registered;**

11. **subject to the adoption of recommendations 8 to 10, the existing licensing arrangements for non-fee charging organisations be amended accordingly;**

12. **the Migration Agents Registration Board ensure the development of a training module to assist non-fee charging organisations which do not qualify for an organisation based registration to have their advisers registered as migration agents; and**

13. **persons who, in association with their business or profession, provide immigration assistance free of charge on an occasional, informal basis not be required to register as migration agents.** (paragraph 4.78)

Staff of legal aid commissions

It is clear from the explanatory memorandum to the legislation establishing the Migration Agents Registration Scheme that the Government always intended to exempt staff of legal aid commissions from the requirement to register as migration agents. The confusion about this, which arose at the commencement of the Scheme and which initially resulted in staff of legal aid commissions being registered, was overcome eventually after DIEA sought clarification of how the term 'official' should be defined. While the Committee is pleased that, in a practical sense, the confusion has been resolved, the Committee is of the view that, in the interests of continuing certainty, it should be put beyond doubt that legal aid commission staff are exempt from registration as migration agents by explicitly including legal aid commission staff within the definition of an official in section 275 of the Migration Act.

The Committee recommends that:

14. **section 275 of the *Migration Act 1958* be amended to specify that the term 'official' includes staff of legal aid commissions, so that it is put beyond doubt that staff of legal aid commissions are exempt from the requirement to register as migration agents.** (paragraph 4.84)

Travel agents

As noted previously, the broad reach of the Migration Agents Registration Scheme was aimed deliberately at ensuring that immigration advice is accurate and competent, whether or not such advice is given free of charge or ancillary to a principal business. As noted previously, the consequences of wrong or inaccurate advice can result in unnecessary hardship and expense. In the Committee's view, no substantive evidence was presented as to why travel agents who provide assistance in relation to an immigration matter should be exempt from the Scheme. If advice is provided in a professional capacity, the consumer rightfully should expect the advice to be accurate and should have appropriate avenues for redress should that not prove to be the case. (paragraph 4.88)

Sponsors and nominators

The existing provisions define immigration assistance to be assistance or representation given to a visa applicant or cancellation review applicant. By definition, a significant proportion of visa applicants are located overseas. Various visa categories require visa applicants to be sponsored by an Australian citizen or resident, or an Australian company or institution. In such circumstances, the advice given by a migration agent is likely to be directed to the Australian sponsor or nominator. Additionally, the review of a visa refusal is lodged in the name of the Australian sponsor or nominator.

If advice given to sponsors and nominators is not included within the definition of immigration assistance, a significant part of migration practice is excluded from the scope of, and therefore protection offered by, the Migration Agents Registration Scheme. Clearly, this is an unsatisfactory situation. One particularly invidious outcome of this omission is that persons who have been found to be unqualified or unfit to practise as migration agents can circumvent the Scheme by directing their practice through sponsors and nominators.

A close reading of the High Court's decision in the *Cunliffe* case would appear to allow advice provided to sponsors and nominators to be included within the scope of the Scheme. The High Court held unanimously that the Scheme was within the aliens power in the Constitution because, although it did not regulate the rights and obligations of non-citizens, non-citizens were the objects of protection and immigration assistance was a matter of peculiar significance to non-citizens. Under these criteria, it would appear that advice given to sponsors and nominators could be brought within the scope of the Scheme because the ultimate beneficiary of the assistance still would be the non-citizen. This view has been confirmed by legal advice obtained from the Attorney-General's Department.

On this basis, the Committee considers that advice to sponsors and nominators should be included within the scope of the Scheme. The definition of immigration assistance should be amended to include assistance and representation given to sponsors and nominators of visa applicants within that definition.

The Committee recommends that:

15. **the definition of immigration assistance under section 276 of the *Migration Act 1958* be amended to include within that definition advice given to sponsors and nominators of visa applicants, thereby requiring persons who provide immigration assistance to sponsors and nominators to be registered as migration agents.** (paragraph 4.101)

Citizenship

Little evidence was received during the inquiry on whether there is a need to include advice given to non-citizens on citizenship within the scope of the Scheme. The issue was raised by the Board late in the inquiry.

Despite the lack of evidence received during the inquiry, the Committee considers that there are good reasons to support the extension of the Scheme to cover advice and assistance given to non-citizens in relation to their citizenship applications. In particular, the Committee considers that persons giving such advice should be required to comply with the Code of Conduct for migration agents which discourages the making of statements which the person knows to be false and misleading.

The Committee is aware from its own experiences that citizenship applicants who have obtained residence by fraud or deception may not necessarily be known to DIEA at the time they make their citizenship applications. The Committee is concerned to ensure that migration agents who may be aware of the deception do not help to perpetuate it by assisting the person to obtain citizenship on the basis of his or her fraudulently obtained residence status.

In its 1994 report on Australian citizenship, *Australians All, Enhancing Australian Citizenship*, the Committee recommended that non-citizens who achieve residence by fraud should be liable to have their Australian citizenship revoked where the fraud is discovered after the granting of citizenship. Including advice and assistance to citizenship applicants within the scope of the Migration Agents Registration Scheme would complement the Committee's proposals in its earlier report. As there may be some constitutional implications arising from this proposal, advice should be sought from the Attorney-General's Department as a first step towards implementing this expansion of the Scheme.

The Committee recommends that:

16. **subject to advice obtained from the Attorney-General's Department on any constitutional implications, the definition of immigration assistance under section 276 of the *Migration Act 1958* be amended to include advice and assistance given to non-citizens in relation to applications for citizenship by naturalisation.** (paragraph 4.108)

Chapter Five: Eligibility for Registration

When the Migration Agents Registration Scheme was established, the then Minister indicated that the emphasis of the Scheme would be on monitoring the conduct of migration agents rather than restricting entry to the migration advice industry. The criteria which migration agents must satisfy in order to be registered reflect this aim.

During the inquiry, contrasting views were presented about the existing entry standards and whether they should be strengthened. In this regard, it is important to note that the transitional entry provisions which operated at the outset of the Scheme, whereby persons already working in the migration advice industry could become registered on the basis of their past work experience in a migration practice, no longer are available to new entrants to the industry. The current entry standards require that persons now seeking to be registered as migration agents must either have a law degree or be able to demonstrate a pass in a designated migration law course. This is a recent development. As such, it is premature to suggest that the existing entry standards are inadequate for achieving a more competent and professional industry. In the Committee's view, further operational experience of the current entry standards is required before any move to strengthen those standards should be considered.

In this regard, it is also relevant to note the advice from the Office of Regulation Review that registration schemes are likely to be ineffective if the effort which is directed to registering practitioners overshadows the effort which is directed to monitoring the activities of those practitioners and taking disciplinary action where necessary. The Committee is concerned that if the competence criteria for registration as a migration agent were strengthened at this point in time, the focus would remain on the registration process rather than on the important tasks of monitoring migration agents, investigating complaints and, where necessary, taking disciplinary action. On this point, the Committee notes the evidence from DIEA and the Board that, in the first two years of the Scheme, most of the Board's efforts, and the efforts of the Scheme's secretariat, have been directed to the registration of migration agents, with only limited attention directed to investigations and disciplinary action.

In supporting the maintenance of the existing competence criteria which migration agents must satisfy for registration, the Committee is not suggesting that the issue of professional competence among migration agents does not warrant attention. The Committee prefers to emphasise continuing professional development rather than the setting of entry standards at too high a level.

In this regard, the Committee supports the suggestion that, in order to renew their registrations, all migration agents, including lawyer and non-lawyer agents, should be required to produce evidence of satisfactory completion of relevant training and/or professional development approved by the Board. Without such a requirement, the Scheme's objective of increasing professional standards within the migration advice industry will be achieved in relation only to those conscientious agents who voluntarily update their knowledge and skills on a regular basis. In the Committee's view, a continuing education points model, as applies in the legal profession, would appear to be the most appropriate option for maintaining standards within the migration advice industry. Under such a model, practitioners would be required to demonstrate satisfactory completion of relevant training and/or professional development approved by the Board when renewing their registrations. Failure to comply with such continuing education requirements would delay or justify refusal to renew a registration.

In proposing a continuing education requirement for migration agents, the Committee acknowledges the concerns expressed by some community organisations, including, for example, the South Australian Multicultural and Ethnic Affairs Commission, that currently there are limited opportunities for professional training in migration law and practice, particularly outside New South Wales and Victoria. In this regard, the Committee is encouraged particularly by the efforts of DIEA and the Migration Institute of Australia in conducting seminars and assisting in the establishment of migration law courses. In the Committee's view, these efforts should continue to be supported. In addition, the Board should take responsibility for ensuring that appropriate training opportunities for migration agents outside of New South Wales and Victoria are or can be made available.

The Committee also notes DIEA's suggestion that consideration be given to the establishment of different levels of registration, which acknowledge a higher level of knowledge or skill demonstrated by a migration agent. The Committee is not disposed to make a specific recommendation to this effect at this time. In its view, further development of the industry is required before such a system can be implemented. Nevertheless, it is a suggestion which should be reconsidered once a continuing training requirement is implemented and specialist accreditation in migration law is established fully within the legal profession.

While the Committee is not in favour of strengthening entry standards, and instead has emphasised the need for ongoing maintenance of standards, the Committee is concerned that the existing criteria for registration as a migration agent, as presently drafted, are not easily understood or ascertained. The existing legislation does not define the term integrity or the concept of a fit and proper person to give immigration assistance. It also does not define the concept of sound knowledge of migration procedure. In the Committee's view, it is unsatisfactory for such matters to be left entirely to discretion and interpretation, as currently would appear to be the case.

In the Committee's view, the criteria for registration of migration agents should be defined specifically. The legislation and accompanying regulations should provide guidance as to the criteria for determining integrity, a person's fitness to give immigration assistance, and sound knowledge of migration procedure. In terms of sound knowledge of migration procedure, this should be defined to mean a pass in a course or examination approved by the Board. In addition, as suggested by the Privacy Commissioner, the legislation should limit the criteria for assessment of a registration to that information which is relevant specifically to the application.

The lack of precision regarding the criteria for registration is reflected in the migration agent registration application form. The information requested on that form is defined in broad and imprecise terms. Information is requested not only about the applicant, but also any third parties linked to the applicant by employment. Persons employed by large firms and partnerships are required to provide detailed information on a number of persons within the firm whose practices may be unrelated and irrelevant to the migration agent's registration application. This obligation can be onerous, intrusive and unnecessary. Accordingly, the

Committee is of the view that the existing application form for registration as a migration agent should be redesigned and amended in accordance with appropriate privacy principles in order to set out more precisely the nature of the information which is required.

The Committee recommends that:

17. **the criteria for registration as a migration agent be defined specifically, with legislative guidance to be given on the criteria for determining whether an applicant for registration is a person of integrity, is a fit and proper person to provide immigration assistance and has sound knowledge of migration procedure;**

18. **the term 'sound knowledge of migration procedure' be defined to be a pass in a course or examination accredited by the Migration Agents Registration Board;**

19. **the information required to be disclosed by an applicant for registration as a migration agent be modified to:**

    - **specify the types of information which are relevant to the assessment of an applicant's suitability for registration;**
    - **limit consideration of the character and conduct of co-workers, co-executives and partners of the applicant to those individuals related by employment who directly or indirectly influence the applicant in the provision of immigration assistance; and**
    - **specify the particular information pertaining to character which is relevant to an assessment of an applicant's integrity;**

20. **the application form for registration as a migration agent be redesigned and amended to indicate the precise nature of information required to be provided by the applicant and to reflect the amendments proposed in recommendation 19;**

21. **all migration agents renewing their registrations be required to provide evidence of satisfactory completion of relevant training and/or professional development approved by the Migration Agents Registration Board as part of a continuing education points system; and**

22. **the Migration Agents Registration Board be responsible for ensuring that adequate and appropriate opportunities for training are available for migration agents across Australia.** (paragraph 5.47)

Chapter Six: Administration of the Scheme

Submissions on the role of DIEA

As one of the principal objectives of the Migration Agents Registration Scheme is to provide consumer protection against professional misconduct in the migration advice industry, it is vital that both the providers and consumers of immigration assistance have confidence in the operation of the Scheme. In this regard, the Committee agrees with the sentiment expressed during the inquiry that such confidence depends on the integrity of the Scheme and its decision making processes.

Some of the dissatisfaction with the existing Scheme appears to stem from concern about the role of DIEA. The Secretary of DIEA, or the Secretary's delegate, approves straight forward applications, refers controversial applications to the Board and serves as Chairperson of the Board. This has given rise to a perception that the Scheme and the Board which administers the Scheme are linked too closely to DIEA.

In this regard, the Committee notes the Privacy Commissioner's concerns regarding the role of DIEA's Secretary in registering and referring applications. These concerns appear to stem in part from the Commissioner's perception, derived from consultations prior to the establishment of the Scheme, that the Board would have responsibility for all aspects of registration. On this point, it is relevant to note that the need to fast-track straight forward applications in practice has required the assistance and expertise of DIEA staff, who cull, register and refer relevant applications. The Committee's recommendations for greater precision in the criteria for registration and changes to the migration registration application form, as detailed in Chapter Five, should assist in allaying some of the concerns about the role of DIEA staff in collating and evaluating information relevant to registration applications.

At the same time, the Committee shares some of the concerns about the Secretary's responsibilities as Chairperson of the Board. On this matter, no specific evidence was presented to the Committee to indicate that the Board is unduly influenced by DIEA as a result of DIEA retaining the position of Chairperson of the Board. Indeed, such suggestions were refuted vigorously by the Board and DIEA. Nevertheless, the Committee considers that public confidence in the Scheme would be enhanced, and the distinct roles of the Board and the Secretary of DIEA would be clarified, if an independent Chairperson was appointed to the Board.

In the Committee's view, the existing arrangement whereby the Secretary of DIEA or his/her delegate serves as Chairperson is unsatisfactory. It creates confusion about who is administering the Scheme, thereby fuelling the perception that the Board is not independent. In addition, because of DIEA's practice of rotating the Chair among its senior executives, the position of the Chair effectively has become a titular one. The Committee considers that the Chairperson of the Board has an important function to perform in providing leadership and direction to the Board. Establishment of an independent Chairperson will not only ensure that such a role

can be fulfilled, but also will contribute to the standing of the Board as an independent decision making body.

In proposing that an independent Chairperson be appointed to the Board, the Committee is firmly of the view that DIEA's presence on the Board should be retained through the creation of an additional place on the Board for a representative of DIEA. A reconstituted Board along the lines proposed by the Committee would allow for an effective working relationship between the Secretary of DIEA, the secretariat and the Board. It would enable the Secretary and secretariat to maintain responsibility for processing uncontroversial applications and referring controversial applications to the Board. It also would enable DIEA to play an active role on the Board alongside the other stakeholders in the Scheme without the perception that it has undue influence in directing the Board. The structure proposed by the Committee would maintain an appropriate balance by continuing to draw representation from all the major stakeholders in the Scheme.

In the Committee's view, the DIEA representative should be a senior officer of DIEA. In addition, to ensure continuity, the position should not be filled on a rotation basis, as has been the current practice in relation to the Chairperson. Rather, one senior officer should be identified and serve as the Board member.

Concerns regarding the role of DIEA in investigating complaints about migration agents are discussed in Chapter Eight.

The Committee recommends that:

23. **the existing administrative arrangements for registration of migration agents be retained, so that the Secretary of the Department of Immigration and Ethnic Affairs maintains responsibility for approving straight forward applications from persons seeking to become migration agents and for referring contentious applications to the Migration Agents Registration Board, which should retain responsibility for considering and determining such contentious applications;**

24. **an independent Chairperson, who is not a migration agent and who is not a representative of the Department of Immigration and Ethnic Affairs, be appointed to the Migration Agents Registration Board; and**

25. **subject to the adoption of recommendation 24, an additional place be created on the Migration Agents Registration Board for a representative of the Department of Immigration and Ethnic Affairs. That representative should be a senior officer of the Department who is appointed to the Board.** (paragraph 6.44)

Quorum of the Board

The Committee agrees with the Board that the existing requirement for the constitution of a quorum of the Board could create administrative difficulties if the member who is a lawyer is unable to consider a registration application because of a conflict of interest. If the Committee's recommendation for the appointment of an independent Chairperson for the Board is adopted (recommendation 24), similar difficulties could arise if the Chairperson became unavailable in certain situations. This practical difficulty should be remedied by providing more flexible arrangements for constituting a quorum of the Board.

The Committee recommends that:

26. **the *Migration Act 1958* be amended to provide more flexible arrangements for constituting a quorum of the Migration Agents Registration Board in circumstances where the lawyer member of the Board or the Chairperson is unavailable to consider a particular registration application.** (paragraph 6.48)

Funding arrangements

The Committee is of the view that if the Migration Agents Registration Scheme is to operate effectively, adequate resources need to be made available for the Migration Agents Registration Board to carry out all of its functions efficiently. To date, one of the principal objectives of the Migration Agents Registration Scheme, that it be self-funding, has not been achieved. Indeed, on advice from DIEA, it is likely that this objective will not be achieved in the foreseeable future unless changes are made to the existing structure of registration fees.

In this regard, it is clear that, because of the high percentage of agents who are paying a concessional levy for registration and renewal of registration, the Scheme is not generating the income which was anticipated when the Scheme was established. In the Committee's view, the use of the concessional levy has gone beyond what was intended originally by the Parliament.

During the parliamentary debates on the establishment of the Scheme, a concessional registration levy was agreed to because of concerns that the flat fee structure originally proposed would discourage solicitors in small country towns who deal with only a few immigration cases each year from registering as migration agents. It was argued that this would disadvantage persons living in such communities who may require immigration assistance but are unable to access alternative sources of advice. Given that 39 percent of registered agents were paying the concessional levy as at 30 June 1994, it is clear that the concessional levy now applies to a much broader category of adviser than was intended when the amendments to the original fee structure were agreed to by the Parliament.

Evidence to the inquiry also suggested that the existing concessional fee structure, whereby agents who undertake six cases per year pay a significantly higher registration fee than agents who undertake no more than five cases per year, is likely to discourage persons from developing their migration practices. In the Committee's view, the Scheme should be structured so as to encourage the development of an experienced and established industry rather than a fragmented industry comprising a large number of operators who have limited experience and deal with only a few immigration cases each year.

Further, the Committee considers that the concessional levy structure increases the administrative complexity of the Scheme by requiring DIEA to monitor whether agents who have paid the concessional levy undertake more than five cases in a year. Given the advice of DIEA that migration agents have undertaken over 11 000 transactions since the establishment of the Scheme, this monitoring function is time consuming and can tie up DIEA resources which could be devoted more productively to the monitoring and investigation of the conduct of migration agents.

Accordingly, the Committee considers that the general concessional levy should be abolished. In coming to this conclusion, the Committee acknowledges the original concerns that a flat fee structure may discourage solicitors in remote locations who deal with few immigration cases from becoming registered, thereby disadvantaging persons in those communities who need immigration assistance. To overcome these concerns, the Committee considers that registered agents who live in towns and regions where there is no access to alternative immigration assistance and who provide immigration assistance in less than six cases per year should pay a concessional levy of $100 for agents registering in their own right and $50 for agents registering as employees of registered agents. In this way, the concessional levy will apply only where the circumstances of the agent and the community which that agent serves warrant the approval of a particular concession. The concession should not apply to migration agents operating in the larger metropolitan centres or in any of their associated firms which may be located in outlying areas.

In recommending that the concessional registration levy apply only to particular migration agents, as identified above, the Committee accepts that the existing registration fee is set at a high level. For those who do not have a substantial migration practice, the existing registration fee may be perceived as a barrier to entry. In particular, it may discourage well qualified persons in the legal profession, who already have significant expenses in establishing a practice and for whom migration work does not constitute a significant proportion of their practice, from providing immigration assistance. In the Committee's view, this would not contribute to the development of a competitive and professional industry. Accordingly, the Committee considers that the registration levy and renewal levy should be reduced to $500 for agents registering in their own right and $250 for agents registering as employees of a registered agent. Agents who do not charge a fee for their services should continue to be exempt from paying a registration fee.

Effectively, the Committee is endorsing the second option put to it by DIEA. The combined effect of the Committee's proposals would be that agents would be required to pay the full registration fee unless they satisfy the remote locality and minimal case load criteria for a concession, but that a significant proportion of agents would pay a substantially reduced registration fee. According to figures provided by DIEA, this would reduce the financial cost of registering for a significant proportion of agents, and is likely to generate additional revenue for the Scheme of around $130 000 per annum. The Committee's proposals are likely to encourage some agents to take on additional cases, and are likely to free up those DIEA resources which to date have been devoted to monitoring the number of cases undertaken by agents paying the concessional levy.

As for the suggestion that agents should gain some additional benefits in return for paying a registration fee, the Committee notes the advice from DIEA that it is responding to proposals from within the industry and, for example, has conducted seminars and briefings on changes to migration law and practice. Such initiatives should continue to be supported.

Finally, the Committee notes that it was intended originally that grants to community immigration advice organisations, under the Immigration Advisory Services Scheme, were to have been funded from revenue generated by the Migration Agents Registration Scheme. A shortfall in such revenue has meant that the grants have had to be funded from other sources within DIEA. If the Committee's proposals noted above are adopted, it is likely that the revenue generated from migration agent registration levies will increase significantly. In the Committee's view, this revenue should be directed first to improving the operation of the Scheme, including investigations by the Migration Agents Registration Board. Thereafter, it should be directed to providing and enhancing community immigration advice services, but only in circumstances where the organisation which provides the assistance imposes a requirement that persons who are not in financial need must make a financial contribution to the organisation for the advice or assistance which is provided.

The Committee recommends that:

27. the existing concessional registration and renewal levies for migration agents be abolished, but that migration agents who operate in towns and regions where there is no access to alternative immigration assistance and who undertake less than six immigration cases per year continue to pay a concessional levy of $100 for migration agents who register in their own right, and $50 for migration agents who register as employees of a registered migration agent or employees of a partnership or corporation at least one of whose members is a registered migration agent;

28. **subject to the adoption of recommendation 27, the general annual registration and renewal levy for migration agents be reduced to $500 for migration agents registering in their own right and $250 for migration agents registering as employees of registered migration agents or employees of a partnership or corporation at least one of whose members is a registered migration agent; and**

29. **revenue generated from the registration and renewal levies paid by migration agents be directed first to improving the operation of the Migration Agents Registration Scheme, including investigations by the Migration Agents Registration Board. Secondly, the revenue should be used to provide and enhance community immigration advice services as long as persons who are not in financial need are required to make a financial contribution for the advice or assistance which those services provide.** (paragraph 6.85)

Chapter Seven: Professional and Ethical Conduct

Obligations to clients

It is evident that a primary concern of those requiring immigration assistance is the price they have to pay for that assistance. Indeed, concerns about overcharging were a major catalyst for the establishment of the Migration Agents Registration Scheme.

Migration agents have broad discretion over the level of fees which they charge for immigration advice and assistance. The consumer is provided with no guidance as to what might be a reasonable fee to pay a migration agent for work undertaken in relation to a particular visa application. The Code of Conduct simply provides that the fees charged by an agent should be reasonable in the circumstances of the case. The legislation and the Code do not specify what is reasonable in any circumstances.

The suggestion that an indicative scale of fees be introduced for work undertaken by migration agents drew a mixed response from participants in the migration advice industry. Some suggested that adoption of such a proposal would be anti-competitive and would be in direct contrast to developments in other professions aimed at reducing adherence to standardised fees. Others suggested that an indicative scale of fees would assist consumers in making informed choices, would reduce the capacity of unscrupulous agents to overcharge for their services, and would assist the Board to investigate and take disciplinary action in response to instances of overcharging.

In the Committee's view, the lack of guidance in relation to fees is a noticeable deficiency within the existing Scheme. As the migration advice industry is still developing, it is likely that many agents will not have the necessary experience to determine the appropriate level of fee to be charged for a particular case. In addition, many consumers of immigration advice are uninformed about the visa

application process, and may have little opportunity or ability to shop around for a better deal.

The Committee, however, is not in favour of establishing scales of fees for migration agents. Such a move would be contrary to the competition policy reforms recommended in the Hilmer report on national competition policy and being pursued by the Commonwealth and State Governments. It also would be contrary to efforts by the Trade Practices Commission in recent years to remove pricing controls and increase price competitiveness within professions, including, for example, the legal profession.

Instead, the Committee considers that a survey of fees charged by migration agents should be conducted and published on a regular basis. Such a survey should indicate the range of fees which migration agents generally have charged for various types of work undertaken in relation to various visa classes. The survey could become an indicative guide for consumers and migration agents regarding the fees which can be expected to be charged for particular services. This will assist consumers in negotiating service agreements with registered agents, and will assist agents in setting reasonable fees. Such a survey also can be used by the Board as a guide for determining whether an investigation for overcharging is warranted.

In the Committee's view, the survey of migration agents' fees should be conducted and published by the Bureau of Immigration, Multicultural and Population Research, in consultation with representatives from the migration advice industry. An appropriate commencement point for the survey would be the thousands of migration agent declarations lodged with DIEA, which contain information on the fees charged by registered agents and which should be made available to the Bureau.

If the Committee's proposal in relation to a survey of migration agents' fees is adopted, then the need for migration agents to disclose fees to DIEA diminishes. In this regard, it is relevant to note the advice from DIEA that the existing practice of disclosing fees to DIEA yields little benefit in terms of assisting in a determination of whether agents are overcharging. Clearly, DIEA does not have the resources to examine and investigate the fees disclosed in the thousands of declarations lodged to date. The requirement that migration agents lodge declarations with each and every visa application for which they receive a payment creates much unnecessary and unprofitable paper work and should be abolished. Given that the Committee already has recommended the abolition of the concessional registration levy for the majority of migration agents, Form 932 is unnecessary. Registered agents should continue to be required to sign and include their names and registration numbers on client application forms.

On another issue, the Committee considers that the existing requirement for migration agents to keep client funds separate from the agent's funds should be stated more emphatically within the Code of Conduct. In the Committee's view, clause 28 of the Code should be redrafted to provide specifically that migration agents must keep separate client accounts in which all outgoings relevant to a client's application are held prior to payment of such monies to DIEA or other

relevant agencies, and where client fees are held until such time as the work which has been contracted for has been completed satisfactorily.

As for the suggestion that migration agents should be required to take out professional indemnity insurance, the Committee is not inclined to recommend that such insurance be compulsory at this time. The Committee, however, considers that agents should be encouraged actively upon registration to take out such insurance.

The Committee recommends that:

30. **as an indicative guide to fees charged by migration agents, the Bureau of Immigration, Multicultural and Population Research, in consultation with representatives from the migration advice industry and by reference to the migration agents declarations (Form 932) lodged to date with the Department of Immigration and Ethnic Affairs, conduct and publish on a regular basis a survey of fees charged by migration agents for the various types of work undertaken in relation to various visa classes;**

31. **the Code of Conduct for migration agents be amended to abolish the requirement for migration agents to lodge with each immigration application in relation to which they have provided paid immigration assistance a migration agents declaration (Form 932) disclosing the entire fee charged in relation to that application;**

32. **clause 28 of the Code of Conduct for migration agents be amended to clarify a migration agent's obligation to maintain client and agent funds in separate accounts; and**

33. **migration agents be encouraged but not be required to take out professional indemnity insurance.** (paragraph 7.71)

Obligations for professional conduct

During the inquiry, little evidence was presented to the Committee concerning the lodgement of unfounded and vexatious claims by migration agents, and the adequacy of the Code of Conduct in dealing with this problem. Few witnesses commented on the provisions within the Code of Conduct for migration agents concerning vexatious and unfounded claims.

The Code, as currently drafted, simply outlines broad principles discouraging agents from presenting vexatious or grossly unfounded claims. No guidance is provided in the migration legislation or the Code as to what types of application could and should be considered vexatious or grossly unfounded. Clearly, the matter is contentious and requires clarification.

In the Committee's view, the Code of Conduct should be amended to provide specifically that migration agents should not lodge vexatious or grossly unfounded immigration applications. The current wording of clause 14 of the Code, which states that migration agents should not encourage such applications, should be strengthened. In addition, the Code of Conduct should contain guidance as to what constitutes a vexatious or grossly unfounded application. In this regard, DIEA and the Board should initiate consultations with representatives from the migration advice industry with a view to providing within the Code of Conduct more specific guidance as to what constitutes a vexatious or grossly unfounded immigration application, and what an agent's obligations are when clients seek to lodge such applications.

The Committee recommends that:

34. **clause 14 of the Code of Conduct for migration agents be amended to provide that a migration agent should not lodge vexatious or grossly unfounded applications under the *Migration Act 1958* or Migration Regulations; and**

35. **the Department of Immigration and Ethnic Affairs and the Migration Agents Registration Board initiate formal consultations with representatives from the migration advice industry with a view to providing within the Code of Conduct for migration agents more specific guidance as to what constitutes a vexatious or grossly unfounded immigration application, and what an agent's obligations are when clients seek to lodge such applications.** (paragraph 7.94)

Chapter Eight: Monitoring and Disciplining Migration Agents

To operate properly, any registration scheme requires an effective and efficient process for monitoring industry participants and taking disciplinary action where their conduct is not in accordance with industry rules and regulations. A registration scheme without appropriate disciplinary mechanisms, or which has disciplinary mechanisms which are used infrequently or with infrequent success, will do little to increase public confidence in that industry.

During the inquiry, many criticisms of the Migration Agents Registration Scheme were focused on its lack of success to date in removing unscrupulous and incompetent agents from the industry. Witnesses suggested that the disciplinary processes of the Scheme are overly reliant on complaints from consumers, are not well known, are too slow and are ineffective. In response, the Board and DIEA indicated that their success in dealing with miscreant agents is improving over time as the Scheme is becoming better known and as the focus of the Board is switching from the registration process to the monitoring and disciplining of registered agents.

Recent statistics which indicate an increasing number of complaints against registered agents and an increasing number of disciplinary actions suggest the Scheme's disciplinary processes are beginning to show results. Nevertheless, the Committee considers that these processes need to be improved if the Scheme is to become truly effective.

The Committee considers that the functions and powers of the Board should be expanded to improve its effectiveness. In particular, the Board, with the assistance of its secretariat, should adopt a more proactive role in identifying unscrupulous and incompetent practice among migration agents. One specific measure could include monitoring of press advertising by migration agents particularly to determine whether agents are meeting the requirements of the legislation and Code of Conduct.

The Board also should have the power to deal with instances of unregistered practice. Given that a primary emphasis of the Scheme is to ensure that all persons providing immigration assistance are registered, the Board's lack of jurisdiction over unregistered practice is a noticeable omission which should be rectified. Specifically, the Board should be able to refer cases of unregistered practice to DIEA for action.

It also appears that there is minimal contact between the Board and State law societies and bar associations regarding instances of unethical conduct by migration agents who are lawyers. In this regard, it is important to note that the legislation already provides the Board with the power to investigate and refer to the appropriate legal bodies any instances of unethical conduct by lawyers when undertaking immigration legal assistance. As recent statistics indicate that a significant percentage of complaints in relation to immigration assistance relate to work undertaken by lawyers, the Board should also have the specific power to refer to the relevant legal bodies unethical conduct by lawyers when providing immigration assistance.

A specific concern expressed to the Committee by the Board related to the Board's powers to obtain information from applicants seeking registration as migration agents. Presently, the Board's powers to request information and require persons to attend before it relate only to registered agents. The Committee agrees with the Board that there is a real need to extend these powers to applicants for registration as migration agents so that the Board can have all the information before it which the Board considers necessary for the proper determination of an application for registration.

Another specific concern raised during the inquiry was that the part-time nature of the Board can lead to lengthy time delays before the conduct of specific agents can be brought to the attention of the Board for consideration, investigation and decision. As indicated in evidence to the Committee, the disciplinary processes can take many months to run their course, during which time an agent may be able to continue practising. In the Committee's view, this problem could be alleviated if an independent Chairperson were appointed to the Board, as proposed at recommendation 24, and that Chairperson were granted the power to initiate and

undertake investigations utilising the Board's secretariat and DIEA investigators. In this way, the independent Chairperson would not need to wait for a Board meeting to undertake an investigation, thereby helping to speed up the overall consideration of the case, which would still go before the Board for decision.

A further concern of the Committee is that while the disciplinary processes of the Scheme generally are initiated through complaints, the process for making complaints is not set down specifically in the Migration Act or Migration Agents Regulations. In the Committee's view, this omission should be rectified by specifying in the legislation how the complaints mechanism operates, including how a complaint should be made, how the complaint is dealt with, the rights of the complainant and the agent against whom the complaint is made, and the process by which decisions are handed down.

The Committee considers that it should be specified that any person can make a complaint against a registered agent, but that the complaint must not be anonymous. Complaints should be required to be made in writing to the Chairperson of the Board outlining the name of the agent against whom the complaint is being made and the nature of the complaint.

Under existing arrangements, the handling of a complaint, including decisions about whether an agent has the opportunity to appear before the Board, is left to the discretion of the Board. Given that decisions of the Board can affect a person's livelihood, the Committee considers that the process for dealing with a complaint should be set down in the legislation. In particular, it should be specified that an agent has a right to a hearing before the Board when the Board is considering a suspension or cancellation of the agent's registration. The process for conducting such a hearing also should be set down specifically. In this regard, the Board should have the power to take evidence on oath or affirmation. The legislation also should specify the rules concerning the status of interested parties, including the complainant, and the rules concerning the examination and cross-examination of witnesses. In addition, the Board should have the power to call relevant witnesses to give evidence before the Board and, where necessary, be cross-examined by and before the Board. It also should be specified that decisions of the Board must be provided to the agent in writing, outlining the reasons for the decision, and that a copy of the decision is to be provided to the complainant. Further, there should be penalties for obstruction of the Board's investigations and adjudications.

Better public information about the complaints process and about the disciplinary actions of the Board also is necessary if the Scheme is to be effective. The Board should be proactive in notifying the public of instances where agents have been suspended or deregistered in order to ensure that such agents do not continue practising because of community ignorance about their status. Specifically, notices about the agent's suspension or deregistration should be placed in DIEA offices and, where an agent has worked with members of a particular ethnic community, notices also should be placed in the relevant ethnic press. In addition, agents who are suspended or deregistered should be obliged to notify their clients of this fact. Failure to do so should be a punishable offence.

The Committee also considers that the Board should be provided with a broader range of sanctions which can be imposed on migration agents. Existing sanctions only allow for measures which prevent an agent from practising, thereby removing the agent's livelihood. In various circumstances, such a sanction may be inappropriate or too severe. Accordingly, the Committee is of the view that the Board should have the power to impose a sanction which will not only chasten the agent but also will serve to improve the agent's conduct and provide some restitution for the aggrieved client. In particular, the Board should have the power to impose fines, order the refund of fees, order the return of a client's documents, order payment of compensation, order an agent to undertake further education, and make orders relating to the management or employment practices adopted by agents in the conduct of their business. By providing additional disciplinary powers, the Board will have greater flexibility in taking action against migration agents where their conduct does not warrant suspension or deregistration.

In light of the enhanced role and powers of the Board proposed by the Committee, the Committee is of the view that cases considered by the Board should not be appealable to the AAT. Appeals on Board decisions should be allowable only to the Federal Court on a question of law.

Finally, the Committee agrees with the suggestion that the Board should produce its own annual report, to be presented to the Minister and tabled in the Parliament. This could become an important source of information on the operation and outcomes of the Scheme.

The Committee recommends that:

36. the Migration Agents Registration Board be proactive in monitoring the activities of migration agents, including by monitoring advertising by migration agents in the ethnic press, to ensure that agents comply with their obligations under the *Migration Act 1958*, Migration Regulations and the Code of Conduct for migration agents;

37. the Migration Agents Registration Board be provided with the specific power to refer instances of unregistered practice to the Department of Immigration and Ethnic Affairs for action;

38. the Migration Agents Registration Board be provided with the specific power to refer complaints about migration agents who are lawyers to the relevant law societies and bar associations;

39. the Migration Agents Registration Board be provided with the power to require applicants seeking registration as migration agents to provide further information and attend before the Board where necessary;

40. the independent Chairperson of the Migration Agents Registration Board, as proposed at recommendation 24, be provided with the power to initiate and undertake investigations of migration agents utilising the Board's secretariat and Department of Immigration and Ethnic Affairs investigators, and to present the findings of the investigations to the Board for consideration;

41. the process for making complaints against migration agents be defined in the legislation specifying that:

- **any person can make a complaint but the complainant must not be anonymous; and**
- **the complaint is to be made in writing to the Chairperson of the Migration Agents Registration Board detailing the name of the agent against whom the complaint is made and the nature of the complaint;**

42. the process for dealing with complaints against migration agents be specified in the legislation to provide that:

- **an agent has the right to a hearing before the Migration Agents Registration Board where the Board is considering suspending or deregistering the agent;**
- **the Board can take evidence on oath or affirmation; and**
- **the Board can call witnesses to give evidence and be cross-examined;**

43. penalties be included in the *Migration Act 1958* for obstructing the investigations and adjudications of the Migration Agents Registration Board;

44. the legislation specify that decisions of the Migration Agents Registration Board are to be provided to the relevant migration agent in writing, outlining the reasons for the decision, and that copies are to be made available to the complainant;

45. the Migration Agents Registration Board be proactive in publicising its decisions, including by way of notice in offices of the Department of Immigration and Ethnic Affairs and advertising in the media, particularly, where relevant, the ethnic media;

46. migration agents who are suspended or deregistered by the Migration Agents Registration Board be required to notify their clients to this effect, and failure by agents to so inform their clients be a punishable offence;

47. **the Migration Agents Registration Board be provided with a broader range of sanctions which it can impose on migration agents, including the power to:**

- **impose fines on registered agents;**
- **order the refund of fees;**
- **order the payment of compensation to a client;**
- **order the return of a client's documents;**
- **order an agent to undertake further education; and**
- **make orders in relation to an agent's management and employment practices;**

48. **subject to the adoption of the recommendations for expanding the functions and powers of the Migration Agents Registration Board, decisions of the Board be appealable only to the Federal Court on a question of law; and**

49. **the Migration Agents Registration Board produce its own annual report to be presented to the Minister for Immigration and Ethnic Affairs and tabled in the Parliament.** (paragraph 8.112)

Chapter One

THE INQUIRY

Establishment of the inquiry

1.1 On 31 May 1994, the Minister for Immigration and Ethnic Affairs (the Minister), Senator the Hon Nick Bolkus, referred to the Joint Standing Committee on Migration (the Committee) terms of reference for an inquiry into the Migration Agents Registration Scheme (the Scheme). The terms of reference are at page xiii.

1.2 The Scheme was established in September 1992 in response to community concerns about incompetent advice and unscrupulous practice by some individuals in the migration industry. It provides for registration of persons who provide immigration assistance, a code of conduct for registered agents, procedures for investigating complaints against agents, processes for suspending and deregistering agents, and criminal sanctions for unregistered practice. The Scheme was designed to 'improve standards of professional conduct and quality of service'.[1]

1.3 The inquiry was established in accordance with the Government's commitment to evaluate the Scheme two years after its commencement. When the legislation establishing the Scheme was introduced into the Parliament, the then Minister for Immigration, Local Government and Ethnic Affairs, the Hon G. Hand, MP, indicated that 'the registration arrangements proposed by the Government will be evaluated after two years'.[2] This evaluation was timed to precede the 'sunset provision' under section 333 of the *Migration Act 1958* whereby the Scheme will cease operating three years after its commencement, which is 21 September 1995.[3]

1.4 Announcing the inquiry, the Minister noted that the terms of reference were designed to measure the extent to which the Scheme has achieved its objectives and to assess the impact of the changes within the industry.[4] As such, the inquiry involved a detailed examination of the efficiency and effectiveness of the Scheme, focusing on its operation and administration. This included consideration of the conduct and standards of migration agents, as well as developments within the migration advice industry.

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1 Hon G. Hand, MP, Minister for Immigration, Local Government and Ethnic Affairs, Parliamentary Debates (Hansard), House of Representatives, 27 May 1992, p. 2937.

2 ibid., p. 2938.

3 As this report was being finalised, a Bill to extend the sunset clause for one year was expected to be introduced into the Parliament.

4 Letter from the Minister for Immigration and Ethnic Affairs dated 31 May 1994.

Conduct of the inquiry

1.5 The inquiry was advertised nationally in capital city newspapers on 15 June 1994. In addition, the Committee wrote to a range of individuals and organisations seeking submissions, including Commonwealth Government agencies, State Governments and community representative organisations. The Committee also sent the terms of reference for the inquiry to some 1 450 registered migration agents.

1.6 There were 65 submissions to the inquiry, which are listed at Appendix One. These included supplementary submissions providing information requested by the Committee at public hearings. The formal submissions have been reproduced in four volumes. The Committee also received 10 exhibits, which are listed at Appendix Two.

1.7 At the commencement of the inquiry, the Committee received a briefing from the Department of Immigration and Ethnic Affairs (DIEA) on the establishment and operation of the Scheme. The Committee also was briefed by the Immigration Review Tribunal (IRT) and the Refugee Review Tribunal (RRT) on their experience with migration agents. A transcript of those briefings was authorised for publication.

1.8 Formal evidence was taken at public hearings held in Sydney, Melbourne and Canberra in October and November 1994. During those hearings, the Committee heard from community and government agencies, the Migration Agents Registration Board (the Board), the IRT, legal bodies and registered migration agents. A list of witnesses who gave evidence at the public hearings is provided at Appendix Three.

1.9 Copies of the transcripts of evidence from the public hearings and the volumes of submissions are available from the Committee secretariat and for perusal at the National Library of Australia. References to evidence in the text of this report relate to page numbers in the transcripts and the volumes of submissions. Where the letter 'S' precedes a page number, this signifies evidence from the volumes of submissions.

Report structure

1.10 In the report, the Committee has examined:

- the background to and practice of regulating immigration advice and assistance (Chapter Two);
- the principal features and outcomes of the Migration Agents Registration Scheme (Chapter Three);

- the scope of the Scheme, in terms of the persons required to register as migration agents (Chapter Four);
- the criteria for registration as a migration agent (Chapter Five);
- the administration of the Scheme (Chapter Six);
- the obligations of migration agents (Chapter Seven); and
- the procedure and practice for monitoring and disciplining migration agents (Chapter Eight).

Chapter Two

THE REGULATION OF IMMIGRATION ADVICE AND ASSISTANCE

Introduction

2.1 The emergence of an immigration advice industry is a relatively new development. It is only in recent times that providers of immigration assistance have reached sufficient numbers to be regarded as an industry in their own right. A decade ago, few people specialised in the provision of such advice. Prior to the emergence of this advice industry, those requiring immigration assistance generally tended to seek advice from Immigration Department officials, parliamentarians, and legal or financial advisers who provided such advice as an ancillary service to their general practice.

2.2 The emergence of a viable migration advice industry in Australia can be linked to the development of comprehensive migration legislation in the 1980s. The 1989 codification of migration law, and subsequent legislative amendments, increased the complexity of migration practice and procedure, and led to an increased demand among immigration applicants for expert advice in the preparation of their applications.

2.3 As the number of migration agents providing assistance increased, reports of unqualified and unscrupulous migration advisers likewise proliferated. This, in turn, led to calls for regulation of such advisers.

2.4 In this chapter, the Committee examines the nature of the immigration advice industry, the reasons given for regulating immigration advisers, and the different models for regulation of the industry in Australia and overseas.

The nature of immigration advice and assistance

2.5 Immigration advice and assistance takes many forms. It can be paid or unpaid assistance, given formally or informally by a lawyer, agent, voluntary worker, neighbour, family member or friend. An immigration adviser may need to give assistance in filling out visa application forms, explaining the workings of the Immigration Department, collecting or compiling evidence to support a visa application, or advising the visa applicant on the merits or legal intricacies of a visa application. Migration advisers make representations on behalf of visa applicants to

DIEA or to and before review tribunals or courts.[1] The assistance provided can vary depending on the skills and understanding of the visa applicant, and the type of visa sought.

2.6 Some advisers provide assistance free of charge. In certain circumstances, legal aid or advice organisations provide immigration assistance on a means tested basis. Others charge a fee for their advice, with some advisers setting a flat fee for a particular type of service and others charging applicants according to the work which is done.

2.7 In Australia, there are a range of persons providing advice to visa applicants. These include:

- public servants, including DIEA officers or staff of other government agencies where immigration status can be relevant, such as in the Department of Social Security or for Medicare;
- parliamentarians and their staff;
- lawyers, working as sole practitioners or in legal firms;
- staff of legal aid commissions and law centres;
- migration agents, working as sole practitioners or in firms of agents or other professionals;
- migration advice workers in agencies generally funded through government grants and public donations;
- refugee caseworkers; and
- ethnic community representatives.

2.8 Under the Migration Agents Registration Scheme, not all of the above are required to be registered as migration agents (see paragraph 3.10).

2.9 It is clear from the above that a great deal of immigration advice and assistance is provided under the auspices of the government, either directly from public servants or through the voluntary or legal aid sectors, which derive their funding from the government.

1 Changes to be introduced by the *Migration Legislation Amendment Bill No. 1* of 1995 will not permit advisers or lawyers to examine witnesses or address the IRT, save in exceptional circumstances, and will limit their representative role to quiet assistance.

2.10 Of those advisers who belong to the private sector, certain lawyers[2] are amenable, under State legislation, to the discipline of their own professional associations. In addition, since 1 January 1992, the Migration Institute of Australia has served as a professional institute for its migration agent members, who undertake to comply with the Institute's standards of conduct. As at October 1994, the Migration Institute of Australia had around 230 members.[3] It is not a requirement for migration agents to belong to the Migration Institute.

2.11 Some migration advisers provide assistance and advice across a broad range of immigration matters. Others provide advice to particular groups or types of applicants, for example applicants belonging to a particular ethnic community, or in relation to a specialist visa category, such as to business migrants or refugees.

2.12 The varied nature of the migration advice industry provides a degree of choice for those seeking immigration assistance. At the same time, the diversity within the industry can give rise to difficulties in ensuring the maintenance of appropriate standards and conduct. These issues are discussed in the sections and chapters which follow.

Persons seeking immigration assistance

2.13 It is difficult to determine how many and which visa applicants seek immigration advice. As noted by DIEA:

> It is difficult to estimate the number of Departmental clients who use the services of a migration agent to assist in lodging an application. This information is not generally recorded in Departmental data bases which record applications received.[4]

2.14 Little specific research has been conducted on the characteristics of persons who seek immigration advice and assistance. A recently published survey by the Immigration Advice and Rights Centre on its telephone advice and drop in advice sessions conducted between July 1990 and November 1992 provides some insight into those characteristics. The survey, which involved an analysis of 9 227 telephone advices and 1 688 drop in advice sessions, indicated that, in a high proportion of cases, advice was sought on the migration prospects or change of status applications for a spouse or other family members. Two of five persons

2 Under the terms of State legal profession legislation, lawyers generally are amenable to professional discipline if they are entered on the Supreme Court roll and have a practising certificate.

3 Evidence, p. 3.

4 Evidence, p. S300.

requested advice concerning change of status. In one in five cases, illegality, whether of the client or the partner, was relevant to the query. Queries in which advice from migration agents was checked comprised 1.1 percent of all queries, while queries about wrong advice, including advice provided by migration agents, community organisations and DIEA, accounted for 1.8 percent of all queries. The most common countries of origin of those seeking advice were the United Kingdom, China, the Philippines and Fiji.[5]

2.15 While many who obtain immigration assistance actively seek it, others obtain immigration advice when seeking assistance in relation to a different matter. Their immigration difficulties may come to light when they approach, for example, Social Security staff or, perhaps, a lawyer assisting with their matrimonial dispute or child custody case.

2.16 Three factors appear to influence immigration applicants to seek immigration assistance:

- the complexity of migration legislation;
- competition for places within the migration program; and
- an applicant's inability to advance his/her case or the case of a family member.

2.17 Immigration legislation is complex and subject to regular amendment in response to changing pressures and circumstances. In Australia, a raft of amendments to the Migration Act and Regulations since 1989 has led one commentator to suggest that the statute law is 'labyrinthine in construction, daunting in complexity'.[6] Faced with this situation, applicants are more likely to seek immigration assistance to ensure that they comply with the relevant requirements. In this regard, it was suggested in one submission to the inquiry that:

> . . . potential immigrants are faced with several Acts of Parliament, over 800 pages of Regulations, and over 2 000 pages of Procedures Advice Manual, setting out how the Department addresses every sort of application. Detailed knowledge is often necessary to maximise the applicant's probability of being granted entry to Australia.

5 Duignan, J. and Staden, F., *Free And Independent Immigration Advice, An analysis of data collected by the Immigration Advice and Rights Centre July 1990-November 1992*,(Bureau of Immigration, Multicultural and Population Research), AGPS, Canberra, 1995, see in particular pp. 29, 31, 41 and 57.

6 McMahon, John, 'Another dose of Claytons, Control of migration agents', in *Law Institute Journal*, Vol. 68(5), May 1994, p. 386.

> Clearly, few immigrants can cope with all that paper by themselves, and even fewer could gain ready access to it.[7]

2.18 Another factor which may motivate applicants to seek immigration assistance is the increasing competition for places in the migration program. As the number of places within a particular migration category decline, or the overall migration intake decreases, applicants may be more inclined to seek assistance in the belief that such assistance will improve their chances of securing entry and stay.

2.19 In some cases, applicants seek assistance in the belief that a particular person will be able to influence the outcome of their cases. Parliamentarians often are approached for assistance from this perspective. Alternatively, applicants may be encouraged to seek advice because a particular adviser has achieved successful outcomes for other members of the applicant's ethnic community. In this regard, certain agents actively target particular ethnic groups by advertising in relevant ethnic community newspapers.

2.20 In addition to the above, many requests for immigration advice arise from persons who are not in a position to advance adequately their own cases or the cases of family members. Applicants may lack an adequate command of English, or may not comprehend the requirements for making immigration applications. Such applicants may be unable or unclear about how best to advance their cases. Applicants from different cultural backgrounds may not understand the processes and the statutory requirements relating to visa applications. Applicants may have limited financial resources or may be in situations where failure of the application could mean separation from family or a return to a difficult or dangerous situation in their country of origin. Applicants may be in the country illegally, may wish to regularise their status, and may be fearful of the consequences if their illegal status is revealed to DIEA. Any of these circumstances can lead applicants, or family associates of applicants, to seek assistance with their immigration applications.

2.21 For immigration applicants who either require or wish to utilise an immigration adviser, the issues of particular importance are:

- whether there is appropriate access to immigration assistance, including from DIEA;
- whether immigration advisers are reasonably skilled; and
- whether immigration assistance is available on a cost effective basis.

7 Evidence, pp. S3-S4.

Access to immigration assistance

2.22 As noted above, the increase in the number of immigration advisers in recent years has provided immigration consumers with a degree of choice which previously was not available to them. Concerns about inadequate access to appropriate advice prompted the Administrative Review Council, in its 1986 report on immigration decision making and review, to recommend that the government establish an independent specialist immigration advisory service. It also recommended that there be appropriate training and funding of migrant welfare groups to enable them to provide immigration advice and assistance.[8] A survey of voluntary advice agencies giving immigration assistance at about the same time revealed that, with the exception of legal aid commissions and some law centres, such agencies had limited expertise in complex immigration cases and were unable to advise or represent clients on appeal.[9]

2.23 At present, government funding is provided to specialist immigration advice agencies such as the Immigration Advice and Rights Centre (IARC), the Victorian Immigration Advice and Rights Centre (VIARC) and the Refugee Advice and Casework Service (RACS), as well as to community based workers and organisations, including grant-in-aid workers and migrant resource centres. In addition, legal aid commissions, funded under Commonwealth/State arrangements, provide immigration assistance on a means and merits tested basis.

2.24 The Immigration Advisory Services Scheme (IASS) is one mechanism by which the Commonwealth Government currently funds immigration assistance. When the Migration Agents Registration Scheme was established, it was intended that the registration levies payable by migration agents not only would fund the administration of the Scheme, but also would be used to provide grants to immigration advice agencies under the IASS. Commenting on the funding of advice agencies through the IASS, DIEA stated:

> The Department is sensitive to the valuable role played by community organisations in providing free immigration assistance to those who need it, and the importance of equipping the voluntary sector for this role is recognised through the grants made available to selected organisations as part of the [Migration Agents Registration] Scheme . . . In deciding on the distribution of grants to voluntary agencies under the Immigration Advisory Services Scheme . . ., the Minister has taken the view that it is a more effective use of resources to allocate funds to a small number of specialist agencies, rather than to spread the limited amount available thinly over a large number of agencies.[10]

2.25 Table 2.1 shows the grants provided under the IASS for 1993-94 and 1994-95. It does not show the total level of government funding for immigration assistance, as there are other sources of funding outside of the IASS. For example, legal aid commissions and community legal centres are funded jointly by the Commonwealth and State Governments. A proportion of advice given by legal aid commissions and community legal centres relates to immigration matters.

TABLE 2.1 IMMIGRATION ADVISORY SERVICE SCHEME GRANTS 1993-94 and 1994-95*

Organisation	1993-94	1994-95
Immigration Advice and Rights Centre, NSW	$ 95 000	$ 80 000
Victorian Immigration Advice and Rights Centre	$125 000	$110 000
South Brisbane Immigration and Community Legal Service	$ 50 000	$ 40 000
Migrant Resource Centre of South Australia	Nil	$ 20 000
Catholic Migrant Centre, Perth	$ 40 000	$ 30 000
TOTAL	$310 000	$280 000

* Evidence, p. S309.

2.26 While government funding of specialist advice agencies is one means of providing adequate access to immigration assistance of an appropriate standard, regulation of the migration advice industry also aims to ensure that consumers have access to affordable and quality advice.

8 Administrative Review Council, *Report to the Attorney-General–Review of Migration Decisions*, Report No. 25, AGPS, Canberra, 1986, recommendation 19, paras. 2.41-2.42.

9 M. E. Crock, *Immigration Advisory Service Report*, A report to the Law Foundation of Victoria, December 1987, pp. 45-47.

10 Evidence, p. S309.

Rationale for regulating immigration advice

2.27 Immigration advice is not the only service subject to some form of regulatory control. Governments supervise and control a range of private enterprise activities in the interests of economic efficiency, fairness, health and safety.[11]

2.28 Consumer protection is one of the principal objectives of regulation. In this respect, regulation seeks to ensure that the services provided satisfy minimum quality levels, are competitively priced, and there is opportunity for redress against deficient services. According to United Nations Guidelines, consumer protection includes:

- 'the right to be protected against dishonest or misleading advertising . . . and the right to be given the facts and information needed to make an informed choice';
- 'the right to choose . . . services at competitive prices with an assurance of satisfactory quality'; and
- 'the right to be compensated for misrepresentation . . . or unsatisfactory services'.[12]

2.29 A framework for consumer protection can be established through the enactment of laws, the establishment of regulatory bodies and the encouragement of self-regulation by representative organisations.

2.30 In relation to the immigration advice industry, the need for regulation stems principally from the vulnerability of those who require immigration assistance. In his judgement on the High Court challenge to the Migration Agents Registration Scheme, Deane J described the consumers of immigration advice as an 'extraordinarily vulnerable group of people'.[13] As noted previously, their vulnerability stems in part from their lack of skills or knowledge. It also arises because of the adverse consequences which could flow if they were to receive inadequate or inaccurate advice. In particular, applicants may lose their chance to qualify for a visa to stay on in Australia. In this respect, within a managed migration program, applicants must satisfy the Minister that they meet all the criteria for their chosen visa class. In the Migration Act, if the appropriate visa criteria are not shown to be met, or if a visa application is not completed fully or accurately, applicants may be denied the right to enter or stay in the country, or may have permission to stay revoked by having their visas cancelled.

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11 Bannock. G., Baxter, R. E. & Davis, E., *Dictionary of Economics*, Fifth Edition, Penguin Books, Australia, 1992, p. 364.

12 Evidence, p. S173.

13 *Cunliffe v The Commonwealth*, (1994) 124 ALR 120; (1994) 68 ALJR 791, High Court of Australia, Deane J, at 823.

2.31 In addition, immigration applicants who receive bad advice or are the victims of unscrupulous practice have particular difficulties in pursuing normal avenues of consumer redress, such as a claim for negligence, because they are unable to remain in the country. Financial constraints also limit a failed applicant's ability to achieve redress.

2.32 The issue of vulnerability was addressed by the then Minister when introducing the legislation establishing the scheme for the regulation of migration agents in 1992. He commented:

> . . . many of those who are likely to seek the assistance of agents are among the most vulnerable in our society, sometimes having a poor grasp of English, fear of authority or meagre financial resources.[14]

2.33 Regulation of the immigration advice industry also is aimed at creating a more efficient and effective immigration system. Applications which are completed correctly and which contain relevant supporting information assist immigration officials in the expeditious processing of claims for entry and stay. By establishing standards for those who provide immigration advice, a regulatory scheme can contribute to efficiencies within the immigration processing system.

2.34 The Migration Agents Registration Scheme constitutes one regulatory model. As noted, when the Scheme was established, a sunset clause was included in the legislation, and the Government decided that the Scheme should be reviewed within two years of the commencement of its operation. During the inquiry, the Committee received evidence on a range of models which could be adopted for the regulation of service providers. The Committee examined each of these models and examples of their application as an introduction to its assessment of whether the migration advice industry should be regulated and, if so, whether the existing Scheme is the most appropriate regulatory model.

Regulatory models

2.35 There are a range of regulatory models which can be applied in regulating service providers across various industries. These include:

- consumer warnings;
- listing;
- certification;
- self-regulation;

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14 Parliamentary Debates (Hansard), House of Representatives, 27 May 1992, p. 2938.

- negative licensing; and
- registration schemes.

2.36 The regulatory model adopted for any given industry will depend upon the nature, profile and needs of that industry. Some regulatory controls are simple consumer protection mechanisms. Others rely on input and action from the industry participants themselves. The more complex regulatory models rely on government intervention and supervision.

Consumer warnings

2.37 Consumer warnings aim to increase consumer knowledge and choice by providing effective and easily available information about service providers and market activities. In regard to the migration advice industry, for example, consumer warnings would augment consumers' decisions about which agent, if any, they should choose.[15] In relation to consumer warnings and information, the Office of Regulation Review stated:

> Consumer warnings could be used to inform consumers of the potential dangers of employing migration agents. This may include media campaigns, warnings on migration forms, warnings posted at immigration offices, or any other activity that would increase the information available to consumers. Consumer warnings of this nature would provide an incentive for consumers to better inform themselves about agents and services they may potentially hire.[16]

2.38 Consumer warnings can include indicative pricing schedules which inform consumers of the prices they can expect to pay. Such schedules aim to reduce overcharging, particularly if consumers have little experience in hiring the services of professionals.[17] Consumer warnings can be the sole, simple form of industry regulation, or a regulatory control which can supplement more complex models.

Listing

2.39 Listing is a system whereby practitioners choose or are directed to be listed as agents. The listing can include a range of information about agents, such as their addresses, qualifications and names of their business organisations. Generally, the listing authority does not vouch for the accuracy of the information provided by the agent. The information provided, however, would be subject to

15 Evidence, p. S168.

16 Evidence, p. S168.

17 Evidence, p. S168.

provisions protecting against false and misleading advertising.[18] The Office of Regulation Review suggested that the main benefit of this approach for consumers would be ease of access to a list of agents. It stated:

> Dissatisfied consumers would also be able to easily find another agent. Interested parties would be better able to trace agents if necessary - for example, when an agent has breached the law.[19]

2.40 At the same time, the Office of Regulation Review suggested that listing is 'of limited strength as it is unlikely to deter a significant proportion of inappropriate agents from practising'.[20]

Certification

2.41 Certification traditionally provides a more rigorous and accountable form of rating and control. Certification requires agents to list themselves and provide additional information relevant to their practice as an agent. The additional information is not accepted on face value, but is verified by the administering body. The Office of Regulation Review commented:

> A certification scheme would have the advantage of supplying the market with independently verified information. It would also avoid the problem of having to determine and administer appropriate entrance standards and would thereby allow consumers a greater range of choice.[21]

2.42 As certification requires the regulatory authority to verify information provided by agents, administrative costs are generated. Such costs can be offset by a verification fee.[22]

18 Evidence, p. S168.

19 Evidence, p. S168.

20 Evidence, p. S168.

21 Evidence, p. S169.

22 Evidence, p. S169.

Self-regulation

2.43 Self-regulation is perhaps the least intrusive regulatory mechanism as government controls and requirements are minimal. The Office of Regulation Review defines self-regulation as 'the acceptance of mutual obligations by firms in an industry or by members of a profession'.[23] These obligations usually are embodied in an industry 'code of practice' or a professional 'code of conduct'. Such codes generally are adopted and administered as an industry initiative. They usually complement Commonwealth and State laws and regulations.[24]

2.44 Self-regulatory codes can deal with a range of issues, including:

- membership eligibility criteria;
- prescribed standards in relation to qualifications, terms and conditions of practice, and consumer protection;
- complaint handling procedures which specify how complaints are to be dealt with and what avenues of appeal are available; and
- pricing of services.[25]

2.45 The application of self-regulatory codes will depend on the suitability and maturity of a particular industry. It is generally considered that self-regulation is inappropriate where 'enforcement mechanisms are inadequate'.[26] In contrast, self-regulation is more effective where there are mature, concentrated markets or where there is the propensity for consumers to make repeat purchases. The Office of Regulation Review stated:

> In a concentrated industry, it is easier for community interest groups and other firms to highlight breaches of the industry code. In addition, if the market largely consists of repeat purchases, customers can penalise firms for any divergences from the code by taking their custom elsewhere. In other markets, however, self-regulation can largely be avoided with impunity.[27]

23 Office of Regulation Review, *Recent developments in regulation and its review, Information Paper*, AGPS, Canberra, 1993, p. 33.

24 ibid.

25 ibid.

26 ibid., p. 34.

27 ibid., pp. 34-35.

2.46 Self-regulation is considered to be a low cost approach for addressing regulatory problems. Government costs are minimised because self-regulatory approaches can be developed and monitored through existing industry channels.[28]

Negative licensing

2.47 Negative licensing is a system whereby all persons who wish to practise in a certain industry register their intention to do so with an authorising agency. In most cases there are no requirements to demonstrate competency, knowledge or ability to practise. If, however, persons are found to be providing an unacceptable standard of service, they can be prevented from operating.

2.48 Negative licensing differs from a registration scheme. In the latter, potential agents are pre-screened before they gain permission to practise. The Office of Regulation Review suggested that a negative licensing scheme may be more effective than a registration scheme in identifying inappropriate agents. It commented:

> With negative licensing, no screening is conducted before agents enter the industry. The number of inappropriate agents entering the industry will therefore be higher than under a registration scheme. However, since negative licensing focuses on pursuing and excluding agents who actually operate inappropriately, inappropriate agents may be detected sooner under negative licensing than under a registration scheme.[29]

2.49 The Office of Regulation Review argued that negative licensing is superior to a registration scheme in three important ways. First, negative licensing is administratively simpler as entry standards and registration fees do not need to be determined. Secondly, negative licensing imposes fewer costs on consumers as the absence of registration fees means that charges should be lower. Finally, negative licensing does not erect barriers to entry for potential practitioners.[30]

Registration schemes

2.50 Registration schemes provide a formalised structure for pre-screening practitioners before they are entitled to practise. Registration schemes may include a regulatory board which is responsible for:

- ensuring that persons who wish to practise satisfy minimal levels of competency;

28 ibid., p. 34.

29 Evidence, p. S170.

30 Evidence, p. S170.

- ensuring that intending practitioners satisfy character requirements;
- ensuring that, where appropriate, all practising agents have paid annual fees;
- ensuring that practising agents maintain acceptable standards or knowledge by undertaking training courses;
- investigating complaints against practising agents;
- implementing appropriate disciplinary action; and
- providing a course of redress for consumers.

2.51 The Office of Regulation Review suggested that, under a registration scheme, not all inappropriate agents will be excluded from the industry as qualifications and current behaviour are not always reliable predictors of future inappropriate behaviour.[31] The Office concluded, however, that an 'effective registration scheme would be at least slightly superior to a negative licensing scheme at reducing the problems associated with inappropriate service'.[32]

Schemes for regulating migration agents

2.52 Various of the above models have been adopted in Australia and overseas for the purpose of regulating migration advisers. Provisions aimed at regulating migration advisers were first enacted in Australia in 1948 and, in various forms, have remained within Australia's migration legislation to this time.

2.53 Other comparable countries with immigration programs, such as Canada, the United Kingdom and the United States of America, also have sought to regulate their migration advice industry. The approaches adopted in each of these countries have not been uniform. Before proceeding to an examination of how Australia over time has sought to regulate its migration advice industry, it is useful to consider the practice of overseas countries as a basis for comparison with the Australian experience.

31 Evidence, p. S169.

32 Evidence, p. S170.

Overseas regulation of migration advisers

United Kingdom

2.54 In the United Kingdom to date, most immigration advice and assistance has been provided under the auspices of the government. Means tested advice and assistance is given by lawyers under legal aid schemes, or advice and assistance is given to immigration applicants by the staff of the government funded United Kingdom Immigrants Advisory Service (UKIAS).

2.55 To date, the UKIAS has undertaken almost 50 percent of immigration appeals before adjudicators or the Immigration Appeals Tribunal. It was established in 1970 to perform the following functions:

- facilitate the acceptance of immigration rulings by explaining decisions to unsuccessful applicants;
- provide a non-threatening forum for applicants faced with adverse decisions where they can collect their thoughts and so do themselves justice in presenting their case;
- ensure that appeal procedures are used to optimum effect by assisting applicants in the preparation and presentation of their cases; and
- ensure that the cases of people appealing from abroad are treated fairly.[33]

2.56 Notwithstanding these laudable aims, there have been concerns about the quality of service provided by the UKIAS and the burgeoning expense of government funded advice schemes. In 1990-91, the expenditure on immigration advice and assistance provided through legal aid was 2.65 million pounds,[34] and the expenditure on the UKIAS was 3 million pounds.[35] In a series of recent discussion papers, the British Government has proposed abolishing the legal aid scheme for immigration advice and assistance, and limiting future funding to a streamlined UKIAS.

2.57 The British Government's involvement in the provision of immigration assistance has limited the need for regulation of immigration advisers. An indicative profile of the British advice industry was revealed in March 1993 immigration

33 Home Office, *Report of the Committee on Immigration Appeals* (The Wilson Committee Report), presented to Parliament August 1967, London HMSO, Cmnd. 3387, pp. 60-61.

34 This does not include legal aid for judicial review proceedings.

35 Question on Notice, House of Commons Debates, 195c763–4W.

appeal statistics, which showed that of the representatives appearing before immigration adjudicators and the Immigration Appeals Tribunal, 48 percent were UKIAS representatives, 27 percent were solicitors and barristers, and 25 percent were private individuals comprising migration agents or a friend of the appellant. Regulatory arrangements for this last group of persons have been devolved to immigration adjudicators and the Immigration Appeals Tribunal. Representatives who are not barristers, solicitors, UKIAS advocates or consular officers must obtain permission from the adjudicator or the Immigration Appeals Tribunal in order to represent an appellant in the review process. The Chief Adjudicator estimated in March 1993 that such requests are made at least once a day in London, and are refused at least once a week.[36]

Canada

2.58 Canada has legislative provisions similar to those in the United Kingdom regulating the practice of immigration advisers. Section 114(i)(v) of the Canadian Immigration Act states that the Governor in Council can make regulations 'requiring any person, other than a person who is a member of the bar of any province, to make an application for and obtain a licence from such authority as is prescribed before the person may appear before an adjudicator, the Refugee Division or the Appeal Division as counsel for any fee, reward or other form or remuneration whatever'.

2.59 The Law Reform Commission of Canada, in its final draft report on the determination of refugee status in Canada,[37] noted that there have been numerous complaints about unscrupulous conduct, lack of competence and serious exploitation of particularly vulnerable refugee claimants by independent immigration consultants who are not members of any self-regulatory professional body. The Commission noted that, since practice of the consultants' trade was a matter exclusively within provincial jurisdiction, any attempt by Federal authorities to regulate or license such consultants may be unconstitutional.[38]

36 Circulated minutes of meeting between Immigration Law Practitioner's Association representatives and the Chief Adjudicator, 16 March 1993, in ILPA Correspondence, April 1994.

37 The Canadian Law Reform Commission's draft report largely was approved when the Commission was abolished in 1992. The Commission published the draft report and noted those sections still under active review which had not received final approval. The unapproved sections reflected debate within the Commission but not necessarily the Commission's final views.

38 Law Reform Commission of Canada, *The Determination of Refugee Status in Canada*, Draft report, 1992, pp. 158-159.

2.60 The Canadian Law Reform Commission recommended that regulations be established under section 114(i)(v) of the Canadian Immigration Act to make it a requirement for persons appearing before the Immigration and Refugee Board, for the purpose of representing claimants for any fee, reward or other remuneration, to be accredited by a recognised non-government organisation, or by a professional or trade association which has an effective program for accrediting and disciplining its members. The Commission also recommended that approaches be made to law societies and bar associations in the provinces, and to provincial legal aid agencies, to require compulsory participation in relevant continuing legal education programs, so as to improve the quality of legal advice and representation.[39]

United States of America

2.61 The United States of America has implemented a regulatory model for migration advisers which has certain features in common with current Australian arrangements. The Immigration and Naturalization Service (INS) has the authority to regulate the practice of lawyer and non-lawyer representatives appearing before it. Section 292 of the Immigration and Nationality Act of 1952, as amended, grants to a person in exclusion or deportation proceedings the privilege to be represented, at no expense to the government, by any counsel 'authorised to practise in such proceedings'.[40] The qualification for practising before the INS and the standards of practice are set down in Title 8 of the Code of Federal Regulations, Part 292 – Representation and Appearances. The following persons may represent applicants before the INS:

- lawyers licensed in any state, possession, territory, commonwealth or the District of Columbia not under any type of suspension, disbarment or restraint;
- law students and law graduates meeting certain requirements;
- reputable individuals of good moral character who appear without remuneration;
- accredited representatives of religious, charitable, social service or similar organisations;
- accredited consular officials; and
- foreign lawyers properly licensed and engaged in the practice of immigration law.

39 ibid.

40 *Rios-Berrios v INS*, 776 F2d 859 (9th Cir., 1987).

2.62 The regulations define 'representation' before the Immigration Appeal Board and the INS as the preparation of documents and the giving of advice in relation to pending or prospective proceedings. Practice is defined as 'the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application or petition' before or with the INS. 'Preparation constituting practice' is defined to mean the study of the facts of a case and the applicable laws.[41]

2.63 The power to admit individuals to practice before the INS also includes the power to regulate their conduct and to discipline such individuals for unethical conduct. As stated, the standards of practice for immigration agents are set down in Title 8 of the Code of Federal Regulations. The INS has the power to suspend or disbar lawyers or agents practising before it for unprofessional conduct in handling immigration matters. The grounds for disbarment or suspension include:

- charging or receiving grossly excessive fees;
- fraud;
- bribery;
- wilful deception of the department in connection with a case;
- unethical solicitation of business;
- practising without authorisation or during suspension or disbarment;
- making false certification that copy documents are true copies of an original;
- being 'obnoxious' regarding a case (essentially contempt of court); and
- false advertising.

2.64 The grounds listed above are not exhaustive.[42] The INS can proceed on unethical conduct grounds not explicitly enumerated in the regulations.

2.65 Complaints regarding the conduct of migration practitioners are investigated by the INS. The General Counsel of the INS files written charges for suspension or disbarment proceedings which are heard by an immigration judge.

41 Title 8 of Code of Federal Regulations, Part 292, Representation and Appearances.

42 There are 14 grounds for disbarment; see Heiserman, R. & Pacun, L. K, 'Professional Responsibilities in Immigration Practice and Government Service' (1985) 22 *San Diego Law Review* 972.

2.66 The Code of Federal Regulations also states that criminal proceedings may be instituted against any lawyer who makes, conspires to make, or aids or abets the making of a false statement to the INS.

2.67 While the INS has such regulatory powers, it secured disbarment of only five lawyers from 1976 to 1985. In relation to the INS disciplinary procedures, INS Senior Special Agent Ira Frank observed:

> The tendency of many Service officers when faced with investigating a possible ethical violation is to first examine if a criminal statute has been violated and if so, pursue prosecution. If a criminal violation is not found, the matter is oftentimes dropped or referred to state or local grievance committees. Those cases referred within the INS have not advanced very far either due to lack of merit, other investigative priorities or lack of interest in trying to impose an ethical sanction. Many Service officers are not even aware of the fact that their own agency has the power to discipline errant legal representatives.[43]

2.68 Despite the few cases of disbarment secured by the INS, there are many reported cases of State Bars disciplining immigration lawyers. These State Bar discipline cases essentially concern four areas of unethical immigration practice, namely:

- lodging frivolous appeals to delay a client's deportation;
- participation with the arrangement of sham marriages including wilful ignorance or silence about fraudulent relationships;
- dishonesty, neglect or delay, such as charging for work not done and giving misleading advice; and
- soliciting business unethically.

2.69 Certain of these cases are examined in Chapter Seven, which deals with the Code of Conduct of the Migration Agents Registration Scheme.

43 Frank, I., 'Ethical Sanctions and Practicing Before the Immigration and Naturalization Service–It is Time for a Change', *Journal of the Legal Profession*, Vol. 16, 1991, p. 192.

Australian regulation of migration agents

1948 arrangements

2.70 Australia first attempted to regulate immigration advisers in 1948. When introducing the *Immigration Bill 1948*, the then Minister for Immigration, the Hon A. Calwell, MP, explained the reasons for regulating migration agents:

> Numerous complaints have been received by the Department of Immigration of misrepresentation and excessive charges having been made in connexion with the preparation and lodgment of applications for the admission of aliens who wish to settle here. It has been stated that in some cases the fee charged for such a service has been 100 pounds or even more. To justify such a charge an un-scrupulous agent would allege that, if he was to succeed in obtaining approval for a migrant's admission, it would be necessary for him to make a special visit to Canberra. In not a few cases the agent was alleged to have claimed that, if the case was to be brought to a successful conclusion, a gift of money was essential.[44]

2.71 The provisions set down in the *Immigration Act 1948* provided that a person could become a registered agent by satisfying character requirements. Section 14(H) of the 1948 Act stated:

> (1) A person who desires to become a registered agent may make application for registration in the prescribed manner.
>
> (2) An application under this section-
>
> (a) shall be accompanied by such lodgment fee as is prescribed; and
>
> (b) shall be supported by such evidence of the good fame, integrity and character of the applicant as is prescribed or is required by the Minister or an authorised officer.
>
> (3) In the case of a company the evidence referred to in the last preceding sub-section shall relate to every director and every manager or other administrative officer of the company.

44 Parliamentary Debates (Hansard), House of Representatives, 28 October 1948, p. 2359.

> (4) If the applicant satisfies an authorised officer that he is a fit and proper person, the authorised officer may register the applicant as a registered agent.

2.72 A penalty of two hundred pounds or imprisonment for one year could be incurred by an unregistered person who accepted payment for providing immigration assistance.

2.73 The 1948 Act also included provisions for cancellation of registration. Section 14(K) stated:

> (1) The Minister or an authorised officer may cancel the registration of a registered agent upon being satisfied that the agent–
>
> (a) has neglected the interests of a client;
>
> (b) has been guilty of any misconduct as an agent;
>
> (c) is not a fit and proper person to remain registered; or
>
> (d) has become bankrupt.

2.74 The 1948 Act also empowered the Minister to set maximum charges for immigration services. Agents could be required, on penalty, to provide the Minister with particulars of fees charged, or proposed to be charged, for immigration assistance. Agents could be penalised for overcharging.

2.75 The 1948 scheme appears similar in structure to the present regulatory model for migration advisers. No evidence was presented to the Committee on the operation of the 1948 regulatory scheme, its success or otherwise, or the reasons for its modification. Introducing legislative amendments in 1958, the then Minister for Immigration, the Hon A. Downer, MP, provided some clue as to the Government's motives for amending the 1948 scheme. The then Minister stated:

> The position now is that any one wishing to act as an immigration agent must first be registered with the department; and persons who are registered have to be issued with certificates of registration. My officers would prefer not to issue such documents which can be displayed as evidence of some standing with the department, and can be so used to impress migrants unduly. Needless to say, careful inquiries are made about all applicants for registration; but it is still possible for unscrupulous people to be registered and to engage in undesirable activities without the department's

knowledge, particularly because settlers in a strange country are more easily duped by plausible agents, and less ready to report them to the authorities.[45]

1958 arrangements

2.76 Amendments introduced under the *Migration Act 1958* removed the practice of issuing agents with certificates of registration. The then Minister stated:

> The Bill retains all the existing powers of supervision of agents without, however, continuing the issue of credentials in the shape of certificates of registration. It also prohibits agents from advertising themselves as approved by the department in any way.[46]

2.77 Under the 1958 arrangements, agents no longer were required to prove their fitness to practise, but instead were licensed upon giving notice to the Secretary of the Immigration Department of their intention to practise. This negative licensing arrangement allowed persons to practise until the Minister established that they were not fit and proper to continue. In this regard, section 46 of the 1958 Act stated:

> For the purposes of this Division, a person shall be deemed to act as an immigration agent if he demands or receives a fee, commission or other reward for or in relation to services rendered or to be rendered by him in relation to–
>
> (a) an application or representations to a Minister, Department or authority of the Commonwealth with a view to the entry of a person into Australia as an immigrant; or
>
> (b) arranging or securing the passage of an intending immigrant to Australia.

2.78 Section 47 of the 1958 Act stated:

> (1) After the expiration of thirty days from the date of commencement of this Part, a person shall not act as an immigration agent unless he has–
>
> (a) delivered to the Secretary to the Department of Immigration a notice of his intention to do so in accordance with the prescribed form and containing such information as is prescribed; and
>
> (b) received acknowledgment in writing of receipt of the notice.

2.79 The penalty for not complying was two hundred pounds or imprisonment for six months. In relation to deregistration, section 48 stated:

> (1) Where the Minister is satisfied that a person is not a fit and proper person to act as an immigration agent, the Minister may, by notice in writing, direct that person not to act as an immigration agent.

2.80 The 1948 and 1958 schemes emphasised an agent's fitness to practise. Consumer protection was addressed through the penalty provisions proscribing false advertising and overcharging for services. There was no specialist body to monitor and investigate registered agents. Again, the Committee received no evidence on the operation of this negative licensing scheme.

1989 arrangements

2.81 In 1989, the immigration advice arrangements were reconsidered yet again. During the 1980s, the immigration system itself had changed radically. Prior to this time, immigration advice was undertaken largely by members of Parliament. Immigration matters represented, and indeed still represent, the significant proportion of the constituency work of many members of Parliament. In the 1980s, however, the number of immigration review cases increased significantly, and departmental internal directives on decision making were opened to public access. Immigration advice became more specialist and involved lawyers and non-lawyer agents. Commenting on the nature of the immigration advice industry at that time, one Sydney consultant estimated that there were approximately 150 full-time migration consultants practising in Australia. He observed:

> To many consultants the Migration Act is irrelevant . . . some have never seen it . . . In the area of skilled and business migration, family reunion migration, and most entry categories, the Act is largely irrelevant because policy and administrative guidelines and instructions determine the requirements in these areas.[47]

45 Parliamentary Debates (Hansard), House of Representatives, 1 May 1958, p. 1400.

46 ibid.

47 'The Role of Migration Consultants', unpublished paper to the Migration Law and Policy Seminar, Institute of Technology Sydney, 12 February 1988.

2.82 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 *Migration Legislation Amendment Act 1989* replaced the negative licensing arrangements with penalty provisions directed at the activities of migration advisers. Introducing those legislative amendments into the Parliament, the then Minister, Senator the Hon R. Ray, commented:

> This is a burgeoning enterprise, where clients are susceptible to inflated charges and false claims of influence. The current legislation simply requires the notification of an intention to act as a migration agent. These provisions are outdated and the Bill provides for their repeal. The Bill substitutes provisions whereby the operation of persons providing advice for a fee will be governed by sanctions aimed to ensure a responsible commercial relationship. Advisers will be committing an offence where they claim they can influence or have influenced the making of a certain decision, either in their own right or through a third person.[48]

2.83 The 1989 Act required that agents:

- must not engage in false advertising;
- must provide statements of account to clients; and
- must not misrepresent their relationship with the Government and the Department.

2.84 While these provisions provided for some measure of regulatory control over immigration advisers, reports of unscrupulous and incompetent advisers continued. Concerns about the competence of immigration advisers became pressing when, from 1989, the practice of immigration advisers became infinitely more complicated. In addition, with stricter provisions concerning illegal entrants, the consequences of bad advice became more serious for the consumer. It is in this context that the present regulatory scheme was drafted.

Accredited Agent Scheme

2.85 In its consideration of models for regulating immigration advice, the Committee examined a further historical experiment in Australia, namely the attempt to accredit and co-opt the services of business migration agents under the Accredited Agent Scheme (AAS). The AAS was established on 1 July 1988 after the Committee to Advise on Australia's Immigration Policies recommended that an

48 Parliamentary Debates, (Hansard), Senate, 5 April 1989, p. 926.

effective monitoring and auditing system be established to cover both the investment of funds by business immigrants and the activities of accredited business immigration agents.[49] The then Minister commented that the principal aim of the AAS was to:

> . . . develop a self-financing means of providing counselling services and assessment of applications outside the usual immigration processing avenues to business migrants.[50]

2.86 The objectives of the AAS were:

- to give the Government a measure of control over the activities of the group of private sector consultants assisting business migrants with their applications for settlement in Australia;
- to harness private sector expertise to attract business migrants and give them a better business advisory service; and
- to reduce the processing workload for the Department's overseas posts.[51]

2.87 Agents accredited under the scheme fell into three broad categories:

- those who used accreditation as an entry to other forms of business, for example, firms of lawyers and accountants who hoped to continue to work for the migrants after their arrival in Australia;
- those who were experimenting in the migration area to explore the potential market; and
- those who were specialist migration consultants relying on business generated by business migration program work for their livelihood.[52]

49 The Report of the Committee to Advise on Australia's Immigration Policies, *Immigration, A Commitment to Australia*, AGPS, Canberra, 1988, p. 124.

50 Joint Committee of Public Accounts, *Report 310, Business Migration Program*, Parliament of the Commonwealth of Australia, AGPS, Canberra, 1991, p. 44.

51 ibid., p. 44.

52 ibid., p. 47.

2.88 The third group described above comprised between 10 and 20 percent of the total number of accredited agents. This group was responsible for processing most of the applications made under the business migration program.[53]

2.89 In 1991, an examination of the AAS by the Joint Committee of Public Accounts revealed problems with the scheme. That Committee indicated in its report that there were 'four critical factors which, when taken together, made the business migration program vulnerable to abuse'.[54] These were as follows:

- the AAS was conceptually flawed because the Commonwealth delegated its authority to assess immigration applications to the private sector. It was in the interests of private agents to ensure that their clients were successful. As such, private agents could not assess applications impartially;
- the AAS was introduced before proper monitoring procedures could be introduced. As such, DIEA could not effectively administer the business migration program;
- too many agents were permitted to register. This had the effect of depressing agents' income. Financial pressures caused agents to process all cases put to them and chase marginal cases; and
- foreign based sub-agents continued to operate irrespective of the scheme's objective of reducing their activities.[55]

2.90 A combination of the above factors noted by the Joint Committee of Public Accounts, together with a lack of effective monitoring of the business migration scheme, led to the abolition of the business migration program and the AAS in July 1991.

Migration Agents Registration Scheme

2.91 The Migration Agents Registration Scheme was established in September 1992. When introducing the legislation establishing the Scheme, the then Minister commented:

> This initiative reflects the Government's concern over the level and nature of complaints made against incompetent or unscrupulous agents . . . It also recognises the fact that many of those who are likely to seek the assistance of agents are among the most vulnerable in our society, sometimes having a poor grasp of English, fear of authority or meagre financial resources.[56]

2.92 As noted by the then Minister, the Government had considered a range of regulatory options before deciding on the form of the Migration Agents Registration Scheme. One such option, self regulation, was rejected because, according to the then Minister, there existed a high level of fragmentation in the Australian migration advice industry, with professions organised into their own distinct associations and a significant number of sole practitioners.[57]

2.93 Another option, negative licensing, also was rejected by the Government. The then Minister commented:

> The Government was concerned that the lack of contact with migration agents involved in negative licensing would have posed significant difficulties. These included ensuring that people recognised when they were operating as migration agents, understood the code of conduct and the need to adhere to it.[58]

2.94 Instead the Government opted for a comprehensive registration scheme under which virtually all providers of immigration advice are required to register as migration agents. The Scheme includes:

- a Migration Agents Registration Board;
- a registration process for persons providing immigration assistance;
- a Code of Conduct for migration agents; and
- investigatory and disciplinary procedures.

2.95 The various attributes of the Scheme, and the extent to which the objectives and expectations of the Scheme have been met, are discussed in detail in the chapters which follow.

2.96 Before proceeding to a detailed analysis of the Scheme and its outcomes, the Committee considered that it would be useful to examine how similar regulatory schemes have been implemented in relation to other professions in

53 ibid.

54 ibid., p. 61.

55 ibid.

56 Parliamentary Debates (Hansard), House of Representatives, 27 May 1992, p. 2937.

57 ibid.

58 ibid.

Australia. It is important to note that the migration advice industry is not the only specialist profession subject to a comprehensive registration scheme. Similar schemes operate in relation to taxation agents, customs brokers and patent attorneys.

Regulatory schemes in other industries

2.97 The regulatory schemes operating in Australia in relation to other professional advisers, such as taxation agents, customs brokers and patent attorneys, include a number of features which also are reflected in the current registration scheme for migration agents. Each scheme has broad coverage of participants in the particular industry. Each scheme is supervised by a regulatory body with the power to register, investigate and discipline participants in the industry. Each scheme establishes entry requirements for those wishing to practise in the relevant field.

Taxation agents

2.98 Taxation agents are required to be registered if they intend to sign taxation returns on behalf of clients and charge a fee for that service. The requirement for registration does not apply to persons who simply provide taxation advice. The registration requirement applies to both accountants and lawyers. It is an offence under the *Income Tax Assessment Act 1936* for unregistered agents to charge a fee for the preparation of a tax return or fringe benefits tax return.

2.99 Individuals, partnerships and companies are eligible to be registered as taxation agents. An individual also may be registered as the nominee of a registered tax agent. Nominees can sign returns and supervise employees on behalf of registered tax agents. Employees of registered tax agents are not required to register. It is an offence for a tax agent to allow a person to participate in preparing tax forms, preparing objections or conducting any business on the tax agent's behalf where that person is not supervised properly by the tax agent or is not another registered tax agent.

2.100 An individual must meet specified criteria relating to character, qualifications and experience in order to be eligible for registration as a tax agent. In general terms, an applicant must be a fit and proper person, and have academic qualifications in accounting and tax law, as well as relevant experience in the tax arena. Nominees must meet similar requirements.

2.101 An agent's registration remains in force for three years unless it is suspended, cancelled, terminated or surrendered before that time. The registration fees are:

- $80 for original registration, including the original nominee;
- $40 for re-registration, including the original nominee;

- $80 for registration of an additional nominee; and
- $5 for re-registration of each additional nominee.

2.102 Tax Agents' Boards established in each State consider applications for registration and have the power to approve, suspend or cancel registrations. Each Board consists of three members appointed by the Minister, comprising an officer of the Australian Taxation Office and two other persons, one of whom is the Chairperson. By convention, the two other persons are drawn from nominations of the legal, accounting and taxation professional bodies. The Boards are independent of each other and the Australian Taxation Office with regard to their determinations on the registration of tax agents.

Customs brokers

2.103 Customs brokers are required to be licensed if they operate on behalf of importers in any gazetted location. The gazetted locations are the major Australian ports. At other locations, where the volume of customs clearances is insufficient to sustain a customs broker industry, there is no requirement to be licensed.[59]

2.104 There are three categories of customs broker:

- nominees, who are persons employed by sole traders or corporate customs brokers and who, by agreement and by virtue of the annual fee they pay, are not able to act on behalf of owners of goods in their own right;
- sole traders, who having paid the prescribed fee, are able to act as customs brokers in their own right; and
- corporate brokers, which are partnerships or companies which act on behalf of owners of goods through nominee customs brokers.

2.105 In general terms, an applicant must be a person of integrity and must have completed successfully the course of study known as the Advanced Certificate of Customs Broker Procedures in order to be licensed as a customs broker. Some accreditation is given to serving or former officers of the Australian Customs Service on the basis of their past work history and training. Alongside this requirement, successful completion of a national examination on customs broking procedures conducted by the Customs Brokers Council of Australia is accepted as evidence that a person has the relevant qualifications to be a customs broker. The national examination is not compulsory and is not a prerequisite for the grant of a licence.

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59 *Australian Customs Service Manual*, Volume 7, Import Control.

2.106 Applications for the grant of a licence are made to the Comptroller-General of Customs, who is required to refer the application to the National Customs Agents Licensing Advisory Committee for consideration. The Advisory Committee is appointed by the Comptroller-General and comprises a Chairman, a member to represent customs agents, and a member to represent the Commonwealth. The Chairman must either be or have been a Stipendiary, Police, Special, or Resident Magistrate of a State or Territory, or a person who, in the opinion of the Comptroller-General, possesses special knowledge or skill in relation to matters on which the Advisory Committee is to advise or report.

2.107 Customs broker applicants are interviewed by the Advisory Committee in order to ascertain their experience in the industry. Executives of a company or partnership may be interviewed in relation to corporate applications. The Advisory Committee reports to the Comptroller-General on the application. The Comptroller-General grants or refuses the licence.

2.108 The annual licence fee for a broker who intends to operate in his/her own right as a sole trader is $200. The annual fee for a nominee intending to operate as a non-trading broker is $20. Licences expire each year on 31 December. Where a licensed broker fails to pay the renewal fee on the due date, entries lodged by that broker are not to be accepted after 28 days of the due date. If the fee remains unpaid, formal notification of the termination of the licence is sent to the broker.

2.109 The Comptroller-General has the power to reprimand agents and suspend or cancel their licences. Investigations with regard to suspension, revocation and non-renewal of licences are referred to and conducted by the Advisory Committee, which reports to the Comptroller-General.

Patent attorneys

2.110 The *Patents Act 1990* provides that a person must be registered to practise as a patent attorney. To obtain registration as a patent attorney, a person must:

- be an Australian citizen;
- be of good character;
- hold an approved degree or diploma in science or engineering from an Australian tertiary institution or an approved foreign institution, or have passed an examination in a branch of engineering or science which would qualify the applicant for corporate membership of the Institution of Engineers, the Royal Chemical Institute or another professional institution approved by the Patent Attorneys Professional Standards Board;

- have worked under the supervision of a registered patent attorney for a continuous period of one year or for periods within a continuous period of two years which total not less than one year; and
- have passed or have been exempt from passing all of the examinations in eight specialist subjects set by the Patent Attorneys Professional Standards Board.

2.111 An annual registration fee is payable on 1 July each year. Patent attorneys who do not pay the fee within 14 days are deregistered.

2.112 The Patent Attorneys Standards Board comprises the Commissioner, two members who are patent attorneys elected by patent attorneys, and no fewer than two members appointed by the Minister. The Commissioner is the Chairperson of the Standards Board.

2.113 Written complaints against patent attorneys may be made to the Standards Board by the Institute of Patent Attorneys of Australia or by persons who allege that their interests are affected by the unprofessional conduct of a patent attorney. The Standards Board considers complaints and authorises persons to bring proceedings before the Patent Attorneys Disciplinary Tribunal where it considers that the patent attorney may have a case to answer. The Disciplinary Tribunal has the power to reprimand a patent attorney, or suspend or cancel a patent attorney's registration.

Comparisons with the Migration Agents Registration Scheme

2.114 Each of the above mentioned regulatory schemes reflect the particular circumstances and requirements of the relevant industry. As noted, the schemes for regulating taxation agents, customs brokers and patent attorneys contain certain features which also can be found in the Migration Agents Registration Scheme. This can be evidenced from the Committee's detailed analysis of the principal elements of the Migration Agents Registration Scheme in Chapter Three.

Chapter Three

OVERVIEW OF THE MIGRATION AGENTS REGISTRATION SCHEME

Introduction

3.1 The Migration Act provides the legal basis for the Migration Agents Registration Scheme. It enacts a scheme which restricts and controls the provision of advice to and the making of representations on behalf of applicants seeking to obtain or retain an Australian visa. Under the Scheme, with some exceptions, persons providing immigration assistance must be registered migration agents.

3.2 In this chapter, the Committee examines the objectives and principal elements of the Scheme. In considering whether those objectives have been met, the Committee examines the statistical outcomes of the Scheme to date, as well as community perceptions about the Scheme.

Objectives of the Scheme

3.3 When introducing the legislation establishing the Migration Agents Registration Scheme, the then Minister indicated that previous regulatory models had not gone far enough in dealing with problems in the migration advice industry. The then Minister noted that those problems included:

- agents having been paid to lodge applications and then failing to do so;
- lodging applications without paying the prescribed fees thereby not giving effect to the application;
- lodging applications tardily in a way which adversely affects the entitlements of applicants;
- holding passports as 'security and then demanding extra payments'; and
- agents providing incompetent advice because they lack even a rudimentary knowledge of the Migration Act and Regulations.[1]

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1 Parliamentary Debates (Hansard), House of Representatives, 27 May 1992, p. 2937.

3.4 According to the then Minister, the Government's initiative in establishing a comprehensive regulatory scheme reflected its concern over the level and nature of complaints made against incompetent or unscrupulous agents.[2] Those concerns were echoed by voluntary organisations operating within the migration advice industry at that time. IARC, for example, commented in the July/August 1992 edition of its publication, *Immigration News*:

> Advisers with the centre continue to hear from clients who have had extremely bad experiences with agents and lawyers. These problems vary from gross over-charging for simple applications and encouraging people to lodge applications which have no chance of success, to outright negligence where an adviser is giving advice with virtually no knowledge of migration law.
>
> It is always the client who suffers in these situations. Their application can take longer to be processed because the agent has not included enough information, they can lose their right to make an application and in many cases are forced to leave Australia to make further applications overseas.[3]

3.5 As noted in Chapter One, the Scheme was designed to 'improve standards of professional conduct and quality of service'.[4] According to DIEA, the Government believed that an outcome of the establishment of the Scheme could be the development of the migration advice industry to a point where self-regulation might be possible.[5] In this regard, the then Minister stated:

> . . . the introduction of this regulatory scheme may well act as a catalyst in drawing together migration agents in a way which will encourage self-regulation and provide future governments greater flexibility in addressing the underlying issues.[6]

2 ibid.

3 Immigration Advice and Rights Centre, *Immigration News*, No. 30, July/August 1992, p. 1.

4 Parliamentary Debates (Hansard), House of Representatives, 27 May 1992, p. 2937.

5 Evidence, p. S296.

6 Parliamentary Debates (Hansard), House of Representatives, 27 May 1992, p. 2939.

3.6 A related objective of the Scheme was that it would be self-funding. The then Minister stated:

> The Government also took the view that migration agents should meet the cost of regulation because they were likely to benefit from the development of a more cohesive and reputable industry, in the medium to long term, and because of the need for budget discipline.[7]

Operation of the Scheme

Form of the Scheme

3.7 Part 3 of the Migration Act (sections 275 to 333) sets down the provisions which govern the establishment and operation of the Scheme. These provisions define the categories of persons liable to be registered as migration agents, and the qualifications for registration. They also establish the principal components of the Scheme including:

- a Migration Agents Registration Board;
- requirements and procedures for the registration of migration agents;
- a Code of Conduct for migration agents;
- investigatory and disciplinary procedures; and
- a sunset clause terminating the scheme three years after its commencement, namely 21 September 1995.

3.8 According to DIEA, the complaints mechanism is the central feature of the Scheme, backed up by the powers vested in the Board to issue warnings, to suspend or deregister agents, and to refuse applications for registration. DIEA commented:

> This mechanism provides protection for clients by ensuring that agents whose conduct does not meet professional standards are not able to practise commercially.[8]

7 ibid., p. 2938.

8 Evidence, p. S296.

Scope of the Scheme

3.9 Section 280(1) of the Migration Act provides, with certain exceptions, that a person who is not a registered agent must not give immigration assistance. The penalty for providing such assistance when not registered is a fine of up to $5 000. Under Section 276 of the Migration Act, a person gives immigration assistance if the person uses or purports to use knowledge of or experience in migration procedure to assist a visa applicant or cancellation review applicant by advising on, preparing or helping to prepare a visa application or cancellation review application, or representing a visa applicant in court or tribunal proceedings which concern the visa application or visa cancellation.

3.10 The Migration Act makes certain exceptions to the principle that all persons must be registered to give immigration assistance. Essentially, Federal and State parliamentarians and their staff, Federal and State public servants and consular officials are allowed to give immigration advice or assistance without being registered. Persons also can give immigration assistance voluntarily and informally, say to a friend or family member, without seeking registration, but such advice cannot be given for fee or reward, or in the person's capacity as an employee or voluntary worker, or as part of or in association with a profession or business.

3.11 Lawyers have special standing within the Scheme. They are required to be registered if they provide immigration assistance, but are not required to register for the purposes of providing immigration legal assistance. In essence, the Scheme allows lawyers to undertake immigration work before a court without being registered as migration agents, but requires lawyers to be registered for the purposes of preparing applications and making any representation to DIEA and the review authorities, which are defined to be the Migration Internal Review Office (MIRO), the IRT and the RRT.[9]

Administration of the Scheme

3.12 The Scheme is administered by the Migration Agents Registration Board and the Secretary of DIEA. Each have distinct roles within the Scheme.

3.13 The Secretary of DIEA is responsible for the processing of uncontroversial registration applications. An application for registration is made to the Secretary of DIEA, who must deal with it unless required to refer it to the Board. The Secretary is required to refer an application to the Board essentially where there is an objection to the registration of an agent, or where there is evidence that an applicant is unsuitable or unfit to give immigration assistance.

9 The Administrative Appeals Tribunal appears to have been omitted from this definition; see paragraphs 4.32 to 4.36.

3.14 The majority of registration applications are dealt with by the Secretary. In practice, this task is performed, on delegation from the Secretary, by officers within DIEA's Migration Agents Registration Section, which acts as the secretariat for the Scheme and the Board. DIEA noted that approximately 80 percent of applications are processed fully by the DIEA secretariat.[10]

3.15 The Board, in turn, is responsible for dealing with registration applications referred to it by the Secretary of DIEA, monitoring and investigating the conduct of registered agents and, where appropriate, taking disciplinary action against registered agents.

3.16 The Board is comprised of:

- a Chairperson, who is the Secretary of DIEA or his/her delegate;
- a member who is a member of the IRT;
- a member who is a lawyer;
- a member who is a migration agent; and
- a member who is a representative of the ethnic community.

Qualifications for registration

3.17 In order to be registered, an applicant must satisfy both professional competency and integrity requirements. In relation to competency, section 292 of the Migration Act, together with the *Migration Agents Regulations 1992*, provide that an applicant for registration as a migration agent must either be legally qualified or able to demonstrate a sound knowledge of migration procedure. The Migration Act allows for the Secretary of DIEA to form an opinion as to what constitutes a sound knowledge of migration procedure. DIEA currently accepts the following as evidence of sound knowledge of migration procedure:

- evidence of a pass in a unit of migration law from an Australian tertiary institution; or
- evidence of a pass in an examination conducted by the Migration Institute of Australia; or
- a certificate of sound knowledge issued by organisations licensed under the Migration Agents Registration Scheme.[11]

10 Evidence, p. S302.

11 Evidence, p. S304.

3.18 It is important to note that when the Scheme was established, transitional provisions enabled those already practising as migration agents to satisfy the competency requirement for registration by demonstrating substantial experience in migration procedure. In this regard, agents had to demonstrate that they had undertaken a minimum of 24 cases in five migration categories in the two years prior to application.[12]

3.19 In relation to character requirements, section 294 of the Migration Act provides that an applicant must not be registered if the Board is satisfied that the applicant is not a person of integrity, is otherwise not a fit and proper person to give immigration assistance, or is related by employment to an individual who is not a person of integrity.

3.20 In general, applicants for registration also must pay the appropriate fee at the time of the lodgement of their applications. The fees are:

- $1 000 for a sole proprietor, a director of a company or a partner in a firm;
- $500 for an employee of a firm where the partner or executive officer of that firm is a registered agent;
- $100 for a sole proprietor, director of a company or partner in a firm dealing with five or less cases per year;
- $50 for an employee of a firm where the partner or executive officer of that firm is a registered agent and deals with five or less cases per year; and
- nil for persons who do not charge a fee for providing immigration assistance.

3.21 Registrations are in force for 12 months from the date of registration. Registrations generally are renewed automatically on payment of the renewal fee. Under section 301 of the Migration Act, DIEA is required to notify an agent one month prior to the anniversary of the date of his/her registration that the registration will be renewed and that, where necessary, a renewal fee, equivalent to the registration fee, is payable. The renewal fee is the same as the appropriate registration fee. Agents who do not pay the appropriate renewal fee within two months of their registration date anniversary are deregistered automatically.

12 Evidence, p. S304.

High Court challenge to the Scheme

3.22 The Scheme commenced operation on 21 September 1992. In February 1993, a High Court challenge to the Scheme, *Cunliffe v The Commonwealth*, (1994) 124 ALR 120; (1994) 68 ALJR 791 (the *Cunliffe* case), was brought by two solicitors who regularly gave legal advice on and assisted with visa applications and reviews of visa refusals. The plaintiffs' entitlement to continue in this practice was affected by the registration provisions. From 21 September 1992, the plaintiffs were required to become registered migration agents if they were to continue practising in relation to immigration matters. The High Court application was heard in August 1993.

3.23 In the case, the plaintiffs contended that the then Part 2A of the Migration Act (now Part 3) was constitutionally invalid because:

- the provisions were beyond the legislative power of the Parliament as they were outside the naturalisation and aliens power (section 51(xix)), the immigration and emigration power (section 51 (xxvii), and the incidental power (section 51 (xxxix)) of the Constitution, or any other provisions of the Constitution. It was argued that the provisions did not operate directly upon aliens and could not be characterised as a law in respect of aliens. It was argued further that the laws were not incidental to the aliens power as the prohibitions and restrictions imposed by the then Part 2A were disproportionate to the object or purpose of protecting aliens from incompetent and/or unscrupulous migration advisers;
- even if the legislation could be characterised as a law with respect to aliens or immigration, it contravened the implied guarantee of freedom of communication of information and opinions about matters relating to the government of the Commonwealth; and
- the legislation contravened the express requirements of section 92 of the Constitution that 'intercourse among the States . . . shall be absolutely free'.[13]

3.24 On 12 October 1994, the High Court handed down its judgement. A majority of the Court (Brennan, Dawson, Toohey and McHugh JJ) held that the Scheme was wholly valid. The three remaining justices (Mason CJ, Deane and Gaudron JJ) considered that some of the provisions relating to the Scheme infringed the implied constitutional freedom of communication.

13 Exhibit 4.

3.25 The High Court held unanimously that the legislative provisions were within the central core of the aliens power conferred on the Commonwealth Parliament by section 51(xix) of the Constitution. There were essentially two reasons for this finding. First, it was held that although the provisions do not regulate directly the rights and obligations of aliens, they are, in their entirety, concerned with the protection of aliens in relation to matters which are directly related to their alien status. Secondly, it was held that the activity which the Scheme restricts, namely advice and assistance in relation to immigration applications, is a matter of particular significance to aliens.

3.26 With respect to the issue concerning the implied freedom of communication, a majority of the High Court (Mason CJ, Deane, Toohey and Gaudron JJ) held that the communications regulated by the Scheme were communications of the kind protected by the implied freedom of communication. A majority of the High Court (Brennan, Dawson, Toohey and McHugh JJ) also held that the Scheme did not contravene this implied freedom of communication. The three dissenting judges (Mason CJ, Deane and Gaudron JJ) considered that the Scheme restricted political communication and, in certain respects, went beyond what was justified in the public interest. Mason CJ, in his dissenting judgement, held that the need for the implied freedom of communication to be restricted, by requiring that legal practitioners be registered, had not been demonstrated. Mason CJ also held that the restrictions on giving voluntary immigration assistance amounted to an unreasonable and disproportionate interference with the freedom of political communication. By contrast, Toohey J, who considered that the Scheme restricted political communication, held that it did not restrict impermissibly political communication as the restrictions imposed were not disproportionate to the need to protect aliens. Toohey J held that 'proportionality is concerned, not with absolutes but with the reasonableness of the balance struck by legislation'.[14]

3.27 On the third issue, a majority of the High Court (Brennan, Dawson, Toohey and McHugh JJ) held that the Scheme did not contravene section 92 of the Constitution. Toohey J noted that the provisions constituted a law of general application which did not discriminate between intrastate and interstate communication. Toohey J held that, to the extent that the provisions impeded interstate communication, they did so incidentally and in a manner that was reasonably required to achieve the primary purpose of the legislation, which was to protect visa applicants from exploitation or incompetence.[15]

14 *Cunliffe v The Commonwealth*, (1994) 68 ALJR 791 at 845.

15 ibid., p. 846.

Inquiry evidence

3.28 The High Court decision validating the Scheme in its entirety answered the core question of whether the Scheme in its existing form could continue to operate. From the establishment of the Scheme until October 1994, this core question had been unresolved. For this Committee, the fundamental issue was whether the Scheme should continue to operate.

3.29 During the inquiry, the Committee received statistical evidence from DIEA and the Board regarding the operation and outcomes of the Scheme to date. In addition, the Committee received a variety of anecdotal evidence from participants in the Scheme. Those who made submissions to the Committee and who appeared at public hearings recounted personal experiences with the Scheme and expressed views about the benefits and disadvantages of the Scheme. In the sections of this chapter which follow, the Committee considers both the statistical and anecdotal evidence received as a basis for determining whether the Scheme is achieving its objectives and whether it should continue to operate.

Statistical outcomes

Registrations, refusals and deregistrations

3.30 There has been a steady increase in the number of registered agents since the establishment of the Scheme in September 1992. As at 31 December 1992, there were 3 registered agents. As at 30 September 1994, the number of registered agents had grown to 1 692, with 166 applications under consideration. DIEA indicated that in the nine months to September 1994, an average of 40 registration applications had been received each month.[16] In a supplementary submission, DIEA advised that, as at 3 March 1995, there were 1 681 registered agents.[17]

3.31 As at 3 March 1995, a total of 2 730 applications for registration had been received since the establishment of the Scheme, including:

- 269 applications which were withdrawn before registration; and
- 335 applications which were refused registration.[18]

16 Evidence, p. S297.

17 Evidence, p. S487.

18 Evidence, p. S486.

3.32 In relation to the 335 applicants refused registration, the following grounds for refusal applied:

- 309 applicants were refused because they lacked sound knowledge of migration procedure;
- 4 applicants were refused because they were not persons of integrity;
- 12 applicants were refused because they lacked sound knowledge of migration procedure and were not persons of integrity; and
- 10 applicants were refused because they did not meet threshold criteria such as being an Australian citizen.[19]

3.33 Of those persons registered as migration agents between 21 September 1992 and 3 March 1995, 241 persons subsequently did not renew their registration, one person was deregistered and three persons were suspended, two for six months and one for 31 months.[20]

3.34 In its original submission, DIEA noted the following profile for the migration advice industry as at 30 September 1994:

- 57 percent of all agents had legal qualifications;
- one third of agents provided immigration assistance without charging a fee;
- 60 percent of those agents charging for their services provided immigration assistance to five or fewer clients annually and therefore paid a concessional registration levy;
- of those agents who charged for their services, 70 percent were lawyers;
- of those agents who provided immigration assistance free of charge, 29 percent were lawyers; and
- of those agents who paid the concessional registration levy (for those intending to provide immigration assistance in five or less cases annually), 82 percent were lawyers.[21]

19 Evidence, p. S487.

20 Evidence, p. S486.

21 Evidence, p. S299.

3.35 Commenting on the profile of the migration advice industry on the basis of the above statistics, DIEA stated:

> . . . the significant number of agents who possess legal qualifications, coupled with the high number who provide services to 5 or less clients each year, paints a picture of an industry where the commercial sector is largely dominated by non-specialist practitioners, principally in the legal profession, for whom provision of immigration assistance is ancillary to their principal professional activities.
>
> Another significant feature of the industry is the large number of agents in the voluntary sector - as noted above, about one-third . . . While it is probably the case that many such voluntary workers also provide immigration assistance as an occasional service amongst many other community services, the existence of a number of specialist immigration voluntary agencies . . . many of which have substantial numbers of registered agents on their workforce, suggests that the services provided by non-fee-charging agencies account for a relatively high proportion of the total volume of service by the industry. This alone distinguishes the migration advice industry from most other industries providing comparable services.[22]

Complaints and disciplinary action

3.36 DIEA indicated that the number of complaints made and the disciplinary action taken against registered and unregistered agents are objective indicators of the performance of the Scheme. DIEA commented:

> Without the Scheme, it would not have been possible to take any kind of action.[23]

3.37 DIEA advised that there has been a dramatic increase in the number of complaints made since the establishment of the Scheme. From September 1992 until the third quarter of 1993, 139 complaints were received. As at 16 September 1994, the total number of complaints received had risen to 431.[24] By 6 May 1995, the total number of complaints received had risen to 610, including 577 complaints received against 269 individuals and 33 complaints which identified

22 Evidence, p. S299.

23 Evidence, p. 693.

24 Evidence, pp. S311-S312.

a business rather than a specific individual. Of the 577 complaints received against individuals, 400 complaints were made against 163 registered agents or applicants for registration and 177 complaints were made against 106 people who had not applied for registration.[25] Overall, the 610 complaints included:

- 6 objections to registration;
- 31 complaints about lack of sound knowledge;
- 288 complaints about individuals not being persons of integrity;
- 34 complaints about failure to lodge migration applications;
- 167 complaints about persons not being registered to practise;
- 19 complaints about agents not quoting their registration numbers when advertising, as required under clause 10 of the Code of Conduct for migration agents;
- 6 complaints about agents lodging applications with no chance of success, including applications which were lodged late and could not be considered, and cases where the agent failed to notify the client of departmental decisions in time to activate an appeal right; and
- 37 complaints on other grounds, including matters such as intimidating departmental staff, being bankrupt, being related by employment to a person who is not a fit and proper person, and persons registered as free service providers charging for their services.[26]

3.38 In its supplementary submission, DIEA noted that the complaints have derived from a variety of sources, including:

- 297 from DIEA officers, including 110 complaints arising from investigations and monitoring of advertising in newspapers;
- 293 from the clients themselves;
- 17 from anonymous sources;

25 Evidence, p. S504.

26 Evidence, p. S311.

- 12 from the IRT; and
- 9 from the RRT.[27]

3.39 As at 6 May 1995, the following outcomes had been achieved in relation to the 400 complaints received against 163 registered migration agents or applicants:

- 76 complaints involving 16 people resulted in registration being refused, cancelled or suspended;
- 185 complaints involving 111 people were not substantiated or were found to have no case to answer; and
- 139 complaints involving 36 people were before the Board.[28]

3.40 As noted at paragraph 3.33, from 21 September 1992 to 3 March 1995, one migration agent was deregistered and three agents were suspended for periods ranging from six to 31 months.[29]

3.41 In its original submission, DIEA noted that the cases found to have no case to answer included complaints which could not be substantiated as well as complaints of unregistered practice where there was no evidence of malpractice or disadvantage to the client. DIEA indicated that in those cases the subject of the complaint was advised of the requirement to be registered, but no further action was taken.[30]

3.42 In a supplementary submission, DIEA indicated that, arising from the complaints received, 10 matters were under active investigation and 109 matters were yet to be commenced as at 6 May 1995. According to DIEA, some of those investigations involved serious fraudulent activity and were the result of multiple complaints against individuals. DIEA noted that while individual complaints are received and may be referred for investigation, concurrent complaints against an individual result in one investigation action.[31]

27 Evidence, p. S504.

28 Evidence, p. S505.

29 Evidence, p. S486.

30 Evidence, p. S313.

31 Evidence, p. S505.

3.43 DIEA advised that, as a result of investigation action, 33 matters had been referred to the Director of Public Prosecutions as at 6 May 1995. The outcomes of those matters were:

- 5 summonses issued but not served;
- a guilty finding in 7 matters;
- 1 matter before the court;
- no action proposed by the Director of Public Prosecutions in 8 matters; and
- 12 matters pending.[32]

3.44 DIEA noted that sentences handed down by the courts ranged from a three year good behaviour bond to a fine of $2 000.[33]

3.45 DIEA also noted that, in addition to court action as a result of DIEA referrals, independent State or Federal police action has resulted in eight migration agent related matters being brought before the courts, with seven matters resulting in a guilty finding and one matter yet to be heard. In these matters, the sentences have ranged from 12 months imprisonment to a $3 000 fine.[34]

Costs of the Scheme

3.46 In assessing the effectiveness of the Scheme, the Committee also was provided with information on the costs of the Scheme. As noted above, one of the objectives of the Scheme was that it would be self-funding. In this regard, DIEA noted:

> . . . the amounts to be paid by agents for registration, and renewal of registration, were a levy, or tax, because the levels of payment were set to provide sufficient income to fund, in addition to the establishment and operation of the Scheme, anticipated litigation costs, and grants worth $310 000 per annum to voluntary organisations providing free immigration assistance.[35]

32 Evidence, p. S505.

33 Evidence, p. S505.

34 Evidence, p. S505.

35 Evidence, p. S319.

3.47 As indicated at paragraph 3.20, different registration levies are payable depending on whether the agent is a sole proprietor, company director or partner in a firm, whether the agent is an employee of a registered agent, whether the agent deals with more than five cases per year, and whether the agent charges for his/her services. As at 30 June 1994, the registration levies received were as follows:

- 300 agents who were sole proprietors, directors of a company or partners in a firm and who intended to deal with more than five cases per year paid the full registration levy of $1 000;
- 522 agents who were sole proprietors, directors of a company or partners in a firm and who intended to deal with five or less cases per year paid the concessional registration levy of $100;
- 127 agents who were the employees of registered agents and who intended to deal with more than five cases per year paid a registration levy of $500;
- 83 agents who were the employees of registered agents and who intended to deal with five or less cases per year paid a concessional registration levy of $50; and
- 516 agents who did not charge for their services were exempt from paying a registration levy.[36]

3.48 According to DIEA, the introduction of a concessional registration levy has had a significant effect on the Scheme's ability to become self-funding. DIEA indicated that the number of agents availing themselves of the concessional levy has been higher than was anticipated. DIEA noted that of the total number of registered agents at the end of June 1994, 33 percent were exempt from the registration levy, 39 percent were eligible for a concession, and 28 percent paid the full levy.[37]

3.49 DIEA advised that the income from the registration levies has been insufficient to pay for the administration of the Scheme, let alone the litigation costs associated with disciplining migration agents, or the IASS grants which were planned to be derived from the Scheme's income. Litigation costs, advisory service grants and shortfalls in administrative expenditure for the Scheme have been funded from other DIEA sources.[38] In this regard, DIEA commented:

> One obvious failure of the Scheme is that it is not self-financing–far from it: not even for the registration scheme itself, without including the ancillary advisory

36 Evidence, p. S319.

37 Evidence, p. S319.

38 Evidence, p. S320.

service funding scheme. Supplementary funding has had to be provided from the Department's general running costs.[39]

3.50 The income and expenditure figures for the Scheme, excluding the IASS, are detailed at Tables 3.1 and 3.2.

TABLE 3.1

MIGRATION AGENTS REGISTRATION SCHEME: INCOME AND EXPENDITURE

	1992-93	1993-94	1994-95 (to 3 March 1995)
Income from registration and renewal levies	$463 000	$222 450	$298 950
Expenditure	$496 000	$470 000 (includes $90 000 expenditure for investigations)	$250 000 (does not include $90 000 allocated for investigations)

* Source: Evidence, pp. S493-S494

TABLE 3.2

MIGRATION AGENTS REGISTRATION SCHEME: INCOME FROM REGISTRATION LEVIES

	1992-93	1993-94	1994-95 (to 3 March 1995)
Income from application levies	$463 000	$ 61 350	$ 62 350
Income from renewal levies	Nil	$148 150	$221 800
Income from agents upgrading from concessional levy to full levy	Nil	$ 12 950	$ 14 800
Total income from levies	$463 000	$222 450	$298 950

* Source: Evidence, p. S493

39 Evidence, p. 690.

3.51 DIEA indicated that, at the current levels of levy, including the concessional rates, it is not expected that the Scheme could achieve full self-funding in the future.[40]

Submissions on the Scheme

3.52 Alongside the statistical evidence on the performance of the Scheme, the Committee received a number of submissions in which participants in the Scheme commented on their experiences with the Scheme to date. A majority of those who made submissions and appeared at public hearings supported the continuation of the Scheme, even though some of the anecdotal evidence suggested that the objectives of the Scheme had yet to be achieved.

3.53 A common theme in submissions was that regulation of the migration advice industry is necessary to ensure consumer protection and the maintenance of appropriate standards within the industry. IARC, for example, commented:

> . . . a regulatory scheme is necessary to support the reputable people working in this area as well as to eradicate the unscrupulous and incompetent operators.[41]

3.54 In some submissions, it was argued that regulation of migration advisers is required because of the vulnerability of persons seeking immigration assistance. Ms Germov, a member of the RRT, stated:

> . . . immigration is a field which has some unique features which merit special regulation in that the client base is, more often than not, in a particularly vulnerable position and this is the case even with clients who can speak English fluently and are highly educated.[42]

3.55 In other submissions, it was suggested that regulation is needed to ensure an acceptable standard of competence and a level of service commensurate with a client's expectations. Mr Young, a registered migration agent, commented:

> There have been a lot of mistakes by agents or lawyers generally. In my view, just generally across the board, there has been a need for this type of scheme.[43]

40 Evidence, p. S320.

41 Evidence, p. S266.

42 Evidence, p. S59.

43 Evidence, p. 345.

3.56 Another view was that a system of registration is needed because the industry has been incapable of regulating itself. On this point, Mr Henry, a registered migration agent, stated:

> There was scope for abuse; abuses were taking place. There was a need to ensure that, as far as possible, people were given competent advice and had their complaints dealt with effectively. So there is certainly a need for a system of agent registration in the form of a regulatory framework rather than detailed prescriptions.[44]

3.57 The Law Council of Australia also accepted the need for the regulation of persons who provide immigration assistance, but submitted that those who are already subject to professional regulation, such as lawyers, should not be included within the scope of the existing scheme.[45] This issue is discussed in further detail in Chapter Four.

3.58 While the majority of those who made submissions to the Committee accepted the need for regulation of the migration advice industry, a variety of views were expressed about whether the existing Scheme has been successful in protecting consumers and deterring unscrupulous or incompetent advisers.

3.59 Some witnesses suggested that the Scheme has made no discernible difference with regard to the improvement of standards among migration agents and the prevention of unscrupulous behaviour. The Migration Institute of Australia, for example, stated:

> There is ample evidence before the Migration Agents Registration Board of unscrupulous practices not only by people who have become registered but also from people holding themselves out to be migration agents who have no qualifications and who are not registered. In this regard, the Institute believes the Registration Scheme has not been effective.[46]

3.60 VIARC noted that because the main focus of the Scheme to date has been in ensuring that people become registered, it has been less than successful in weeding out incompetent and unscrupulous operators.[47] Commenting on whether there has been an improvement in standards within the migration advice industry

44 Evidence, p. 209.

45 Evidence, p. S203.

46 Evidence, p. S130.

47 Evidence, p. S194.

since the establishment of the Scheme, VIARC stated that, based on the inquiries which it has received, there seems to be an alarming gap of knowledge of contemporary migration law among a great many migration agents who are operating at present.[48] According to VIARC, this situation has arisen because there is no emphasis within the Scheme on the need for agents to improve and keep up to date with their knowledge of migration law.[49]

3.61 Evidence of poor standards among migration agents also was received from the IRT and the RRT. Commenting on the experience of its members since the enactment of the Scheme, the IRT stated:

> . . . the quality of advice provided by applicants remains very poor. Many agents are ignorant of the regulations, including those applying to review. Often the written submissions we get are little more than legal nonsense. We continue to see applications lodged through agents which are fatally flawed and therefore doomed to fail.[50]

3.62 The IRT noted that statistics which it has collected show that in 1993-94 applicants without advisers had the same chance of a successful outcome as those with advisers, and that the involvement of advisers tended to delay the review process.[51]

3.63 The RRT indicated that its experience with migration agents has been similar to that of the IRT. The RRT stated:

> . . . one can say fairly accurately that the level of service provided by advisers, generally speaking, is fairly low or minimal and, in many cases, the adviser has not been of any significant help to the applicant at all . . . We find that a large number of submissions are just plainly incorrect, misleading and sometimes drawn up on standard lines.[52]

3.64 Ms Germov, a full-time member of the RRT, presented similar evidence, noting that submissions in support of applications to the RRT all too often do not address relevant legal criteria, raise matters not within the jurisdiction, are standardised and not adapted to suit individual cases, contain claims which are

48 Evidence, p. 273.

49 Evidence, p. S194.

50 Transcript of briefing, 29 September 1994, p. 4.

51 ibid., p. 4.

52 ibid., p. 11.

exaggerated and sometimes fabricated, and are poorly set out and presented. Ms Germov commented that applications often are lodged for a collateral purpose, such as buying time in order to meet residential requirements or avoid deportation, are not completed properly, and fail to disclose that an agent has given advice or assistance. In addition, Ms Germov noted that agents all too often fail to advise the RRT of changes in their or their clients' circumstances, fail to forward correspondence or other communications to their clients in a timely manner, fail to respond promptly to correspondence and telephone calls from the RRT, fail to lodge submissions within the deadlines specified by the RRT, and fail to explain delays or non-appearances of clients at hearings.[53]

3.65 Another concern expressed to the Committee was that the Scheme has given added status to migration agents without resulting in improved standards. The Springvale Community Aid and Advice Bureau, which called for the abolition of the Scheme, stated:

> The Migration Agents Registration Scheme has given extra status to those who are registered and has made it easier for them to attract clients and dramatically increase charges. People believe that those who are registered must have the expertise which is required for a successful application. In fact, there are no checks and balances once registered. Those who are registered do not come under scrutiny unless complained against. In fact, the quality of service provided has not improved. We have many examples of inaccurate and inadequate information, poorly prepared submissions and inappropriate representation.[54]

3.66 Similarly, Mr McDonell, a registered migration agent, argued that incompetent advisers and inferior services are 'shielded by an official scheme which sets the Commonwealth's seal on frauds and incompetents'.[55]

3.67 It also was argued that the Scheme has acted against the interests of consumers by reducing the number of persons providing advice on a voluntary basis. The Committee was told that a number of community organisations no longer provide free immigration assistance as a result of the introduction of the Scheme.

53 Evidence, pp. S59-S61; see also: RRT Ref. BN94/02576, 19 May 1994, Sydney, pp. 9-10 regarding blank letterheads provided to client by agent; RRT Ref. BN94/05907, 23 May 1995, Sydney, pp. 2, 11 and BN 94/05908, 25 May 1995, Sydney, pp. 9-10, 18-19 regarding generalised, unsupported claims repeatedly made by agent; and RRT Ref. BN94/05886, 18 April 1995, Sydney, regarding agent's lodgement of claim out of time.

54 Evidence, p. S184.

55 Evidence, p. S21.

The Refugee Council of Australia, RACS and the Springvale Community Aid and Advice Bureau indicated that grant-in-aid and community workers have stopped providing immigration assistance because of the legalistic and cumbersome nature of the Scheme, and because the committees of management of community organisations fear legal action should complaints be made by those receiving assistance.[56] The Springvale Bureau commented:

> As a result of the decreasing number of information providers in the community, people requiring assistance were forced to seek help from registered agents and pay for a service they had previously received, free of charge.[57]

3.68 On this point, DIEA conceded that some agencies appear to have withdrawn from the provision of immigration advice, but suggested that this was because those who were not confident of their expertise recognised this and were not prepared to vouch for their workers.[58]

3.69 Other witnesses suggested that the Scheme has not achieved one of its principal aims of providing consumer protection because there is insufficient knowledge about the Scheme within the community. Ms Mathewson, a registered migration agent, commented:

> Most people are not aware of the Scheme. If it is going to work, it has to be understood.[59]

3.70 In response to the criticisms of the Scheme, DIEA argued that the statistics which the Scheme has generated to date are indicators that consumers are in a better position now than they were before the Scheme came into existence. DIEA commented:

> Over 1 700 agents have been registered, for a start. The screening process has resulted in some 200 people being rejected as unsuitable to practise, and almost 400 have withdrawn their applications when they realised they did not meet the threshold practising criteria. In other words, there are some 600 people in an industry of 1 700

56 Evidence, p. S185, p. S262, p. S290.

57 Evidence, p. S185.

58 Evidence, p. S309.

59 Evidence, p. 244.

> registered people, who otherwise would be operating as migration agents but without the requisite knowledge, and they have been excluded.[60]

3.71 DIEA also indicated that the Scheme has resulted in the development of courses and examinations, including from within the legal profession and the migration advice industry itself, which are contributing to increased professionalism within the industry. DIEA noted that, at the time of the establishment of the Scheme, there was little in the way of training available for those wishing to gain increased knowledge in immigration procedure. Since the establishment of the Scheme, various courses and examinations have been developed, including:

- a sixteen week part-time course on migration law for community workers developed by VIARC;
- a course on Australian immigration law and practice conducted as an elective subject by the University of New South Wales for those who have completed successfully a core of undergraduate subjects;
- a course on practice and procedure in immigration law conducted by the University of New South Wales for those in need of vocational training in immigration law and practice for accreditation purposes;
- a single semester course on migration law conducted by the University of Melbourne for those who have completed successfully a core of undergraduate subjects;
- a summer course on citizenship and immigration law conducted by the University of Technology Sydney;
- an examination on immigration procedure developed by the Migration Institute of Australia; and
- various short lecture series on migration law organised by the continuing legal education bodies in the legal profession.[61]

3.72 In addition, VIARC advised that it conducts a migration course in conjunction with the Law Institute of Victoria and also conducted a part-time course for persons seeking to register as migration agents in Perth in February 1995.[62]

60 Evidence, p. 692.

61 Evidence, pp. S305-S306.

62 Evidence, p. 277 and p. 280.

3.73 DIEA itself also has undertaken a more proactive role in the education of migration agents. For example, DIEA allocated funding of $25 000 to the Migration Institute of Australia to develop with Deakin University a distance learning correspondence course in migration law aimed at preparing new and current practitioners to sit the Migration Institute's examination.[63] In addition, prior to the commencement of the *Migration Reform Act 1992* on 1 September 1994, DIEA conducted numerous briefing and information sessions for migration agents on the new provisions.[64]

3.74 DIEA also commented that there is an increasing awareness of the Scheme among consumers, evidenced by the growing number of complaints made against agents and the consequential referral of cases to the Director of Public Prosecutions.[65]

3.75 Other witnesses highlighted the positive effect which the Scheme has had on changing the 'culture' within the migration advice industry. The Legal Aid Commission of Victoria, for example, submitted that the Scheme has assisted in establishing a culture whereby those operating in the industry are now more concerned about maintaining their knowledge and competency.[66] In the Commission's view, DIEA's initiative in introducing training for migration agents is one of the positive benefits arising from the Scheme which has led to this change in culture.[67]

3.76 IARC suggested that the Scheme has heightened consumer awareness about the mechanisms which are available for dealing with unprofessional and/or exploitative conduct. IARC stated:

> The Scheme appears to create an environment which allows consumers to exercise an informed choice.[68]

3.77 In acknowledging the positive effect of the Scheme to date, various witnesses argued that the full benefits of the Scheme have not become evident. DIEA and the Board indicated that, because the Scheme has been in operation for just over two years, the full impact of the Scheme has not become apparent as yet.[69] DIEA and the Board noted that much of the initial work in relation to the Scheme was

63 Evidence, p. S307.

64 Evidence, p. S320.

65 Evidence, p. 692.

66 Evidence, p. 418.

67 Evidence, p. 416, p. 444.

68 Evidence, p. S267.

69 Evidence, p. S455, pp. 690-691.

directed to the registration process.[70] According to DIEA, because the bulk of the registration work now has been completed, greater emphasis and resources can be directed to the consumer protection functions of the Scheme. DIEA commented:

> While the achievements of the Scheme to date have been considerable, they could be said to have been merely setting the stage for the work which is yet to come.[71]

3.78 The Legal Aid Commission of Victoria commented that the Scheme could not have been expected to solve all the problems in the migration advice industry overnight. A representative of the Commission commented:

> I would not have thought that you would have created the Migration Agents Registration Scheme and expected overnight for all the problems which were quite significant, significant enough to cause its creation, just to vaporise instantly. I think it is quite a big task to change cultures . . .[72]

3.79 In a similar vein, Mr Henry, a registered migration agent, stated:

> Cleaning up the industry and shaking out some of the less reputable operators is not something that can be done instantly. It has to be done in accordance with due process on the basis of written complaints being tested out. So perhaps it was unrealistic to expect that in a very short space of time a number of people who enjoy an unsavoury reputation, whether or not it is merited, would lose their ability to practise. Some of these things will happen over time.[73]

3.80 By advocating improvements to the Scheme rather than its abolition, it is apparent that the vast majority of those who made a submission to the Committee agreed with the sentiment that the Scheme required further time to become fully effective.

70 Evidence, p. S453, p. 551, p. 691.

71 Evidence, p. S321.

72 Evidence, p. 444.

73 Evidence, p. 210.

Conclusions

3.81 To date, the Migration Agents Registration Scheme has achieved mixed results. Critics of the Scheme suggested that it has had little if any impact on the standard and conduct of persons providing immigration advice. They cited continuing problems with poor advice and unscrupulous practice as evidence of the Scheme's failure to make any discernible difference. In contrast, supporters of the Scheme argued that the registration requirements have resulted in the exclusion from practice of a significant number of persons who were unfit or not appropriately qualified and who otherwise may have been operating in the field. They also suggested that the Scheme is assisting to change attitudes within the migration advice industry by instilling among registered agents an enhanced awareness of the need to maintain knowledge and standards. On this basis, a significant number of those who made submissions to the inquiry supported the continuation of the Scheme with improvements.

3.82 Statistics obtained by the Committee support a finding that the achievements of the Scheme relevant to its objectives have been chequered. On the positive side, around 600 persons either have been denied the right to practise as migration agents or have decided to withdraw from seeking entry to the industry. In addition, the avenues for developing expertise in migration law have increased noticeably, with various courses and seminars now being conducted at a tertiary level and within the industry itself. On the negative side, disciplinary action taken against migration agents has been minimal, even though the number of complaints in relation to registered and unregistered practice has been increasing over time. In addition, public awareness of the Scheme remains at a relatively low level. The Scheme also has not achieved its objective of being self-funding and, according to DIEA, is unlikely to do so in the future.

3.83 During the inquiry, it was acknowledged that the Scheme has been in operation for just over two years. In this regard, it is relevant to note that, for virtually the entire operational life of the Scheme, the High Court challenge to the Scheme placed its validity and operation in doubt.

3.84 In coming to its conclusions on whether to retain the Scheme, a range of factors have influenced the Committee's decision. The Committee's examination revealed that the migration advice industry has been subject to some form of regulatory control since its early development. Many witnesses suggested that, as the migration advice industry is still developing in Australia, mechanisms to assess and monitor standards within the industry are important for ensuring a competent, professional and reputable industry. In this regard, while a self-regulatory professional body for migration agents, namely the Migration Institute of Australia, has been established recently, the Institute has not secured broad coverage of the industry. As such, self-regulation is not a viable option at this time, particularly given the varied nature of the industry.

3.85 While there is continuing anecdotal evidence of poor advice and unscrupulous conduct, the Committee considers that, at this stage in the Scheme's development, such evidence does not necessarily indicate the failure of the Scheme. Statistical evidence about increasing use of the complaints mechanism established under the Scheme suggests that consumers increasingly have knowledge about the Scheme. Evidence of increasing complaints through the Scheme's formal mechanisms suggests a continuing need for some form of regulation of the migration advice industry in the interests of consumer protection. As noted by one witness to the inquiry, it was not expected that problems which led to the establishment of the Scheme could be resolved overnight. In the Committee's view, abolition of the Scheme, or its substantial diminution, could send an inappropriate signal to the community about the Government's commitment to the establishment of a competent and reputable migration advice industry in which the interests of those most in need of assistance are safeguarded.

3.86 Further, while some have suggested that the Scheme has been ineffective in curtailing the activities of certain incompetent and unscrupulous agents, it could be argued that such agents have been able to continue operating because of loopholes in the Scheme, such as the exclusion of advice to sponsors and nominators from the scope of the Scheme. This could be an argument for strengthening rather than abolishing the Scheme.

3.87 On the basis of all the evidence presented to it, the Committee concludes that the Scheme should be retained for the time being, but that it should be reassessed by the Committee after a further three years of operational experience. The Committee was swayed in particular by arguments that the Scheme only now is beginning to show results and that further time is required to achieve the Scheme's intended objectives.

3.88 In arriving at the conclusion that the existing Scheme should continue to operate, the Committee has taken into account both the statistical outcomes of the Scheme to date and the anecdotal evidence received during the inquiry. At the same time, the Committee has relied on that evidence to recommend improvements in relation to the scope of the Scheme, the criteria for registration, the administration of the Scheme, its Code of Conduct and its disciplinary processes. Those recommendations are detailed in subsequent chapters of this report.

3.89 In recommending that the Scheme be retained for the time being, but that it be reassessed in three years time, the Committee is of the view that the Migration Agents Registration Board should develop specific performance indicators which would assist in an objective assessment of the Scheme after a further three years of operation.

Recommendations

3.90 **The Committee recommends that:**

1. **the Migration Agents Registration Scheme continue to operate for a further three years, with a range of improvements as detailed in subsequent recommendations; and**

2. **the Migration Agents Registration Scheme be reviewed by the Joint Standing Committee on Migration after a further three years of operational experience, and that such a review be based on the outcomes which have been achieved in relation to objective performance indicators developed by the Migration Agents Registration Board.**

Chapter Four

MIGRATION AGENTS

Introduction

4.1 When the legislation establishing the Scheme was introduced into the Parliament, the then Minister commented that there was a high level of fragmentation in the migration advice industry, with professions organised into their own distinct associations and a significant number of persons working as sole practitioners. The then Minister indicated that, on this basis, the Government accepted the need for a broadly based registration scheme. He stated:

> Broad definitions have been adopted to minimise avoidance.[1]

4.2 In establishing the Scheme, the Government decided that, with limited exceptions, all of those working in the migration advice industry should be required to register. This includes lawyers advising on migration matters, voluntary workers and persons such as travel agents advising travellers and university staff dealing with overseas students on visa matters.

4.3 In this chapter, the Committee considers the scope of the scheme, specifically the categories of adviser required to be registered as migration agents.

Scope of the Scheme

4.4 The Migration Act does not provide a specific definition of who is or should be a registered migration agent. Rather, the Act defines a type of work undertaken, namely immigration assistance, and requires, with some exceptions, that all persons undertaking that work must be registered. Under Section 276 of the Migration Act, a person gives immigration assistance if the person uses, or purports

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1 Parliamentary Debates (Hansard), House of Representatives, 27 May 1992, 2937.

to use, knowledge of or experience in migration procedure to assist a visa applicant, termed an entrance applicant,[2] or cancellation review applicant[3] by:

(a) preparing, or helping to prepare, the entrance application[4] or cancellation review application[5]; or

(b) advising the entrance applicant or cancellation review applicant about the entrance application or cancellation review application; or

(c) preparing for proceedings before a court or review authority in relation to the entrance application or cancellation review application; or

(d) representing the entrance applicant or cancellation review applicant in proceedings before a court or review authority in relation to the entrance application or cancellation review application.

4.5 Not all immigration work is included in this definition. The definition does not include advice or assistance given to sponsors and nominators of visa applicants. It also does not include advice or assistance in connection with the deportation or removal of non-citizens, criminal prosecutions for migration offences, or related immigration compliance proceedings, for example garnishees of a non-citizen's assets to pay detention or removal costs. The definition also omits reference to migration proceedings before the Administrative Appeals Tribunal (AAT). These include criminal deportations, business visa cancellations and visa refusals on public interest grounds, that is visas refused under section 501 of the Migration Act because of the character or conduct of the visa applicant. Advice and assistance to non-citizens concerning applications for citizenship by registration and naturalisation likewise are excluded from the Scheme. The scope of the immigration assistance definition is addressed later in this chapter.

2 Entrance applicant means an applicant for a visa under the Migration Act (section 275).

3 Cancellation review applicant means an applicant for review of a decision to cancel a visa held by the applicant (section 275).

4 Entrance application means a visa application (section 275).

5 Cancellation review application means an application for review of a visa cancellation decision (section 275).

4.6 Under section 280 of the Migration Act, certain persons are not required to be registered as migration agents in order to provide immigration assistance. The persons exempt from registration are defined to be:

- parliamentarians, specifically a Senator or a Member of the House of Representatives or a member of the Parliament of a State or a member of the Legislative Assembly of a Territory;
- officials who give immigration assistance in the course of their duties as an official. An official is defined as an officer of the Australian Public Service or a person employed under the *Public Service Act 1922* or a member of the public service of a State or Territory or a member of the staff of a parliamentarian;
- an individual in his or her capacity as a member of a diplomatic mission or a member of a consulate post or a member of an office of an international organisation;
- an individual, if the assistance is:
  - not given for a fee or other reward; and
  - not given in his or her capacity as an employee of, or a voluntary worker for, another person or organisation; and
  - not given in the course of, or in association with, the conduct of a profession or business; and
- lawyers when they provide immigration legal assistance (see paragraph 4.8).

4.7 During the inquiry, much of the evidence was focused on the categories of immigration adviser covered by the Scheme. Some argued for limiting the scope of the Scheme by exempting from the registration requirement certain categories of adviser, such as lawyers, voluntary workers and travel agents. Others argued for the Scheme's expansion by extending the definition of immigration assistance to include, for example, advice given to sponsors and nominators of visa applicants. These matters are considered in the sections which follow.

The legal profession

4.8 As noted at paragraph 4.2, lawyers are required to be registered as migration agents in order to provide immigration assistance. The Scheme covers solicitors and/or barristers admitted to practice in Australia. Such lawyers are not required to be registered for the purposes of providing immigration legal assistance. The Scheme allows lawyers to undertake immigration work before a court without being registered as migration agents, but requires lawyers to be registered for the purposes of preparing applications and making any representation to MIRO, the IRT and the RRT.[6] Under section 277 of the Migration Act, immigration legal assistance is defined to be when a lawyer:

- acts for an entrance applicant or cancellation review applicant in preparing for proceedings before a court in relation to the entrance application or cancellation review application; or
- represents or otherwise acts for an entrance applicant or cancellation review applicant in proceedings before a court in relation to the entrance application or cancellation review application: or
- gives advice to an entrance applicant or cancellation review applicant in relation to the entrance application or cancellation review application that is not advice for the purpose of any of the following:
  - the preparation or lodging of the entrance application or cancellation review application;
  - proceedings before a review authority in relation to the entrance application or cancellation review application;
  - the review by a review authority of a decision relating to the entrance application or cancellation review application.[7]

4.9 In Australia, a significant proportion of immigration assistance is provided by lawyers. As noted in Chapter Three, 57 percent of agents obtained registration on the basis that they possessed an Australian law degree or were admitted to practise law. Of those agents who paid a registration levy, and therefore

6 The AAT appears to have been omitted from this definition. See paragraphs 4.32 to 4.36

7 A review authority is defined to be MIRO, the IRT or the RRT but does not include the AAT. The AAT's immigration proceedings, therefore, are not included in the definition of immigration legal assistance.

charge for their services, 70 percent were lawyers, while lawyers comprised 29 percent of agents in the voluntary sector. Of those applicants seeking to pay the concessional levy, who were intending to provide services in five or fewer cases per annum, 82 percent were lawyers.[8]

4.10 As well as being the major providers of immigration assistance, lawyers have particular status in the Scheme. As stated, lawyers are exempt from registration when providing immigration legal assistance. In addition, for those lawyers who provide immigration assistance and are required to register as migration agents, an Australian law degree or practising qualification automatically satisfies the competency requirement for registration. Lawyers, therefore, can be registered as migration agents without the need to demonstrate particular competence in migration law or practice.

4.11 Much debate has surrounded the inclusion of lawyers within the Scheme. That debate has focused on the following issues:

- whether lawyers could and should be registered in the Scheme;
- whether the distinction between immigration assistance and immigration legal assistance is valid and appropriate; and
- whether lawyers should have favoured status within the Scheme by having a generalist law degree accepted as proof of competence for providing immigration assistance.

4.12 The qualifications for registration are discussed in Chapter Five. In the sections which follow, the Committee focuses on the central issue of whether lawyers should be required to register as migration agents, and the related issue concerning the type of legal work, if any, for which registration should be necessary.

Inclusion of lawyers in the Scheme

4.13 On the core issue of including lawyers within the Scheme, the High Court settled the constitutional question of whether lawyers could be included in the registration scheme. In evidence before this Committee, representatives of the legal profession and other participants in the Scheme debated the subsidiary question of whether lawyers should be included in the Scheme. In that evidence, various references were made to the High Court decision.

4.14 As noted in Chapter Three, the inclusion of lawyers in the Scheme was the catalyst for the constitutional challenge to the Scheme launched by two lawyers, Cunliffe and Nicol, with the support of the Law Council of Australia. As indicated,

8 Evidence, p. S299.

a majority of the High Court held that the Scheme in its entirety was valid. The impact of the Scheme on the legal profession was referred to in the majority and dissenting judgements.

4.15 McHugh J, upholding the validity of the Scheme, stated:

> . . . legal qualifications do not always, or even naturally, fit a person for immigration practice and procedure that falls outside the area of 'immigration legal assistance' as defined.[9]

4.16 By contrast, Mason CJ in his dissenting judgement agreed with the plaintiffs' submission that the regulatory scheme extends too far in embracing lawyers who are subject to the admission and disciplinary requirements which exist in every State and Territory. Mason CJ stated:

> While the prescription of standards of competence and integrity applicable to non-practitioners can be seen to be reasonably necessary, the prescription of such standards for legal practitioners who have already satisfied standards of competence and integrity in order to gain admission to practice is not, in my view, reasonably appropriate and adapted to protect entrance applicants unless a real problem of incompetence or unscrupulous behaviour is shown to exist and to such a degree that it justifies subjecting them to the new requirements. No such mischief has been satisfactorily demonstrated in this case.[10]

4.17 During the inquiry, representatives of the legal profession reiterated their objection to the requirement for lawyers to be registered to give immigration assistance. In light of the High Court decision, they did not raise constitutional issues with the Committee. Rather, they objected to the inclusion of lawyers in the Scheme on the grounds that:

- lawyers already have demonstrated a level of competence and therefore the additional requirement to demonstrate competence in providing immigration assistance is unnecessary;
- lawyers already are subject to disciplinary controls through their own professional associations; and

9 *Cunliffe v The Commonwealth*, (1994) 68 ALJR 791 at 853.

10 ibid., p. 801.

- the requirement to register amounts to regulation of the legal profession and diminishes the independence of the legal profession.

4.18 The Law Council of Australia submitted that the Scheme is unnecessary for the legal profession because the profession itself already has procedures in place which guarantee the competence and ethical conduct of lawyers.[11] First, it was put to the Committee that, having being admitted to practice, lawyers already have a demonstrated competence in the law. The Law Council of Australia and the New South Wales Bar Association argued that, because of their legal training, lawyers are well equipped to give assistance in relation to all legal matters, including migration law, and therefore should not have to be registered in order to provide assistance in what is, essentially, just another area of law.[12] The Law Council suggested that every regulatory authority considers that their area is special and requires special standards and special expertise. The Law Council commented:

> Once you allow a regulatory authority to regulate legal practitioners in any branch of the law, then what is to stop that happening everywhere else? This disease, if we could call it that, has certainly spread into the tax arena. The Law Council has been arguing . . . that the scheme in relation to tax agents should not apply to lawyers, who are covered by a much more thoroughgoing scheme than will ever be introduced through the Tax Agent Registration Board. The same argument applies here. The same argument applies if there is a scheme in relation to lawyers practising property law, environmental law or family law.[13]

4.19 The Law Council also questioned the need for lawyers to be registered as migration agents in order to provide immigration assistance when lawyers are not required to be registered to provide immigration legal assistance. The Law Council stated:

> As there is no requirement for any standards apart from legal standards of the State law bodies for immigration legal assistance, why have a whole licensing regime applicable to lawyers to practise what is called immigration assistance.[14]

11 Evidence, p. S203.

12 Evidence, p. 48, p. 502.

13 Evidence, p. 502.

14 Evidence, p. 504.

4.20 Further, the Law Council and the New South Wales Bar Association indicated that the Scheme is unnecessary for ensuring the competence of lawyers because incompetence is a disciplinary offence for lawyers. It was noted that evidence of incompetence amounts to unsatisfactory professional conduct or professional misconduct. Both of these offences attract significant penalties, including directions to undertake further eduction, fines of up to $50 000, orders for compensation and cancellation of a practising certificate. The Law Council stated:

> Where is the evidence that lawyers practising in the field of migration require to be subject to a licensing scheme which, at best, is a second guess of what their local bodies administer? At worst it is a very poor imitation of the State schemes.[15]

4.21 In a similar vein, the New South Wales Bar Association commented that there is no justification for making lawyers twice subject to disciplinary provisions based on competence. It stated:

> We would say that the best safeguards against incompetence in any particular specialist area are the exiting professional disciplinary mechanisms which encompass the test of incompetence. If someone is in a specialist area incompetently, then they are subject to the full discipline of the profession in relation to that incompetence.[16]

4.22 The Committee also was told that in relation to specific competence in migration law, the legal profession is in the process of implementing accreditation tests for lawyers who wish to hold themselves out as migration specialists. In Victoria, for example, lawyers wishing to be accredited as migration specialists must undertake a five hour examination conducted by the Law Institute of Victoria covering all areas of migration law. To maintain accreditation, lawyers must meet continuing education standards set by the Institute each year. The Law Society of New South Wales is implementing a similar scheme in 1995 under which applicants for accreditation will be tested for their knowledge in a written exam and will be required to demonstrate, for example, competence in interviewing clients with the assistance of an interpreter.[17]

15 Evidence, p. 503.

16 Evidence, p. 49.

17 Evidence, p. S305.

4.23 On the issue of specialist knowledge, the New South Wales Bar Association commented:

> As far as I am aware the [Migration Agents Registration] Board and current regime has not set standards of education, knowledge, experience or ethics higher than those which currently prevail in the profession or prevailed earlier.[18]

4.24 Finally, the Law Council argued that the Scheme undermines the independence of the legal profession. It stated:

> It is a fundamental tenet of Australia's constitutional and legal system that there be an independent legal profession able to advise without fear or favour.
>
> The legal profession must be able to represent the interests of its clients in their dealing with the State, within the parameters of the law. Any attempt by the executive government to control the legal profession undermines the integrity of that principle.[19]

4.25 In contrast to the views expressed by representatives of the legal profession, other participants in the Scheme submitted that lawyers should remain within the Scheme in order to satisfy the original intention of establishing a comprehensive registration scheme aimed at raising standards within the migration advice industry. Mr Henry, a registered migration agent, stated:

> If the scheme is to be comprehensive it must include lawyers as well as non lawyers. Migration law is not an element in most law courses in Australia. It is a complex and ever-changing area and there is simply no reason why lawyers per se should not be part of the scheme if the philosophy is to ensure that those people giving members of the public migration advice are reasonably competent.[20]

18 Evidence, p. 47.

19 Evidence, p. S203.

20 Evidence, pp. S87-S88.

4.26 In a similar vein, IARC indicated that the Scheme should continue to apply to lawyers as legal qualifications do not necessarily indicate a knowledge of migration law nor a propensity to act scrupulously. IARC commented:

> We recognise that there are difficulties raised with the issue of regulation of lawyers by the Scheme as they are also accountable to their own professional body, however we believe these difficulties can be overcome by greater cooperation between the Board and the respective Law Societies. Given that it is a major priority of the Scheme to enhance professional standards within the industry, it seems that this objective can only be achieved if there is total coverage of advisers.[21]

4.27 The Board also provided evidence on the importance of maintaining lawyers within the Scheme. Mr Power, who is the lawyer member of the Board, noted that from his experience there are 'enough solicitors who do not act with integrity'.[22] Mr Power commented:

> They are just as prone, I guess, to overcharge as a non-lawyer. They are just as prone to be negligent as a non-lawyer. They are just as prone to rip-offs, if you like, as anyone else.[23]

4.28 While acknowledging that only a small percentage of lawyers would act without integrity, Mr Power indicated that because there has been a 'history of 'rip-offs" in the migration advice industry, and because lawyers currently comprise the overwhelming majority of registered agents, 'solicitors have got to come under the same scrutiny as everyone else within the industry'.[24] When questioned by the Committee on whether the disciplinary procedures of the legal profession would not be sufficient to deal with the small percentage of lawyers who do not act with integrity, the Board member who is the member of the IRT, Mr Karas, stated:

> Complaints also come to the Board in relation to solicitors or lawyers practising in the immigration area who do not go to the disciplinary committees of their society. There have also been instances of people who have been struck off as lawyers who have applied to be registered as migration agents.[25]

21 Evidence, pp. S266-S267.

22 Evidence, p. 559.

23 Evidence, p. 559.

24 Evidence, p. 560.

4.29 Relevant also to the Committee's deliberations in this regard was evidence from the IRT and the RRT that there has been no discernible difference in the success rate of lawyer and non-lawyer agents appearing before the tribunals. The IRT stated:

> In the tribunal's view there are good agents who are legally qualified and good agents who are not legally qualified. There are cases that come to us from poor agents who are not legally qualified; and there are cases that come to us, involving legal practitioners, where there is a clear lack of understanding of migration law and their assistance is not helpful to their clients, or to the tribunal.[26]

4.30 This view also was reflected by Ms Germov, a full-time member of the RRT, who stated:

> . . . in my capacity as a Member of the RRT, I have seen a wide cross-section of work from both legally qualified and non-legally qualified Migration Agents and I have found that in general, the standard is overwhelmingly poor.[27]

Pro bono immigration advice

4.31 A related issue, canvassed by the High Court in the *Cunliffe* case but not raised specifically in evidence to this inquiry, was whether lawyers who provide immigration advice on a pro bono basis (i.e. free of charge) should be required to register as migration agents. As indicated above, an individual who provides immigration assistance free of charge must be registered as a migration agent if he/she provides such assistance in his/her capacity as an employee of or a voluntary worker for another person or organisation, or in the course of or in association with the conduct of a profession or business. Given their particular legal expertise, lawyers who are not registered as migration agents unwittingly could contravene these provisions if they were to provide immigration assistance free of charge to a friend, acquaintance or associate, or as a community service. As this problem also arises for other professional voluntary workers, the Committee's discussion on this is expanded in the section of this chapter dealing with voluntary advisers.

25 Evidence, p. 561.

26 Evidence, p.680.

27 Evidence, p. S59.

Immigration matters before the AAT

4.32 Although not raised in evidence to the inquiry, a further issue which emerged from the Committee's own deliberations relates to immigration work before the AAT. Such work, which includes challenges to visa refusals on public interest grounds, business visa cancellations and criminal deportation cases, presently is undertaken largely by lawyers. Immigration work before the AAT is omitted from the definition of immigration assistance. There is, therefore, no requirement that persons giving assistance or representation in such AAT cases be registered as migration agents. Migration work before the AAT likewise is omitted from the definition of immigration legal assistance.

4.33 The AAT's migration jurisdiction concerning visa refusals or cancellations is relatively new. It is not clear whether such visa reviews will continue to be presented by lawyers. Indeed, as most business visa work is undertaken by migration agents rather than lawyers, it could be expected that review of such visa cancellations is likely to be handled by migration agents.

4.34 The additional area of AAT visa work concerns public interest refusals. Visas may be refused not only on the grounds of the visa applicant's character or conduct, but also on some other substantive ground, for example if the person fails to meet the points test. The AAT has jurisdiction only in relation to the refusal on character and conduct grounds. In such circumstances, the review of the visa decision may take place in the AAT, dealing with the character and conduct grounds for refusal, and in the IRT, dealing with the substantive ground for refusal. The representative dealing with such a case is required to be registered as a migration agent for the IRT review, but is outside the registration scheme for the AAT proceedings concerning the same visa application.

4.35 The third area of AAT migration jurisdiction concerns the review of criminal deportation decisions. This is a longstanding jurisdiction of the AAT. Generally, representation in such cases has been undertaken by barristers.

4.36 The Committee did not receive any evidence concerning the potential problems and anomalies which may arise in relation to visa reviews before the AAT. As the enlarged jurisdiction of the AAT translates to a larger and more diverse case load, the omission of this area of work from the Scheme is likely to constitute a noticeable anomaly.

Conclusions

4.37 The debate on whether lawyers should be included in the Migration Agents Registration Scheme focused principally on the issue of whether there was a demonstrated need for lawyers to be registered as migration agents. Those opposed to the inclusion of lawyers argued that the legal profession itself has adequate controls for ensuring the competence and conduct of lawyers without the need for an additional registration scheme. Representatives of the legal profession referred, in particular, to comments by Mason CJ, who, in his dissenting judgment on the

High Court challenge to the Scheme, intimated that the Scheme was unnecessary for lawyers because no evidence had been presented that there was a real problem of unscrupulous behaviour or incompetence among lawyers.

4.38 During the inquiry, the Committee received a variety of evidence to suggest that while a majority of lawyers undertake their duties with due competence and integrity, some lawyers practising in the immigration field do not have adequate knowledge of migration law, and a small percentage act in an unscrupulous manner. Particularly relevant in this regard was the evidence from the IRT and the RRT that, in proceedings before the tribunals, poor standards have been evident among lawyers and non-lawyers alike. Relevant also was the information from the Board that it has dealt with complaints about lawyers not under investigation by the legal profession's own disciplinary committees or tribunals.

4.39 In the previous chapter, the Committee recommended a continuation of the Scheme for three years, on the basis that further time is required for the Scheme to be assessed adequately. Given that the statistical and anecdotal evidence regarding the shortcomings of migration agents related to both lawyer and non-lawyer agents, the Committee is not minded at this time to exempt a significant proportion of the industry, namely lawyers, from the Scheme.

4.40 Clearly, the Government's original objective of raising professional standards across the migration advice industry has yet to be achieved. In the Committee's view, exemption of lawyers from the Scheme at this point in time would make the achievement of that objective even more difficult. Again, the Committee notes the evidence from the IRT and RRT regarding poor standards among lawyer and non-lawyer migration agents.

4.41 The Committee also is concerned that exemption of lawyers from the Scheme would remove an important avenue of consumer redress for persons who are given poor immigration advice by incompetent or unscrupulous lawyers. In this regard, community groups indicated that a large proportion of persons requiring immigration assistance would have little knowledge of the intricacies of the legal profession's complaints and disciplinary system. As such, it would be unlikely that persons who receive poor advice from incompetent or unscrupulous lawyers would be in a position to utilise those disciplinary processes. Exemption of lawyers from the Scheme would make it more difficult for such persons to achieve appropriate redress.

4.42 Accordingly, it is in the interests of the migration advice industry and the consumers of immigration assistance that the Committee at this time supports the continued inclusion of lawyers within the Scheme.

4.43 The Committee, however, is concerned that, in certain circumstances, the existing requirements of the Scheme are unduly onerous for lawyers and may result in persons unwittingly breaching the legislation. As detailed above, the current legislative drafting of the Scheme means that lawyers who are not registered as migration agents but who provide immigration advice on a casual basis to a friend

or acquaintance or who occasionally provide pro bono immigration advice would be breaching the legislation. As this problem also affects other professional advisers, the Committee's proposals in this regard are detailed in the section dealing with non-fee charging advisers.

4.44 Another problem identified by the Committee concerns visa related immigration work before the AAT, which is not included within the existing definitions of immigration assistance or immigration legal assistance. When the Scheme was established, the then Minister indicated that broad definitions have been used to include all persons working in the migration area and all types of immigration work. The omission of reference to the AAT in the Scheme does not accord with this approach and should be rectified.

4.45 In considering whether all persons providing assistance on migration matters before the AAT should be required to register as migration agents, the Committee noted that the registration scheme is directed principally at the regulation of advice given in relation to visa matters. On this basis, the Committee is of the view that assistance given in relation to an AAT review of a business visa cancellation or a visa refusal on character or conduct grounds should be included in the definition of immigration assistance. Criminal deportation work, which results from successful criminal prosecutions, should remain outside the Scheme.

4.46 While the Committee considers that AAT visa work should be included within the scope of the Scheme, the Committee is aware that advocacy work undertaken in the AAT by lawyers, whether in respect of visa refusals or criminal deportation cases, is associated closely with advocacy work in court, for which lawyers are exempt from the requirement to register as migration agents. On this basis, the Committee is of the view that advocacy work undertaken by lawyers in the AAT likewise should be included in the definition of immigration legal assistance and, therefore, should constitute, along with court advocacy, areas of work for which lawyers are exempt from the requirement to register as migration agents. The effect of this proposal would be that non-lawyers would be required to be registered as migration agents when undertaking advocacy work before the AAT, but lawyers would be exempt from this requirement.

Recommendations

4.47 **The Committee recommends that:**

3. **subject to recommendations 5, 6 and 13, lawyers continue to be required to register as migration agents in order to provide immigration assistance;**

4. **the definition of immigration assistance be amended to include advice, assistance or representation given in relation to visa refusals or cancellations before the Administrative Appeals Tribunal, including business visa cancellations and visa refusals and cancellations under section 501 of the *Migration Act 1958*;**

5. **advice, representation and assistance given in relation to criminal deportations before the Administrative Appeals Tribunal continue to be outside the scope of the Migration Agents Registration Scheme; and**

6. **lawyers continue to be exempt from the requirement to register as migration agents when undertaking preparation or representation in relation to visa refusals or cancellations before the Administrative Appeals Tribunal.**

Non-fee charging migration agents

4.48 Individuals who give immigration assistance on a non-fee charging basis, including persons who give advice on a voluntary basis, also come within the scope of the Scheme. Under section 280 of the Migration Act, an individual is required to register in order to give immigration assistance if the assistance is given:

- for a fee or other reward;
- in his her capacity as an employee of, or a voluntary worker for, another person or organisation; or
- in the course of, or in association with, the conduct of a profession or business.

4.49 Those who give immigration assistance without charging a fee are required to register but are not required to pay a registration fee. Those who give advice in breach of the registration requirements, even if it is for no fee, commit a criminal offence, the penalty for which is $5 000.

4.50 The effect of these provisions is that persons who are not in voluntary associations and not giving assistance in the course of or in association with their professional business can respond to requests for advice and give immigration assistance free of charge without being registered. The recipients of their advice might be family friends or neighbours. Such advisers are unlikely to have knowledge of immigration law or practice. By contrast, non-fee charging workers in advice organisations, lawyers and, for example, overseas student officers or, indeed, immigration officers, who do have knowledge of immigration law and practice, appear to be precluded from giving immigration assistance, even to a family friend or neighbour, unless they are registered.[28]

28 There were differing opinions expressed on this point in the *Cunliffe* case in the High Court.

4.51 Within the migration advice industry, many advisers are likely to be either employees or voluntary assistants of non-profit organisations. The Migration Act requires that each adviser within such organisations, whether a full-time employee or part-time volunteer, must be registered for the purposes of giving immigration assistance. DIEA noted that about one third of currently registered agents are from the non-fee charging sector. It stated:

> . . . the services provided by non-fee-charging agencies account for a relatively high proportion of the total volume of service by the industry.[29]

4.52 In this regard, DIEA acknowledged that registration of community agency workers posed particular problems, not least because of the high turnover of staff in some agencies and, in some cases, workers' lack of specialisation, experience and formal qualifications. DIEA indicated that requiring such community workers to satisfy the normal competency criteria was considered to be too disruptive to the operations of the agencies and their ability to serve their clients. Accordingly, a system of registration which relies on the community agency itself vouching for the competence of each of its workers was developed by the Board.[30]

4.53 Evidence received by the Committee indicated that the non-fee charging sector generally is held in high regard. DIEA noted the valuable role played by community organisations in providing free immigration assistance to those who need it.[31] The Board indicated that no complaints have yet been received against people who provide advice for no fee or reward.[32] The IRT and RRT commented on the high level of competence among persons in non-profit organisations such as RACS, IARC and VIARC.[33] In relation to these organisations, the Principal Member of the RRT stated:

> The people who work there are committed and focused and have in-house training.[34]

4.54 The provisions affecting non-fee charging advisers were considered by the High Court in the *Cunliffe* case. The issue before the High Court was whether in restricting such free assistance the Scheme offended the implied constitutional protection for freedom of communication of information and opinion about matters

29 Evidence, p. S299.

30 Evidence, p. S308.

31 Evidence, p. S309.

32 Evidence, p. S120.

33 Transcript of briefing, 29 September 1994, pp. 52-54.

34 ibid., p. 54.

relating to the government of the Commonwealth. As noted in Chapter Three, three of the judges found the Scheme to be unconstitutional because it breached such implied freedom. The majority of the High Court upheld the validity of the Scheme.

4.55 In his dissenting judgement, Deane J, commenting on Australia's immigrant population, stated:

> . . . communications of the kind which constitute 'immigration assistance' or 'immigration representations' are among the most important of all political communications and political discussions in this country. In my view, the freedom of the ordinary citizen to lend support and assistance, by advice, encouragement and representation, to an applicant for admission to this country as a visitor, an ordinary immigrant or a refugee clearly falls within the central area of the freedom of political communication and discussion which the Constitution's implications protects.[35]

4.56 Commenting on the effect of the provisions relating to non-fee charging advisers, Deane J observed further:

> The voluntary worker with any charitable organisation concerned to assist the disadvantaged who responds, without thought of fee, to a request for advice of the kind which constitutes 'immigration assistance' is guilty of an offence punishable by a $5 000 penalty. A person other than a lawyer, such as a member of the clergy, a medical practitioner, an accountant or a shopkeeper, who generously and helpfully provides voluntary immigration assistance 'in the course of, or in association with, the conduct of a profession or business' likewise commits that offence. Even a lawyer is guilty of that offence if he or she provides such voluntary assistance in the course of, or in association with, the conduct of his or her profession, unless such assistance falls within the narrower definition of 'immigration legal assistance' . . .[36]

35 *Cunliffe v The Commonwealth*, (1994) 68 ALJR 791 at 822.

36 ibid., pp. 823-824.

4.57 In their respective judgements, Mason CJ and Deane J indicated that the restriction on an individual providing assistance in a voluntary capacity was 'extreme and draconian' and, 'in some of its applications, arbitrary and extreme'. Mason CJ stated further:

> To prohibit a person from giving voluntary advice simply because the person works for another person or organisation or because the advice is given in association with the conduct of a profession or business is an extraordinary contravention of the implied freedom of communication and is grossly disproportionate to the end in view.[37]

4.58 In contrast, Dawson J commented that while the restrictions imposed upon individuals giving immigration assistance when they are employed or voluntary workers or are associated with the conduct of a business or profession may be thought to go further than is necessary for the protection of aliens, that 'is a matter for the legislature and does not take the legislation outside legislative power'.[38] Dawson J also observed that the freedom of communication was not absolute, and 'must be balanced against competing rights'.[39] McHugh J stated:

> To prohibit persons from giving immigration assistance unless they register as agents is not a measure that is disproportionate to the need to protect entrance applicants from exploitation or incompetence. Honest and competent persons will have no difficulty in obtaining registration.[40]

4.59 During the inquiry, various views were put to the Committee about whether persons giving advice on a non-fee charging basis should be required to register as migration agents. Some supported the existing requirement, while others proposed the exemption of community agencies and non-fee charging workers from the Scheme.

4.60 The Springvale Community Advice and Assistance Bureau, which argued for the Scheme's abolition, submitted that the Scheme has resulted in a significantly reduced number of non-fee charging or community agencies providing information on migration matters. According to the Springvale Bureau, organisations which previously provided advice free of charge are no longer willing

37 ibid., p. 803.

38 ibid., p. 832.

39 ibid., p. 835.

40 ibid., pp. 852-853.

or allowed to offer such advice. In its view, this has reduced the options for persons seeking advice to the detriment of the consumer. The Springvale Bureau stated:

> By putting into place a system that has reduced the number of community organisations that can provide assistance, and which has dramatically increased the number of lawyers and migration agents wanting to come into the system and charging huge amounts of money for what still is, in many cases, totally inadequate advice, you have removed the ability to access free advice for some of the most vulnerable people in our community.[41]

4.61 In a similar vein, both the Refugee Council of Australia and RACS submitted that the effect of the Scheme has been to diminish access to immigration assistance in the community sector rather than regulate the provision of such assistance.[42] The Refugee Council indicated that the penalties and legal complexity of the Scheme alarmed a number of organisations which previously had been providing advice, causing them to cease providing such advice. According to the Refugee Council, the result has been that visa applicants have become more vulnerable to:

- bad advice from well meaning but naive members of the community who have little knowledge of the facts;
- rumour and misinformation which circulates within a community; and
- exploitation by unscrupulous fee charging lawyers and migration agents.[43]

4.62 The Refugee Council proposed that community agencies be exempt from the Scheme in the same way as members of Parliament and their staff are exempt. The Springvale Community Aid and Advice Bureau, while favouring the total abolition of the Scheme, also proposed such an exemption if the Scheme was retained. It stated:

> We understand that the exemption for members of Parliament and their staff is on the grounds of freedom to obtain information from elected representatives. We

41 Evidence, p. 320.

42 Evidence, p. S262 and p. S290.

43 Evidence, p. S291.

submit that community agencies should also be exempt to broaden the sources of information and advocacy provisions.[44]

4.63 The above suggestion was supported by the Migration Agents Registration Board, which proposed:

> That people who give immigration assistance and do not charge or receive a fee or reward for this service be able to do so without registration. Such activities should be excluded from the ambit of the Migration Agents Registration Scheme. This would require amendment to section 280 of the Act.[45]

4.64 Other witnesses were opposed to the proposition that those providing advice on a non-fee charging basis should be exempt from the Scheme. It was put to the Committee that to ensure the provision of competent and accurate advice, all persons providing immigration assistance should have their knowledge tested and be registered. In this regard, DIEA stressed the importance of including non-fee charging workers within the ambit of the Scheme, stating:

> . . . community agency workers who give immigration assistance, of which there are substantial numbers, must be registered. This is consistent with the Government's desire to ensure that the Scheme covered all people providing immigration assistance: while issues of exploitation of clients are unlikely to arise in the voluntary sector, poor advice, whether free or not, can seriously prejudice clients' access to entitlements.[46]

4.65 IARC argued that the Scheme should continue to regulate the provision of all migration advice, regardless of who is the provider. It stated:

> From the point of view of the consumer of migration advice, there seems to be no justification for the regulation of one type of advice provider and not another. Any Scheme which makes a distinction would become very confusing for a consumer . . . we believe that the advisers within the not for profit sector should be subject to the Scheme in the same way as fee charging advisers. Although the exclusion of these advisers has momentary appeal, ultimately the removal of the requirement to

44 Evidence, p. S192.

45 Evidence, p. S120.

46 Evidence, p. S308.

> register would simply devalue the standard of advice given. People who require migration advice but cannot afford to pay for it should still have access to accurate advice provided by a registered adviser and to the complaints mechanism if that advice is deficient or the adviser unscrupulous.[47]

4.66 During public hearings, IARC reiterated this view, stating:

> Our point is that for consumers of migration advice it matters not whether there is a fee involved or not. Consumers should be able to expect quality advice and be able to access mechanisms for complaints should that advice provided be inaccurate or in some way negligent or dishonest . . .[48]

4.67 As an alternative to exemption of non-fee charging advisers, it was proposed that organisations should be able to register with the Scheme so that persons working within that organisation would be able to provide immigration assistance without the need to register individually. A benefit of an organisation registration is that it would allow those organisations which rely on volunteers to cope better with periods of high work demands and the problems of high staff turnover.[49]

4.68 On this point, the Board expressed some concern about the practice of persons becoming registered on the basis of certification by a non-fee charging organisation. Commenting on the existing licensing arrangements, under which non-fee charging organisations are able to certify that persons have a sound knowledge of migration procedure for the purposes of that organisation, the Board stated:

> Of particular concern is that once a person is registered under the licensing arrangements, he or she is able to practise commercially even though a 'sound knowledge' of migration procedure had never been demonstrated. The licensing arrangements could be exploited as a backdoor method of registration by people who do not possess the requisite knowledge to meet the 'sound knowledge' criterion.[50]

47 Evidence, p. S266.

48 Evidence, p. 171.

49 Evidence, p. S47.

50 Evidence, p. S120.

4.69 Another suggestion was to introduce provisional registration for persons working for non-fee charging and community organisations which have demonstrated expertise in areas of migration law. RACS proposed that, under such a system, a person would register on a preliminary basis, but would work under the supervision of a designated registered agent. Provisional registration would enable supervised persons to provide immigration assistance until they became eligible for registration in their own right, or came within the scope of the existing licensing arrangements. According to RACS, provisional registration would enable non-fee charging and community organisations to cope better with peak demand periods and problems arising from high turnover of staff.[51]

Conclusions

4.70 As stated previously, when the Migration Agents Registration Scheme was introduced, the Government made the deliberate decision to include virtually all providers of immigration assistance within the scope of the Scheme. Some have criticised the requirement that non-fee charging workers and members of non-profit organisations are required to register, suggesting that this requirement is extreme and has resulted in a reduced number of sources of advice for those who are unable to afford paid advice. Others have argued that the broad reach of the Scheme has helped to ensure that those providing advice in the non-profit sector are skilled and competent. In this regard, the Committee notes the high regard with which many non-profit immigration advisory services are held in the community.

4.71 In considering the scope of the Scheme, the Committee notes the differing views of the High Court regarding the registration arrangements. The Committee notes in particular the view of the majority of the High Court that the balancing of competing interests associated with the Scheme is a matter for the Parliament.

4.72 In this regard, the Committee agrees with the view of the Immigration Advice and Rights Centre that the principal issue is not whether the advice is paid for or is provided free of charge, but whether consumers, particularly those who are least able to shop around for advice, should be able to expect accurate advice from competent advisers, and whether they should be able to access appropriate avenues of redress should the advice which is provided prove to be negligent, inaccurate or dishonest. The need for access to information must be balanced against the right to appropriate and competent advice. While the exemption of non-fee charging advisers from the requirements of the Scheme may increase the sources of free advice, the Committee is concerned that any such move would dilute, to the detriment of the consumer, the overall objective of the Scheme to improve the quality of advice within the migration advice industry. Accordingly, the Committee is of the view that, in general, persons providing immigration assistance without charging a fee, when providing such assistance in the capacity of a non-fee charging advice service, or in

51 Evidence, pp. S262-S263.

the course of or in association with their business or profession, should continue to be required to register as migration agents.

4.73 At the same time, however, the Committee is sympathetic to the need for adequate access to immigration advice and the difficulties faced by non-profit organisations seeking to assist those with an immigration problem. The Committee acknowledges the limited resources with which they must operate, the increasing demand for their services, and the problems of staff turnover which continually trouble such organisations. To alleviate some of these difficulties, the Committee supports the suggestion for the introduction of an organisation based registration whereby the non-fee charging advice agency itself is registered without the need to register in their own right all persons working for that agency. In supporting this proposal, the Committee considers that the Board's concerns that persons can use such licensing arrangements or organisation based registrations as a back door method of gaining registration for the purposes of commercial practice need to be addressed.

4.74 In the Committee's view, organisation based registrations should be made available to those non-fee charging organisations which are able to demonstrate to the Board that they have:

- continuity of leadership within their management committees;
- supervision of workers by a permanent and experienced staff member who would qualify to register as a migration agent in his/her own right;
- adequate and appropriate resources;
- a regular and on-going training program for staff to ensure their continued competence in immigration law and practice; and
- a commitment to ethical conduct.

4.75 Individuals working for a registered organisation who provide immigration assistance either outside of the auspices of that organisation or after leaving the employ of that organisation would be required to register as migration agents in their own right. In addition, the Board should have the power to revoke organisation registrations where the organisation ceases to satisfy the prescribed standards of staff training, advice and/or conduct. Where an organisation ceases to be registered, individuals working for that organisation would need to register as migration agents in their own right in order to provide immigration assistance. This proposal would obviate the need for any provisional registration, as proposed by the Refugee Advice and Casework Service, and would overcome the Board's concerns about existing licensing arrangements being a back door method of registration. If the proposal to establish organisation based registrations is adopted, then the existing licensing arrangements should be amended accordingly.

4.76 The Committee acknowledges that, if the above proposals are implemented, some community organisations which currently operate under the licensing arrangements may not qualify for an organisation based registration and, therefore, may need to ensure that their staff are registered individually. To assist such organisations in getting staff registered, the Board should ensure that an appropriate training module for community workers is developed, with a view to such workers gaining registration as migration agents in their own right.

4.77 As for those professional advisers, such as lawyers and student advisers, who occasionally may provide advice free of charge to a family friend or acquaintance, the Committee is concerned that the current provisions of the Scheme unwittingly may bring them into a breach of the legislation by virtue of the fact that their advice is provided on the basis of their professional knowledge. Such persons may not be aware of the requirements of the Scheme and may be acting out of a genuine desire to provide assistance with a particular problem. It is unlikely that such persons would be prosecuted. Indeed, DIEA's advice to the Committee was that where such cases have come to its attention, the unwitting advisers simply were cautioned about the need for registration when providing immigration assistance. Nevertheless, under the existing legislation, such persons attract a potential liability and offend the penalty provisions. To overcome this anomaly, the Committee is of the view that the Migration Act should be amended to ensure that those persons who, in association with their business or profession, provide immigration assistance free of charge on an occasional, informal basis are exempt from the requirement to register as migration agents. In making this recommendation, the Committee is heeding the concerns expressed in the *Cunliffe* case by certain of the dissenting High Court judges regarding the ambit of the registration arrangements applying to voluntary advice.

Recommendations

4.78 **The Committee recommends that:**

7. **persons providing immigration assistance without charging a fee when providing such assistance in the capacity of a voluntary advice service or in the course of or in association with their business or profession continue to be required to register as migration agents, except for those persons under section 280 of the *Migration Act 1958* who currently are exempt from the requirements of the Migration Agents Registration Scheme, as well as those persons covered by recommendations 10 and 13;**

8. **for the purposes of allowing non-fee charging organisations to provide immigration assistance without requiring their employees or voluntary workers to register as migration agents in their own right, the Migration Agents Registration Board be empowered to implement a system of organisation based registrations under which the Board is able to register non-fee charging organisations which are able to demonstrate to the Board that they have:**

   - **continuity of leadership within their management committees;**
   - **supervision of workers by a permanent and experienced staff member who would qualify to register as a migration agent in his/her own right;**
   - **adequate and appropriate resources;**
   - **a regular and on-going training program for staff to ensure their continued competence in immigration law and practice; and**
   - **a commitment to ethical conduct;**

9. **pursuant to recommendation 8, the Migration Agents Registration Board be empowered to revoke the registration of registered organisations which cease to satisfy the prescribed standards of staff training, advice and/or conduct;**

10. **pursuant to recommendations 8 and 9, individuals who work for registered organisations not be required to register as migration agents in their own right unless or until they provide immigration assistance outside the auspices of the organisation, or they leave the employ of the organisation, or in circumstances where the organisation ceases to be registered;**

11. **subject to the adoption of recommendations 8 to 10, the existing licensing arrangements for non-fee charging organisations be amended accordingly;**

12. **the Migration Agents Registration Board ensure the development of a training module to assist non-fee charging organisations which do not qualify for an organisation based registration to have their advisers registered as migration agents; and**

13. **persons who, in association with their business or profession, provide immigration assistance free of charge on an occasional, informal basis not be required to register as migration agents.**

Staff of legal aid commissions

4.79 As noted above, section 280(4) of the Migration Act provides that officials are not required to be registered in order to provide immigration assistance in the course of their duties as an official. Under section 275 of the Migration Act, an official is defined to be:

(a) an officer of the Australian Public Service; or

(b) a person employed under the *Public Service Act 1922*; or

(c) a member of the public service of a State or Territory; or

(d) a member of the staff of a Parliamentarian.

4.80 In the explanatory memorandum to the *Migration Legislation Amendment Bill (No. 3) of 1992*, which introduced the Scheme, it was made clear that staff of legal aid commissions would fall within the definition of an official and therefore would not be required to register as migration agents in order to provide immigration assistance. In the explanatory memorandum it was stated:

> Official is defined . . . to include a member of the public service of a State or Territory. For the purposes of this definition, persons employed by Legal Aid Commissions of the States and Territories are regarded as being members of the public service.

4.81 At the commencement of the Scheme, however, staff of legal aid commissions registered as migration agents despite the pronouncement in the explanatory memorandum. The Legal Aid Commissions of New South Wales and Victoria, for example, took the view that, as some fees were payable by its clients in relation to certain legal aid matters, their employees were required to register for the purposes of providing immigration assistance.[52] In this regard, until recently DIEA had interpreted the definition of an official to mean that unless a Legal Aid Commission employed its staff as an official in a State or Commonwealth Public Service or under the Public Service Act, the exemption from registration for officials provided for in the Migration Act did not apply.

52 Evidence, pp. S47-S48, p. S277.

4.82 Subsequently, after seeking advice from the Attorney-General's Department, DIEA has come to the view that staff of legal aid commissions are exempt from the requirement to register on the basis that a wider view of public service is permitted by the Migration Act than had previously been adopted.[53] In response, the Legal Aid Commission of Victoria stated:

> This is a pleasing outcome as the requirements of registration and the costs involved had created a number of difficulties for [the Legal Aid Commission of Victoria]. The costs of registration diverted funds which would have otherwise been used in the provision of legal assistance to clients. The requirement of registration inhibited the development of the practice . . . The exemption for [the Legal Aid Commission of Victoria] from the requirement to register staff as agents will, it is hoped, lead to a situation where there will be greater provision of advice and assistance in the migration law area.[54]

Conclusions

4.83 It is clear from the explanatory memorandum to the legislation establishing the Migration Agents Registration Scheme that the Government always intended to exempt staff of legal aid commissions from the requirement to register as migration agents. The confusion about this, which arose at the commencement of the Scheme and which initially resulted in staff of legal aid commissions being registered, was overcome eventually after DIEA sought clarification of how the term 'official' should be defined. While the Committee is pleased that, in a practical sense, the confusion has been resolved, the Committee is of the view that, in the interests of continuing certainty, it should be put beyond doubt that legal aid commission staff are exempt from registration as migration agents by explicitly including legal aid commission staff within the definition of an official in section 275 of the Migration Act.

Recommendation

4.84 **The Committee recommends that:**

14. **section 275 of the *Migration Act 1958* be amended to specify that the term 'official' includes staff of legal aid commissions, so that it is put beyond doubt that staff of legal aid commissions are exempt from the requirement to register as migration agents.**

53 Evidence, p. 84, p. S277, p. 595; Exhibit 1.

54 Evidence, p. S277.

Travel agents

4.85 During the inquiry, the particular situation of travel agents also was raised with the Committee. The Australian Federation of Travel Agents (AFTA) and the Inbound Tourism Association of Australia (ITOA) noted that it is not uncommon for travel agents to be asked about Australia's visa requirements.[55] Under the existing provisions of the Scheme, travel agents who provide advice on visa arrangements are required to register as migration agents, as such advice is classified as immigration assistance.

4.86 AFTA argued that travel agents should be exempt from the requirement to register as migration agents when they provide advice without charge. AFTA commented:

> Travel agents are not in the business of arranging migration. They are concerned with short term travel. It is absolutely ridiculous to attempt to subject our members to a further layer of red tape.[56]

4.87 ITOA noted that while DIEA has not chosen to prosecute those who may be technically in breach of the legislation, travel agents nevertheless remain liable to substantial penalties if they provide informal advice without charge and are not registered. ITOA indicated that this anomalous situation should be corrected either by excluding inbound tour operators from the definition of persons who are required to be registered under the Migration Act, or by including inbound tour operators in the list of persons exempt from the Scheme.[57]

Conclusions

4.88 As noted previously, the broad reach of the Migration Agents Registration Scheme was aimed deliberately at ensuring that immigration advice is accurate and competent, whether or not such advice is given free of charge or ancillary to a principal business. As noted previously, the consequences of wrong or inaccurate advice can result in unnecessary hardship and expense. In the Committee's view, no substantive evidence was presented as to why travel agents who provide assistance in relation to an immigration matter should be exempt from the Scheme. If advice is provided in a professional capacity, the consumer rightfully should expect the advice to be accurate and should have appropriate avenues for redress should that not prove to be the case.

55 Evidence, p. S9, p. S100.

56 Evidence, p. S10.

57 Evidence, p. S100.

Sponsors and nominators

4.89 As noted above, immigration assistance is defined to be assistance given to a visa applicant or an applicant seeking review of a visa cancellation. According to DIEA, assistance given to another person who may have an interest in a visa application, such as a sponsor or nominator, is not covered by the definition.[58] A person, therefore, is able to give advice to a sponsor or nominator in relation to a visa application without being registered as a migration agent.

4.90 In various submissions, it was argued that the omission of advice given to sponsors and nominators from the ambit of the Scheme is a major deficiency of the Scheme which should be rectified. DIEA commented:

> This apparent anomaly has been widely referred to as a loophole in the Scheme's operation, and has attracted the criticism that the Scheme has not achieved its principal goal of offering protection to all people who seek professional assistance in relation to an application . . . Now that the High Court has upheld the validity of the Scheme, it is appropriate to seek legal advice on means to cure this problem through legislative amendment.[59]

4.91 The Board noted that sponsors and nominators may constitute approximately 70 percent of DIEA's workload in Australia, and are as vulnerable to inaccurate advice or poor business practices as visa applicants. It proposed that the definition of an entrance applicant be broadened to include persons who seek any immigration assistance.[60]

4.92 From a similar perspective, Mr Henry, a registered migration agent, stated:

> For the agent registration scheme to be effective it must be comprehensive. The current scheme is not comprehensive. The most glaring weakness is that persons giving advice to sponsors and nominators, as opposed to entrance applicants, are not required to be registered. This was never the intention and is such a major weakness as to call the usefulness of the whole scheme into question. For instance in 1994/95, 51 600 or 71% of the 73 000 non humanitarian places in the Migration Program will go to persons subject to

58 Evidence, p. S323.

59 Evidence, p. S323.

60 Evidence, p. S121.

> sponsorship or nomination. At present someone who is not eligible for registration, or perhaps who is refused registration, or perhaps whose registration is even cancelled, can continue to advertise his or her services and to operate quite freely on the basis of giving advice to sponsors and nominators rather than to entrance applicants.[61]

4.93 Other witnesses suggested to the Committee that advice provided to a sponsor or nominator is effectively advice provided to a visa applicant through an intermediary. The Legal Aid Commission of New South Wales noted:

> The common practice appears to be to engage an agent to prepare Form 47 (Migration to Australia) and to advise the sponsor on the documents which need to be provided to support the application. The form is forwarded to the applicant who then lodges it at the appropriate overseas post. Thereby, a migration agent can be completing the application form without ever taking instruction from the applicant.[62]

4.94 From a similar perspective, VIARC commented:

> Certainly in our experience with a large number of potential migrants to Australia the usual procedure is they decide they would like to come, contact their family member in Australia to find out how to go about it, and that person's first port of call is a migration agent. That would be a fairly common procedure amongst potential migrants. That advice is passed through the intermediary of the family member here in Australia, but it is hard to see that they are not being advised by a migration agent here in Australia.[63]

4.95 It also was suggested to the Committee that the omission of advice to sponsors and nominators from the ambit of the Scheme allows individuals who have been deregistered by the Board to continue providing immigration advice, albeit indirectly through sponsors and nominators.[64]

61 Evidence, p. S87.

62 Evidence, p. S42.

63 Evidence, p. 295.

64 Evidence, p. 172.

4.96 In a supplementary submission, DIEA noted that it has obtained legal advice from the Attorney-General's Department on the question of whether immigration assistance given to sponsors and nominators can be included within the scope of the Scheme. A copy of that advice was provided to the Committee by DIEA. In that advice, the Attorney-General's Department stated:

> . . . it would be possible to expand the statutory definition of 'immigration assistance' to include assistance provided to sponsors and nominators in relation to the entry application to which the sponsorship or nomination relates; and . . . it may be possible to expand the statutory definition of 'immigration assistance' to include advice to sponsors and nominators in relation to sponsorship and nomination.[65]

Conclusions

4.97 The existing provisions define immigration assistance to be assistance or representation given to a visa applicant or cancellation review applicant. By definition, a significant proportion of visa applicants are located overseas. Various visa categories require visa applicants to be sponsored by an Australian citizen or resident, or an Australian company or institution. In such circumstances, the advice given by a migration agent is likely to be directed to the Australian sponsor or nominator. Additionally, the review of a visa refusal is lodged in the name of the Australian sponsor or nominator.

4.98 If advice given to sponsors and nominators is not included within the definition of immigration assistance, a significant part of migration practice is excluded from the scope of, and therefore protection offered by, the Migration Agents Registration Scheme. Clearly, this is an unsatisfactory situation. One particularly invidious outcome of this omission is that persons who have been found to be unqualified or unfit to practise as migration agents can circumvent the Scheme by directing their practice through sponsors and nominators.

4.99 A close reading of the High Court's decision in the *Cunliffe* case would appear to allow advice provided to sponsors and nominators to be included within the scope of the Scheme. The High Court held unanimously that the Scheme was within the aliens power in the Constitution because, although it did not regulate the rights and obligations of non-citizens,[66] non-citizens were the objects of protection and immigration assistance was a matter of peculiar significance to non-citizens. Under these criteria, it would appear that advice given to sponsors and nominators

65 Evidence, p. S497.

66 In the case *Pochi v Macphee*, (1982) 151 CLR 101 at 109, Gibbs CJ held that Parliament can treat as aliens any person born outside Australia whose parents were not Australian and who had not been naturalised as Australian. The term alien is synonymous with non-citizen.

could be brought within the scope of the Scheme because the ultimate beneficiary of the assistance still would be the non-citizen. This view has been confirmed by legal advice obtained from the Attorney-General's Department.

4.100 On this basis, the Committee considers that advice to sponsors and nominators should be included within the scope of the Scheme. The definition of immigration assistance should be amended to include assistance and representation given to sponsors and nominators of visa applicants within that definition.

Recommendation

4.101 **The Committee recommends that:**

15. the definition of immigration assistance under section 276 of the *Migration Act 1958* be amended to include within that definition advice given to sponsors and nominators of visa applicants, thereby requiring persons who provide immigration assistance to sponsors and nominators to be registered as migration agents.

Citizenship

4.102 Advice and assistance given to non-citizens concerning applications for citizenship by registration and naturalisation also are excluded from the scope of the Scheme.

4.103 In a supplementary submission, the Board noted that it was unable to consider complaints which involved the giving of advice in relation to citizenship applications. The Board commented:

> It was of concern to the Board that the giving of advice in relation to citizenship matters is not currently covered by the scheme. The Board would like the Committee to consider expanding the definition of 'immigration assistance' to include assistance in respect of citizenship matters when considering the scope of the scheme.[67]

Conclusions

4.104 Little evidence was received during the inquiry on whether there is a need to include advice given to non-citizens on citizenship within the scope of the Scheme. The issue was raised by the Board late in the inquiry.

67 Evidence, p. S465.

4.105 Despite the lack of evidence received during the inquiry, the Committee considers that there are good reasons to support the extension of the Scheme to cover advice and assistance given to non-citizens in relation to their citizenship applications. In particular, the Committee considers that persons giving such advice should be required to comply with the Code of Conduct for migration agents which discourages the making of statements which the person knows to be false and misleading.

4.106 The Committee is aware from its own experiences that citizenship applicants who have obtained residence by fraud or deception may not necessarily be known to DIEA at the time they make their citizenship applications. The Committee is concerned to ensure that migration agents who may be aware of the deception do not help to perpetuate it by assisting the person to obtain citizenship on the basis of his or her fraudulently obtained residence status.

4.107 In its 1994 report on Australian citizenship, *Australians All, Enhancing Australian Citizenship*, the Committee recommended that non-citizens who achieve residence by fraud should be liable to have their Australian citizenship revoked where the fraud is discovered after the granting of citizenship. Including advice and assistance to citizenship applicants within the scope of the Migration Agents Registration Scheme would complement the Committee's proposals in its earlier report. As there may be some constitutional implications arising from this proposal, advice should be sought from the Attorney-General's Department as a first step towards implementing this expansion of the Scheme.

Recommendation

4.108 **The Committee recommends that:**

16. subject to advice obtained from the Attorney-General's Department on any constitutional implications, the definition of immigration assistance under section 276 of the *Migration Act 1958* be amended to include advice and assistance given to non-citizens in relation to applications for citizenship by naturalisation.

Chapter Five

ELIGIBILITY FOR REGISTRATION

Introduction

5.1 Alongside the issue of which persons are required to be registered as migration agents, another important consideration for the Committee was how persons qualify to become registered migration agents.

5.2 When introducing the migration agents legislation into the Parliament, the then Minister indicated that there was a need to minimise the risk of anti-competitive behaviour which might arise if entry into the migration advice industry was restricted. He stated:

> Resources will be directed to the investigation of complaints rather than erecting in the legislation entry barriers at too high a level.[1]

5.3 In this chapter, the Committee examines the criteria for registration as a migration agent. In particular, the Committee considers whether the existing standards for entry to the industry are adequate, and whether there are appropriate mechanisms for maintaining standards as part of the registration renewal process.

General criteria for registration

5.4 The Migration Act does not list the specific criteria which an individual must satisfy in order to be registered as a migration agent. Rather, it sets down the types of persons who must not be registered as migration agents, and also details the circumstances in which an applicant will not be registered automatically by the Secretary of DIEA but instead will be referred to the Board for its consideration. It is only by reference to these provisions that the criteria for registration can be deduced.

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1 Parliamentary Debates (Hansard), House of Representatives, 27 May 1992, p. 2938.

5.5 By referring to section 294 of the Migration Act, which details the circumstances in which an applicant must not be registered as a migration agent, it can be deduced that an applicant must meet the following mandatory criteria for registration:

- an applicant must not have been refused registration as an agent within 12 months of the application;
- the applicant's registration as an agent must not have been cancelled by the Board within five years of the application;
- the applicant must be an Australian citizen or a permanent resident;
- the applicant must be 18 years of age or over;
- the applicant must be a person of integrity and a fit and proper person to give immigration assistance; and
- the applicant must not be related by employment[2] to an individual who is not a person of integrity.

5.6 The terms 'person of integrity' and 'fit and proper person to give immigration assistance' are not defined specifically in the legislation. It is only by reference to section 292(1) of the Migration Act, which defines the circumstances in which an application must be referred to the Board for consideration, that it can be established that an applicant must not only satisfy relevant character checks, but also must possess either a prescribed qualification or a sound knowledge of migration procedure. Section 292(1) provides that a registration application must be referred to the Board if:

- the applicant has been convicted of a criminal offence and the conviction is not spent;
- the applicant is, or has been, bankrupt;

2 Under section 278 of the Migration Act, a person is related by employment to another individual if:

(a) one individual is employed by the other; or
(b) they are executive officers of the same corporation; or
(c) they are members of the same partnership; or
(d) one individual is an employee of a corporation and the other is:
  (i) an employee of the corporation; or
  (ii) an executive officer of the corporation; or
(e) one individual is an employee of a partnership and the other is:
  (i) an employee of the partnership; or
  (ii) a member of the partnership.

- the applicant is, or has been, the subject of disciplinary action by a professional association, being disciplinary action that the Secretary of DIEA considers relevant to the application;
- the applicant is, or has been, the subject of criminal proceedings, an investigation or an inquiry, that the Secretary of DIEA considers relevant to the application;
- the applicant is, or has been, the subject of an investigation by the Department because of allegations against him or her of fraud or corruption (whether when an officer of the Department or otherwise), that the Secretary of DIEA considers relevant to the application; or
- the applicant does not have one of the following:
  - a prescribed qualification; or
  - in the opinion of the Secretary, a sound knowledge of migration procedure.

Competence criteria

5.7 As noted above, an applicant for registration as a migration agent must either have a prescribed qualification or satisfy the Secretary of DIEA that he/she has a sound knowledge of migration procedure. A prescribed qualification is defined specifically in the Migration Agents Regulations (regulation 4) to be an Australian law degree or a qualification to practise before the High Court or a Supreme Court of a State or Territory. By contrast, the Migration Act does not define what constitutes sound knowledge of migration procedure, but rather allows the Secretary of DIEA to form an opinion in this regard.

5.8 In its submission, DIEA noted that the following have been developed by the Board as indicators of sound knowledge of migration procedure:

- evidence of substantial experience in giving immigration assistance over a period of at least two years immediately prior to the application, demonstrated by an applicant having undertaken at least 24 cases in five migration categories;
- evidence of a pass in a unit in migration law from an Australian tertiary education institution;
- evidence of a pass in an examination conducted by the Migration Institute of Australia; or

> advice from a member of the management committee of a voluntary organisation that the applicant possesses a sound knowledge of immigration procedure.[3]

5.9 The relevant experience criteria was developed to accommodate persons already operating in the migration advice industry at the time the Scheme was established. Such persons only were required to demonstrate previous experience in migration practice, and were not required to demonstrate specific competency.

5.10 DIEA indicated that the competency criteria established for registration of migration agents are sufficiently flexible to cater for the range of practitioners within the migration advice industry and reflect the Government's intention not to set entry barriers at too high a level. DIEA commented:

> The model which was adopted through legislation was, instead, an inclusive one, with the aim of formally admitting to registration all existing practitioners who had a reasonable claim to membership of the industry by virtue of their experience, and who were not known to be unfit persons to practise.[4]

5.11 DIEA indicated that the bulk of the applications for registration which rely on the relevant experience criteria for entry now have been considered. Barely one percent of applications currently rely on relevant experience to gain registration. According to DIEA, future applicants will gain entry on the basis of formal qualifications rather than by virtue of their experience.[5]

Criteria for renewal of registration

5.12 Once registered, renewal of an agent's registration is virtually automatic.[6] No competence or character criteria need to be satisfied in order for a registration to be renewed. Section 300 of the Migration Act provides:

> If, at the end of a period for which a registered agent is registered, he or she is not about to be deregistered, the Board must renew his or her registration.

3 Evidence, p. S304.

4 Evidence, p. S321.

5 Evidence, p. S305, p. S321.

6 Migration agents can be deregistered.

5.13 Under section 301 of the Migration Act, the Board must notify an agent one month prior to the end of the period for which the agent is registered that the agent's registration will be renewed and that a registration fee, where applicable, is payable to the Commonwealth. Section 302 of the Migration Act provides that an agent will be deregistered automatically if the renewal fee is not paid within two months of the date of the renewal.

Inquiry evidence

5.14 Evidence provided to the Committee on the criteria which need to be satisfied in order to become and remain a migration agent focused on the following issues:

- the appropriateness of existing entry standards; and
- the lack of any requirement to demonstrate continuing competence in the migration field.

Submissions on entry standards

Competence criteria

5.15 In various submissions, it was suggested that, in the light of developments within the migration advice industry since the establishment of the Scheme, it may be necessary to review the existing competence criteria for registration. In this regard, DIEA stated:

> The Department considers that standards of entry for future entrants to the industry should be reviewed, with a view to their progressive tightening as the industry matures. In particular, it is appropriate to consider whether generalist qualifications in the law are a sufficient guarantee of competence in the specialist field of migration procedure.[7]

5.16 In some submissions, it was argued that a legal qualification alone does not adequately equip a person to practise in the migration field. It was suggested that a person seeking registration on the basis of a prescribed qualification should

7 Evidence, p. S322.

also be required to demonstrate a sound knowledge of migration procedure. Mr Henry, a registered migration agent, commented:

> Lawyers should not be exempt from any demonstration of competence in the area of migration law and policy simply because they have a legal qualification. Such a qualification, in most cases, is of no more relevance to the subject matter of migration law and policy than any other tertiary qualifications.[8]

5.17 Similarly, the Migration Institute of Australia stated:

> The Institute feels that lawyers too should be required to demonstrate their expertise in their specialist field and that preferably this should be done by the same means as other practitioners.[9]

5.18 One suggestion was that accreditation by one of the legal professional bodies would be one acceptable means of ensuring that lawyers have specific competence in migration procedure before being registered as migration agents.[10] In this regard, the Ethnic Communities' Council of New South Wales stated:

> Considering the complexity of migration law and regulations, the registration scheme should extend to include lawyers who as a requirement for migration practice would have to demonstrate substantial knowledge and/or expertise in migration law. Means of demonstrating substantial knowledge could be established by providing evidence of having undergone an accredited law society course or a unit in migration law at university.[11]

5.19 In response to suggestions that a legal qualification may not equip a person adequately for practice as a migration agent, the New South Wales Bar Association, which objected to the inclusion of lawyers in the Scheme, stated:

> Someone having gone through a law course emerges with a body of law expertise that they are going to apply in practice . . . Someone who has undergone a degree course in law emerges as a person better equipped to advise

8 Evidence, p. S88.

9 Evidence, p. S132.

10 Evidence, p. S25, p. S102, p. S132, p. S179.

11 Evidence, p. S179.

> people on migration law than someone who has done a six-month course or a one-month course on 'migration law'.[12]

5.20 Other witnesses commented on the requirement that persons without a prescribed qualification must prove sound knowledge of migration procedure. The Board proposed that the term 'sound knowledge of migration procedure' should be defined specifically in the Migration Act as a pass in a course or examination recognised by the Board.[13] Relevant to this proposal, DIEA suggested that existing courses and examinations should be reviewed periodically to ensure that the standards they set remain appropriate in terms of increasing professionalism within the industry. DIEA also proposed that guidelines should be set by the Board for the development of future courses and examinations.[14]

5.21 VIARC, on the other hand, argued for a tightening of general entry standards by introducing formal assessment procedures. VIARC stated:

> If the scheme is to have its greatest long term impact, there needs to be a move to tighten standards of entry to practice and to the maintenance of those standards . . . It is our submission that the scheme should incorporate a formal assessment of 'sound working knowledge' at the point of application, and ongoing assessment at 2 or 3 year intervals.[15]

5.22 A separate concern expressed to the Committee was that there are insufficient opportunities for persons wishing to become registered agents to gain adequate knowledge of migration procedure. The South Australian Multicultural and Ethnic Affairs Commission, for example, noted that persons living outside Victoria and New South Wales are unable to access tertiary institutions which offer units in migration law.[16]

12 Evidence, p. 48.

13 Evidence, p. S120.

14 Evidence, p. S322.

15 Evidence, pp. S194-S195.

16 Evidence, p. S85.

Basis for assessment of applications

5.23 Related to the issue of entry standards, some criticisms were made about the lack of precision in the existing legislation regarding the information which is required to be provided by an applicant for registration purposes. As noted above, the criteria for registration are not listed specifically in the Migration Act, but rather are couched in terms of the circumstances in which an applicant will not be registered or the circumstances in which an application will be referred to the Board for further consideration.

5.24 The Privacy Commissioner expressed concern that, within the legislation, there is considerable discretion for determining the types of matters which are relevant to a registration application. In particular, the Privacy Commissioner highlighted the continual reference in section 292 of the Migration Act to matters which 'the Secretary considers relevant to the application'. The Privacy Commissioner commented:

> By giving an official the responsibility of determining relevance, there is considerable scope for applying discretion. It is our view that the nature and scope of information handling powers should not be left to officials to determine, but should be clear in the Statute.[17]

5.25 The Privacy Commissioner also was concerned that no legislative guidance is provided as to the criteria by which an applicant's integrity or fitness to give immigration assistance should be assessed. According to the Privacy Commissioner, the lack of specific criteria gives considerable scope for information collection which could be at odds with privacy principles.[18]

5.26 Of particular concern to the Privacy Commissioner was the legislative discretion which enables the Secretary of DIEA, when assessing a registration application, to take into consideration the integrity of persons with whom the applicant works. According to the Privacy Commissioner, as there are no limitations on this requirement, it could result in the collection of irrelevant, incomplete and inaccurate information about a third party in relation to which that third party has no knowledge or control. The Privacy Commissioner stated:

> In our view such a practice would be extremely unfair and an unreasonable intrusion of the privacy of that third party.[19]

17 Evidence, p. S227.

18 Evidence, pp. S225-S241.

19 Evidence, p. S229.

5.27 Mr Cunliffe, a lawyer and registered migration agent, raised a number of similar concerns, suggesting that the information which an applicant for registration is required to provide is very open-ended and imprecise. Mr Cunliffe indicated that the application form requires an applicant to answer a number of questions not only in relation to the applicant, but also, for applicants in a firm, all of the applicant's partners. Mr Cunliffe stated:

> In the case of my firm it really calls on me to answer a lot of questions like, 'Have you ever been the subject of an inquiry? Have you ever had an order made for any pecuniary penalty against you? Have you ever been declared bankrupt? Those questions are asked not only about me but about 120 other people as well, which seems invasive of my privacy and not to the point.[20]

5.28 Mr Cunliffe indicated that the information which is required to be provided in support of a registration application can lead to a range of irrelevant information being sought and provided. To illustrate this point, Mr Cunliffe commented:

> It seems to me that they require that I confess to a parking fine incurred 25 or more years ago; to a schoolroom inquisition 40 years ago; to an inquiry by the Department of Social Security into whether a female boarder in my home was in a defacto relationship; to a tax audit, even if it was absolutely clear; to a public service disciplinary inquiry into whether anything should be done over the goings on at the office Christmas party; to an inquiry by a nurse at the baby health centre as to why my baby is underweight; or to questions asked by my doctor to determine whether the child's black eye was really an accident.[21]

5.29 It was suggested to the Committee that there needs to be limitations on the extent of the information required to be provided with an application so that the information is relevant to the application and is of currency. In this regard, the Privacy Commissioner proposed a range of amendments to the legislation, including amendments to:

- specify the classes of information which are relevant to the assessment of suitability;

20 Evidence, p. 463.

21 Evidence, p. 464.

- limit consideration of employment relations to only those which directly or indirectly influence an applicant in the provision of immigration assistance;

- specify what particular elements of character information are relevant to an assessment of integrity; and

- exclude quashed and pardoned convictions and limit information about criminal proceedings to serious charges relevant to an applicant's ability to give immigration assistance.[22]

5.30 The Privacy Commissioner also proposed that the Secretary of DIEA should provide written guidance indicating the parameters of information considered relevant to the criteria upon which an application for registration is assessed.[23]

Submissions on maintenance of standards

5.31 In a number of submissions, it was suggested that a major deficiency in the existing Scheme is the lack of any requirement to maintain or update knowledge of migration procedure. As noted above, the existing provisions provide that renewal of registration is virtually automatic. Expressing its concerns in this regard, VIARC stated:

> At present, the re-registration process happens upon the payment of a fee. It happens without any further investigation unless some complaint has been brought against the person. So there is no investigation, presumably five or six years down the track after a person initially demonstrated their sound knowledge of procedure to see if they are still up to date with the migration law. That is the problem with the Scheme, as we see it, at present.[24]

5.32 Commenting on his direct experience with this problem, a representative of IARC stated:

> I get legal practitioners calling up sometimes on phone advice asking me what the current situation is with regard to the legislation. They are people who are registered and giving advice and charging their clients

22 Evidence, pp. S223-S224.

23 Evidence, pp. S223-S224.

24 Evidence, p. 287.

> thousands of dollars to do it, and abusing a public resource in order to justify their private practice.[25]

5.33 It was proposed in a variety of submissions that migration agents should be subject to a mandatory training requirement as part of the registration renewal process. As noted by the Legal Aid Commission of Victoria:

> . . . in order for people to continue to give advice in this area, there ought to be ongoing training and some way of ensuring that those who hold themselves out as experts do have the knowledge. We would support very much the idea of some sort of ongoing checking of people's ability.[26]

5.34 Various suggestions were made as to how a mandatory training requirement should be structured. Mr Gillespie, a registered agent, argued that agents should undertake a minimum of 6 to 8 hours training per year.[27] Another registered agent, Mr Henry, proposed that registered agents should undertake at least 12 hours professional development training every year in programs accredited by the Board.[28] The Migration Institute of Australia suggested a minimum of 15 to 20 hours of training ever year.[29] Ms Mathewson, a registered agent and partner at Coopers and Lybrand, in suggesting a training requirement at the higher end of the spectrum, noted that the Institute of Chartered Accountants requires 40 hours professional development training per year.[30]

5.35 An alternative although related suggestion was to establish a system of professional development points along similar lines to the mandatory continuing legal education points system which applies to solicitors in New South Wales. Such a system would involve attending a structured series of seminars and workshops conducted by DIEA, the Migration Institute of Australia or legal professional bodies. Points would be allocated for each seminar or workshop attended. Agents would need to accrue a minimum number of points each year in order to be able to renew their registrations. Under this proposal, the Board would be given responsibility for maintaining a register which records the points accrued by agents.[31]

25 Evidence, p. 198.

26 Evidence, p. 430.

27 Evidence, p. S103.

28 Evidence, p. S88.

29 Evidence, p. S132.

30 Evidence, p. 247.

31 Evidence, p. S62.

5.36 Another suggestion, proposed by DIEA, was to consider establishing a system of differential registration levels which would allow for more highly trained practitioners to be acknowledged. According to DIEA, the system of accreditation adopted by the National Accreditation Authority for Translators and Interpreters is one model which could be followed. The Accreditation Authority accredits practitioners at five levels according to the standard they have obtained and, to some extent, the level of specialisation they have pursued. DIEA noted that, in its early days of operation, the system allowed existing practitioners to be 'recognised' as distinct from being 'accredited'. The Accreditation Authority publicised widely the difference between 'recognition' and 'accreditation', and the difference between the various levels of accreditation so as to allow consumers to make an informed choice and select an appropriately qualified practitioner.[32]

Conclusions

5.37 When the Migration Agents Registration Scheme was established, the then Minister indicated that the emphasis of the Scheme would be on monitoring the conduct of migration agents rather than restricting entry to the migration advice industry. The criteria which migration agents must satisfy in order to be registered reflect this aim.

5.38 During the inquiry, contrasting views were presented about the existing entry standards and whether they should be strengthened. In this regard, it is important to note that the transitional entry provisions which operated at the outset of the Scheme, whereby persons already working in the migration advice industry could become registered on the basis of their past work experience in a migration practice, no longer are available to new entrants to the industry. The current entry standards require that persons now seeking to be registered as migration agents must either have a law degree or be able to demonstrate a pass in a designated migration law course. This is a recent development. As such, it is premature to suggest that the existing entry standards are inadequate for achieving a more competent and professional industry. In the Committee's view, further operational experience of the current entry standards is required before any move to strengthen those standards should be considered.

5.39 In this regard, it is also relevant to note the advice from the Office of Regulation Review that registration schemes are likely to be ineffective if the effort which is directed to registering practitioners overshadows the effort which is directed to monitoring the activities of those practitioners and taking disciplinary action where necessary. The Committee is concerned that if the competence criteria for registration as a migration agent were strengthened at this point in time, the focus would remain on the registration process rather than on the important tasks of monitoring migration agents, investigating complaints and, where necessary, taking disciplinary action. On this point, the Committee notes the evidence from

32 Evidence, p. S322.

DIEA and the Board that, in the first two years of the Scheme, most of the Board's efforts, and the efforts of the Scheme's secretariat, have been directed to the registration of migration agents, with only limited attention directed to investigations and disciplinary action.

5.40 In supporting the maintenance of the existing competence criteria which migration agents must satisfy for registration, the Committee is not suggesting that the issue of professional competence among migration agents does not warrant attention. The Committee prefers to emphasise continuing professional development rather than the setting of entry standards at too high a level.

5.41 In this regard, the Committee supports the suggestion that, in order to renew their registrations, all migration agents, including lawyer and non-lawyer agents, should be required to produce evidence of satisfactory completion of relevant training and/or professional development approved by the Board. Without such a requirement, the Scheme's objective of increasing professional standards within the migration advice industry will be achieved in relation only to those conscientious agents who voluntarily update their knowledge and skills on a regular basis. In the Committee's view, a continuing education points model, as applies in the legal profession, would appear to be the most appropriate option for maintaining standards within the migration advice industry. Under such a model, practitioners would be required to demonstrate satisfactory completion of relevant training and/or professional development approved by the Board when renewing their registrations. Failure to comply with such continuing education requirements would delay or justify refusal to renew a registration.

5.42 In proposing a continuing education requirement for migration agents, the Committee acknowledges the concerns expressed by some community organisations, including, for example, the South Australian Multicultural and Ethnic Affairs Commission, that currently there are limited opportunities for professional training in migration law and practice, particularly outside New South Wales and Victoria. In this regard, the Committee is encouraged particularly by the efforts of DIEA and the Migration Institute of Australia in conducting seminars and assisting in the establishment of migration law courses. In the Committee's view, these efforts should continue to be supported. In addition, the Board should take responsibility for ensuring that appropriate training opportunities for migration agents outside of New South Wales and Victoria are or can be made available.

5.43 The Committee also notes DIEA's suggestion that consideration be given to the establishment of different levels of registration, which acknowledge a higher level of knowledge or skill demonstrated by a migration agent. The Committee is not disposed to make a specific recommendation to this effect at this time. In its view, further development of the industry is required before such a system can be implemented. Nevertheless, it is a suggestion which should be reconsidered once a continuing training requirement is implemented and specialist accreditation in migration law is established fully within the legal profession.

5.44 While the Committee is not in favour of strengthening entry standards, and instead has emphasised the need for ongoing maintenance of standards, the Committee is concerned that the existing criteria for registration as a migration agent, as presently drafted, are not easily understood or ascertained. The existing legislation does not define the term integrity or the concept of a fit and proper person to give immigration assistance. It also does not define the concept of sound knowledge of migration procedure. In the Committee's view, it is unsatisfactory for such matters to be left entirely to discretion and interpretation, as currently would appear to be the case.

5.45 In the Committee's view, the criteria for registration of migration agents should be defined specifically. The legislation and accompanying regulations should provide guidance as to the criteria for determining integrity, a person's fitness to give immigration assistance, and sound knowledge of migration procedure. In terms of sound knowledge of migration procedure, this should be defined to mean a pass in a course or examination approved by the Board. In addition, as suggested by the Privacy Commissioner, the legislation should limit the criteria for assessment of a registration to that information which is relevant specifically to the application.

5.46 The lack of precision regarding the criteria for registration is reflected in the migration agent registration application form. The information requested on that form is defined in broad and imprecise terms. Information is requested not only about the applicant, but also any third parties linked to the applicant by employment. Persons employed by large firms and partnerships are required to provide detailed information on a number of persons within the firm whose practices may be unrelated and irrelevant to the migration agent's registration application. This obligation can be onerous, intrusive and unnecessary. Accordingly, the Committee is of the view that the existing application form for registration as a migration agent should be redesigned and amended in accordance with appropriate privacy principles in order to set out more precisely the nature of the information which is required.

Recommendations

5.47 **The Committee recommends that:**

17. **the criteria for registration as a migration agent be defined specifically, with legislative guidance to be given on the criteria for determining whether an applicant for registration is a person of integrity, is a fit and proper person to provide immigration assistance and has sound knowledge of migration procedure;**

18. **the term 'sound knowledge of migration procedure' be defined to be a pass in a course or examination accredited by the Migration Agents Registration Board;**

19. **the information required to be disclosed by an applicant for registration as a migration agent be modified to:**

    - **specify the types of information which are relevant to the assessment of an applicant's suitability for registration;**
    - **limit consideration of the character and conduct of co-workers, co-executives and partners of the applicant to those individuals related by employment who directly or indirectly influence the applicant in the provision of immigration assistance; and**
    - **specify the particular information pertaining to character which is relevant to an assessment of an applicant's integrity;**

20. **the application form for registration as a migration agent be redesigned and amended to indicate the precise nature of information required to be provided by the applicant and to reflect the amendments proposed in recommendation 19;**

21. **all migration agents renewing their registrations be required to provide evidence of satisfactory completion of relevant training and/or professional development approved by the Migration Agents Registration Board as part of a continuing education points system; and**

22. **the Migration Agents Registration Board be responsible for ensuring that adequate and appropriate opportunities for training are available for migration agents across Australia.**

Chapter Six

ADMINISTRATION OF THE SCHEME

Introduction

6.1 The Migration Agents Registration Scheme is administered by both the Secretary of DIEA and the Migration Agents Registration Board. As noted in Chapter Three, each have distinct roles and responsibilities within the Scheme. Those roles and responsibilities are set down in the Migration Act.

6.2 In this chapter, the Committee examines the administrative framework for the Scheme. The Committee considers the composition and role of the Migration Agents Registration Board, focusing particularly on its linkages to DIEA. The Committee also considers the funding arrangements for the Scheme.

Migration Agents Registration Board

6.3 The Migration Agents Registration Board, established by section 315 of the Migration Act, constitutes the operational base of the Scheme. The Migration Act sets down the structure, functions and powers of the Board.

Composition of the Board

6.4 Section 318(1) of the Migration Act specifies that the Board shall consist of:

(a) a Chairperson; and

(b) a member of the Immigration Review Tribunal; and

(c) 3 ordinary members, being:

(i) a member who is a lawyer; and

(ii) a member with associations with ethnic community organisations; and

(iii) a member who is a registered agent.

6.5 In relation to the Chairperson of the Board, section 319 of the Migration Act specifies that:

(1) Subject to subsection (2), the Chairperson is the Secretary [of DIEA].

(2) The Secretary [of DIEA] may appoint, in writing, an officer of the Department as the Chairperson.

(3) A Chairperson appointed under subsection (2) holds office under the conditions specified in the appointment.

6.6 With respect to the Board member who is a member of the IRT, section 320 of the Act states:

(1) Subject to subsection (2), the member referred to in paragraph 318(1)(b) is whichever of the Principal Member or Senior Members of the Immigration Review Tribunal as the Minister appoints in writing.

(2) A member appointed under subsection (1) holds office under the conditions specified in the appointment.

6.7 As for the other members, section 321 specifies that the ordinary members of the Board are to be appointed in writing by the Minister. Members of the Board are appointed on a part-time basis.

Functions of the Board

6.8 The functions of the Board, as set out in Section 316 of the Act, are:

(a) to deal with registration applications in accordance with [Part 3 of the Migration Act]; and

(b) to monitor the conduct of registered agents in their provision of immigration assistance and of lawyers in their provision of immigration legal assistance; and

(c) to investigate complaints about registered agents in relation to their provision of immigration assistance; and

(d) to take appropriate disciplinary action against registered agents; and

(e) to investigate complaints about lawyers in relation to their provision of immigration legal assistance, for the purpose of referring appropriate cases to professional associations for possible disciplinary action; and

(f) to inform the appropriate prosecuting bodies about apparent offences against Part 3 or Part 4 of the Act; and

(g) to monitor and advise the Minister on the adequacy of any Code of Conduct

6.9 In practice, decisions made by the Board relate to a small percentage of applications referred to it by DIEA (see paragraphs 3.14).

6.10 In considering an application for registration as a migration agent, the Board is not bound by technicalities, legal forms or rules of evidence and must act according to substantial justice and the merits of the case. The Board is guided by the provisions of the Code of Conduct for migration agents, the Migration Act and other administrative laws (for example, the *Privacy Act 1988* and the *Administrative Decisions (Judicial Review) Act 1977*).

Powers of the Board

6.11 Section 331 of the Migration Act provides that:

The Board has power to do all things necessary or convenient to be done for, or in connection with, the performance of its functions.

6.12 Specifically, the Board has the power to:

- consider registration applications referred to it by the Secretary of DIEA (section 291);
- intervene in an application for registration (section 293);
- register an applicant as a migration agent or refuse a registration application (section 297);
- cancel or suspend the registration of a migration agent or caution an agent (section 303);
- request the Secretary of DIEA to arrange for an investigation which the Board considers necessary to fulfil its functions (section 307); and
- require a migration agent to provide the Board with relevant information (section 308).

6.13 Section 306 of the Migration Act provides that decisions of the Board are reviewable by the AAT.

Role of DIEA

6.14 The system of registration of agents is administered by the Secretary of DIEA and the Board. An application for registration is made to the Secretary, who must deal with it unless required to refer it to the Board. Under sections 290, 292 and 293 of the Migration Act, the Secretary of DIEA is required to refer an application to the Board where:

- the applicant falls within a specified category of apparently ineligible persons;
- an objection to the registration of the applicant has been received;
- the Secretary is satisfied that there is evidence that the applicant is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance;
- the Secretary is satisfied that an individual related by employment to the applicant is not a person of integrity; or
- the Board in its discretion gives the Secretary a notice that the Secretary is not to deal with the application.

6.15 As noted at paragraph 5.6, under section 292 of the Migration Act, persons whose applications must be referred to the Board include any applicant who:

- has been convicted of a criminal offence and the conviction is not spent; or
- is, or has been, bankrupt; or
- is, or has been, the subject of disciplinary action by a professional association, being disciplinary action that the Secretary of DIEA considers relevant to the application; or
- is, or has been, the subject of criminal proceedings, an investigation or an inquiry, that the Secretary of DIEA considers relevant to the application; or

- is, or has been, the subject of an investigation by the Department because of allegations against him or her of fraud or corruption (whether when an officer of the Department or otherwise), that the Secretary of DIEA considers relevant to the application; or
- does not satisfy either of the following:
  - is the holder of a prescribed qualification;
  - has, in the opinion of the Secretary of DIEA, a sound knowledge of migration procedure.

6.16 The majority of registration applications are dealt with by the Secretary of DIEA. In this regard, DIEA noted that approximately 80 percent of applications are processed fully by the DIEA secretariat. Only 20 percent of applications are referred to the Board for consideration.[1] As the legislative provisions make clear, the Secretary of DIEA not only decides on the uncontroversial registration applications, but also decides which applications are to be referred to the Board. The Board, in turn, must consider and dispose of such applications as soon as practicable.

6.17 Alongside this registration function, the Secretary of DIEA or his/her delegate also is Chairperson of the Board. In its submission, DIEA indicated that the practice of rotating the Chair amongst senior executives of DIEA has ensured that this role is essentially a titular one, without undue influence over the deliberations of the Board. On this point, DIEA commented that on no occasion has the Chairperson needed to use his or her casting vote.[2]

6.18 In accordance with section 332 of the Migration Act, DIEA also provides the Board with accommodation, a secretariat and other services for the Board's operation. The Migration Agents Registration Section within DIEA, which as at March 1995 consisted of six officers, undertakes the following tasks in support of the Scheme:

- receives and processes applications for registration;
- on delegation from the Secretary, considers and makes decisions on straight forward applications where there is no reason to doubt the qualifications, experience or integrity of the applicants;

1 Evidence, p. S302.

2 Evidence, p. S302.

- on delegation from the Secretary, refers the more difficult or contentious applications to the Board for its consideration;
- maintains the register of migration agents and the Scheme's database; and
- provides administrative support to the Board.[3]

6.19 In addition, DIEA's specialist investigation unit based in Sydney assists the Board in its investigations into the conduct of registered agents.[4]

Debate on the structure of the Scheme

6.20 During the inquiry, a number of witnesses questioned the appropriateness of the existing structure of the Scheme. Particular concern was expressed about the role of DIEA within the Scheme. Those concerns focused on:

- the role of the Secretary of DIEA and his/her delegates in registering migration agents; and
- the role of DIEA's Secretary as Chairperson of the Board.

6.21 Evidence also was received on a practical difficulty relating to the quorum requirements for the Board.

Submissions on the role of DIEA

6.22 As noted above, the Secretary of DIEA is responsible for processing uncontroversial applications for registration as a migration agent. In practice, the Secretary delegates this power to DIEA officers within the Migration Agents Registration Section. Various witnesses expressed concern to the Committee that the involvement of DIEA in the registration process creates confusion and can result in conflict of interest.

6.23 Before detailing these concerns, it is relevant to note that similar concerns have been expressed in the United States regarding the role of the Immigration and Naturalisation Service in regulating and disciplining accredited immigration practitioners. On the nature of INS difficulties in this regard, one commentator observed that 'migration attorneys will always be suspicious of the

3 Evidence, p. S302.

4 Evidence, p. S302.

motives of the INS' in attorney discipline cases.[5] Further, the department has a divided interest. Its responsibilities in controlling immigration may require expeditious deportation of an alien rather than protection of that alien against his/her incompetent or unscrupulous migration attorney.[6]

6.24 In relation to the Australian arrangements, the Privacy Commissioner submitted that there is uncertainty about whether the Secretary of DIEA, in registering migration agents, is acting as an agent of the Board or in his/her capacity as the head of DIEA. The Privacy Commissioner stated:

> . . . it is unclear from the legislation whether in performing these functions the Secretary is acting in his/her capacity of Departmental Secretary, or whether he/she is the Board's agent. The question arises as to whether the Board alone has the authority for registering applicants and the Secretary has, under the legislation, been delegated some of the Board's responsibility, or whether the Secretary is registering an applicant in performance of his/her Departmental function.[7]

6.25 The Privacy Commissioner indicated that, when the Scheme was proposed, he was under the impression that the Board alone would be given the overall authority for the administration and operation of the scheme, with DIEA simply assisting with the administration. In his view, it was intended that the Secretary of DIEA should be acting for the Board rather than DIEA in the registration process. According to the Privacy Commissioner, this intention is not reflected clearly in the legislation.[8]

6.26 The Privacy Commissioner indicated that this legislative uncertainty regarding the differing roles of the Secretary gives rise to certain privacy concerns, as it is unclear whether personal information collected for the purposes of registration is utilised only on behalf of the Board, or whether it also is utilised by

5 Motiey, K., 'Ethical Violations by Immigration Attorneys, Who should be sanctioning?', *Georgetown Journal of Legal Ethics*, vol. 5, 1992, p. 695.

6 ibid.

7 Evidence, p. S232.

8 Evidence, p. S232.

DIEA for its own purposes.[9] These concerns also were reflected by IARC, which stated:

> There is some feeling that DIEA officers are making use of the registration complaints mechanism unfairly because they are privy to the content of applications before the DIEA from which they may form their own (justified or not) conclusions. This perception, even if unfounded, maybe cause for concern if it means that the Scheme's operations are not trusted. It may be useful to demonstrate that the relevant privacy principles are being applied.[10]

6.27 The Privacy Commissioner suggested that the legislation should be amended to clarify whether the Secretary's functions are performed on behalf of the Board or as the head of DIEA. In this way, privacy responsibilities associated with collection and record-keeping can be managed more appropriately by DIEA.[11]

6.28 Related to this issue, other witnesses suggested that the involvement of DIEA in the registration process can lead to potential conflict of interest, as DIEA may be investigating the registration of an agent at the same time as it is involved with an agent in proceedings on a particular client's case. On this point, the Law Council of Australia commented:

> It is inappropriate for the Department, which determines applications and which is a potential adversary in subsequent appeals and judicial reviews to be responsible for investigating alleged breaches of the Code.[12]

6.29 The Law Council of Australia indicated that those responsible for administering a regulatory scheme should not only be independent but also be seen to be independent.[13] In this regard, it was argued that DIEA's involvement in the registration and investigation of migration agents gives rise to the perception that the Board which is responsible for supervision of the Scheme is not independent of one of the major stakeholders in the Scheme. On this point, the Law Council also

9 Evidence, p. S232.

10 Evidence, p. S274.

11 Evidence, p. S233.

12 Evidence, p. S204.

13 Evidence, p. S204.

questioned the appropriateness of the Secretary of DIEA serving as Chairperson of the Board given that the Chairperson has a deliberative and casting vote at the Board.[14]

6.30 RACS indicated that the perceived lack of independence of the Board can impact on the operation of the complaints mechanism, as applicants whose status is uncertain may not be prepared to come forward with their complaints if they perceive that the Board is not independent from the department which is responsible for determining their status.[15]

6.31 To overcome the perception that the Board is not independent of DIEA, it was suggested to the Committee that the Board should be established as an independent statutory authority or that responsibility for the Board should be transferred to another Commonwealth department. VIARC commented:

> . . . the position of the Board could be strengthened and given greater autonomy by perhaps either switching to the jurisdiction of another department–perhaps the Department of Justice or the Attorney-General's Department–or being created as a fully autonomous body in its own right.[16]

6.32 In response, the Board refuted the suggestion that it is not independent of DIEA. One member of the Board, Mr Karas, stated:

> As a member of the Board I can categorically state that the Board is not in any way subjected to any direction or directives by the Department. We carry out our functions in accordance with the legislation without fear or favour. If one was to look at the minutes of the Board and to look at the way it has conducted itself, I am sure that would be reflected. It just happens that the legislation says that the Chairperson . . . will be the Secretary [of DIEA]. It happens again that the secretariat of the Migration Agents Registration Scheme that provides the backup happens to be a division of the Department. It is funded by the Department, it comes within part of its budgetary allocations.[17]

14 Evidence, p. S204.

15 Evidence, p. S264.

16 Evidence, p. 289.

17 Evidence, p. 550.

6.33 Another Board member, Ms Chan, indicated that the Chairperson of the Board simply chairs the meeting, while the three ordinary members and the member who is an IRT representative have primary carriage of the business at the meeting. Commenting on the four members of the Board who are not from DIEA, Ms Chan stated:

> . . . we are the Board per se, and there is another person who sits and chairs the meeting.[18]

6.34 As noted at paragraph 6.17, DIEA concurred with this evidence by indicating that its practice of rotating the Chair amongst senior executives of DIEA has ensured that the role of the Chairperson is essentially a titular one, without undue influence over the deliberations of the Board. DIEA commented:

> . . . the registration . . . processes have been quite specifically left to the non-departmental members of the Board to manage . . .[19]

6.35 DIEA indicated that it is appropriate to consider alternative models for appointing the Chairperson.[20] DIEA stated:

> . . . measures that might be taken to further build the independence–in form as well as in substance–of the Board would be a step in the right direction.[21]

Conclusions

6.36 As one of the principal objectives of the Migration Agents Registration Scheme is to provide consumer protection against professional misconduct in the migration advice industry, it is vital that both the providers and consumers of immigration assistance have confidence in the operation of the Scheme. In this regard, the Committee agrees with the sentiment expressed during the inquiry that such confidence depends on the integrity of the Scheme and its decision making processes.

6.37 Some of the dissatisfaction with the existing Scheme appears to stem from concern about the role of DIEA. The Secretary of DIEA, or the Secretary's delegate, approves straight forward applications, refers controversial applications to the Board and serves as Chairperson of the Board. This has given rise to a

18 Evidence, p. 548.

19 Evidence, p. 727.

20 Evidence, p. S324.

21 Evidence, p. 727.

perception that the Scheme and the Board which administers the Scheme are linked too closely to DIEA.

6.38 In this regard, the Committee notes the Privacy Commissioner's concerns regarding the role of DIEA's Secretary in registering and referring applications. These concerns appear to stem in part from the Commissioner's perception, derived from consultations prior to the establishment of the Scheme, that the Board would have responsibility for all aspects of registration. On this point, it is relevant to note that the need to fast-track straight forward applications in practice has required the assistance and expertise of DIEA staff, who cull, register and refer relevant applications. The Committee's recommendations for greater precision in the criteria for registration and changes to the migration registration application form, as detailed in Chapter Five, should assist in allaying some of the concerns about the role of DIEA staff in collating and evaluating information relevant to registration applications.

6.39 At the same time, the Committee shares some of the concerns about the Secretary's responsibilities as Chairperson of the Board. On this matter, no specific evidence was presented to the Committee to indicate that the Board is unduly influenced by DIEA as a result of DIEA retaining the position of Chairperson of the Board. Indeed, such suggestions were refuted vigorously by the Board and DIEA. Nevertheless, the Committee considers that public confidence in the Scheme would be enhanced, and the distinct roles of the Board and the Secretary of DIEA would be clarified, if an independent Chairperson was appointed to the Board.

6.40 In the Committee's view, the existing arrangement whereby the Secretary of DIEA or his/her delegate serves as Chairperson is unsatisfactory. It creates confusion about who is administering the Scheme, thereby fuelling the perception that the Board is not independent. In addition, because of DIEA's practice of rotating the Chair among its senior executives, the position of the Chair effectively has become a titular one. The Committee considers that the Chairperson of the Board has an important function to perform in providing leadership and direction to the Board. Establishment of an independent Chairperson will not only ensure that such a role can be fulfilled, but also will contribute to the standing of the Board as an independent decision making body.

6.41 In proposing that an independent Chairperson be appointed to the Board, the Committee is firmly of the view that DIEA's presence on the Board should be retained through the creation of an additional place on the Board for a representative of DIEA. A reconstituted Board along the lines proposed by the Committee would allow for an effective working relationship between the Secretary of DIEA, the secretariat and the Board. It would enable the Secretary and secretariat to maintain responsibility for processing uncontroversial applications and referring controversial applications to the Board. It also would enable DIEA to play an active role on the Board alongside the other stakeholders in the Scheme without the perception that it has undue influence in directing the Board. The structure proposed by the Committee would maintain an appropriate balance by continuing to draw representation from all the major stakeholders in the Scheme.

6.42 In the Committee's view, the DIEA representative should be a senior officer of DIEA. In addition, to ensure continuity, the position should not be filled on a rotation basis, as has been the current practice in relation to the Chairperson. Rather, one senior officer should be identified and serve as the Board member.

6.43 Concerns regarding the role of DIEA in investigating complaints about migration agents are discussed in Chapter Eight.

Recommendations

6.44 **The Committee recommends that:**

23. the existing administrative arrangements for registration of migration agents be retained, so that the Secretary of the Department of Immigration and Ethnic Affairs maintains responsibility for approving straight forward applications from persons seeking to become migration agents and for referring contentious applications to the Migration Agents Registration Board, which should retain responsibility for considering and determining such contentious applications;

24. an independent Chairperson, who is not a migration agent and who is not a representative of the Department of Immigration and Ethnic Affairs, be appointed to the Migration Agents Registration Board; and

25. subject to the adoption of recommendation 24, an additional place be created on the Migration Agents Registration Board for a representative of the Department of Immigration and Ethnic Affairs. That representative should be a senior officer of the Department who is appointed to the Board.

Quorum of the Board

6.45 A separate issue raised by the Board related to the requirements for constituting a quorum of the Board. Under section 330 of the Migration Act, a quorum of the Board is constituted by the Chairperson, the member of the Board who is a lawyer and one other member. According to the Board, this requirement can give rise to certain administrative difficulties. If the member who is a lawyer has a conflict of interest in dealing with a particular application, he or she must disclose the matter to the applicant and not take part in any discussion unless the applicant agrees. It was submitted that, in effect, the Board may not be able to consider such an application unless that Board member resigns and the Minister appoints a new member who is a lawyer.[22]

22 Evidence, p. S124.

6.46 To address this problem, the Board proposed that Section 330 be amended so that if the member who is a lawyer has a conflict of interest in relation to a registration application, a quorum of the Board can be constituted by the Chairperson and two ordinary members.[23]

Conclusions

6.47 The Committee agrees with the Board that the existing requirement for the constitution of a quorum of the Board could create administrative difficulties if the member who is a lawyer is unable to consider a registration application because of a conflict of interest. If the Committee's recommendation for the appointment of an independent Chairperson for the Board is adopted (recommendation 24), similar difficulties could arise if the Chairperson became unavailable in certain situations. This practical difficulty should be remedied by providing more flexible arrangements for constituting a quorum of the Board.

Recommendation

6.48 **The Committee recommends that:**

26. the *Migration Act 1958* be amended to provide more flexible arrangements for constituting a quorum of the Migration Agents Registration Board in circumstances where the lawyer member of the Board or the Chairperson is unavailable to consider a particular registration application.

Funding arrangements

6.49 When the Scheme was established, the Government decided that the costs of the Scheme should be met by the migration advice industry through a registration levy. The then Minister stated:

> The Government . . . took the view that migration agents should meet the cost of regulation because they were likely to benefit from the development of a more cohesive and reputable industry, in the medium to long term, and because of the need for budget discipline.[24]

6.50 The *Migration Agents Registration (Application) Levy Act 1992* and the *Migration Agents Registration (Renewal) Levy Act 1992* set down the fees which are required to be paid by persons registering or renewing their registrations as migration agents. Under those Acts, all persons registering or renewing their

23 Evidence, p. S124.

24 Parliamentary Debates (Hansard), House of Representatives, 27 May 1992, p. 2938.

registrations as migration agents must pay a registration levy unless they propose to give immigration assistance in their capacity as employees of, or voluntary workers for, persons who or organisations which do not charge visa applicants a fee, or do not require any other reward for providing immigration assistance.

6.51 The original Levy Bills introduced into the Parliament provided for three tiers of registration levy:

- $1 000 for persons registering as migration agents in their own right;
- $500 for persons registering in the capacity of an employee of a registered agent, or an employee of a partnership or corporation at least one of whose members is a registered agent; and
- nil for persons who did not intend to charge a fee for providing immigration assistance.

6.52 During the passage of the legislation through the Parliament, certain amendments were made to the structure of levies originally proposed. In the parliamentary debates, it was argued that persons in rural communities may be disadvantaged if the single fee structure deters solicitors in country towns, who may conduct only a few immigration cases a year, from registering as migration agents. As noted by the then Shadow Minister for Immigration and Ethnic Affairs, and current Committee member, Mr Philip Ruddock, MP:

> It has been seriously put by members from rural constituencies, in particular, that members of the public will be disadvantaged when they cannot seek advice on immigration matters . . . in country towns where there might be only one solicitor, . . . no migration agents, nobody with experience in these matters, whom they could readily get to, and where a solicitor would have to pay $1 000 to register in order to offer advice on one or two cases a year.[25]

6.53 In response to such concerns, it was decided that, in addition to the three grades of levy noted above, there would be a concessional rate of levy for agents who, at the time of application, proposed to give immigration assistance in five or fewer cases per year. The concessional registration levy was set at:

> $100 for persons who are registering as migration agents in their own right and who propose to give immigration assistance in no more than five immigration cases during the period of registration; and

25 Parliamentary Debates (Hansard), House of Representatives, 2 June 1992, p. 3376.

> $50 for persons who are registering as employees of a registered agent, or a partnership or corporation one of whose members is a registered agent, and who propose to give immigration assistance in no more than five immigration cases during the period of registration.

6.54 Under section 302 of the Migration Act, an agent who has paid the concessional registration levy but who provides paid immigration assistance in more than five cases per year must pay the balance of the full registration levy within two months of commencing the sixth case. If payment is not received within two months, the agent is deregistered automatically.

6.55 In accordance with Clause 22 of the Code of Conduct, all migration agents who are paid to assist with a visa application are required to lodge a Migration Agents Declaration (Form 932) when submitting the visa application. Form 932 must be lodged for each and every case which a migration agent undertakes. On that form, an agent must provide his/her full name, his/her registration number, and must disclose the entire fee charged for the particular visa application.[26]

6.56 DIEA advised that since the establishment of the Scheme, there have been over 11 000 such migration agent transactions lodged with DIEA.[27] By checking the names of agents listed on the Migration Agents Declarations lodged with DIEA against the list of agents paying the concessional registration levy, DIEA is able to determine whether any agents who have paid the concessional levy have exceeded the five case limit.

6.57 The following registration levies were received from migration agents registered as at 30 June 1994:

- 300 agents who were registered in their own right paid the full registration levy of $1 000;
- 127 agents who were registered as employees of registered agents paid a registration levy of $500;
- 522 agents who were registered in their own right and proposed to undertake no more than five cases per year paid the concessional levy of $100;
- 83 agents who were registered as employees of registered agents and who proposed to undertake no more than five cases per year paid the concessional levy of $50; and

26 This disclosure requirement as it relates to fees is discussed further in Chapter Seven.

27 Evidence, p. S473, p. 719.

516 agents who did not charge a fee for providing immigration assistance paid no registration levy.[28]

6.58 These figures show that, as at 30 June 1994, 39 percent of registered agents had paid the concessional levy, 33 percent of registered agents had paid no registration levy, and only 28 percent had paid the full registration levy.[29]

6.59 DIEA advised that, since the Scheme's establishment, the income from registration levies has been insufficient to meet the costs of the Scheme (see Tables 3.1 and 3.2, page 52). In addition, grants to community immigration advice organisations under the Immigration Advisory Services Scheme[30] and the costs of disciplinary action against migration agents, which were to have been funded from income derived from the registration levies, have had to be funded from other sources within DIEA.[31]

6.60 According to DIEA, the Scheme has not met its objective to be self-funding because of the introduction of concessional registration levies, which reduced the Scheme's anticipated income by half. DIEA commented:

> The introduction of the concessional rate has had a significant effect on the Scheme's ability to become self-funding, with the number of agents availing themselves of the concession being rather larger than may have been anticipated when the amendments to the legislation were considered, and the number of people not required to pay any levy higher than originally assumed.[32]

6.61 DIEA also indicated that, due to the large percentage of agents who pay either a concessional levy or no levy at all, it is not expected that the Scheme will achieve self-funding in the foreseeable future. DIEA stated:

> There is little scope for reducing the level of administrative costs, which are already pared to the minimum considered necessary for the continued operation of the Scheme. Any further reduction in

28 Evidence, p. S319.

29 Evidence, p. S319.

30 Grants of $310 000 in 1993-94 and $280 000 in 1994-95 have been provided to various community immigration advice organisations under the Immigration Advisory Services Scheme (see Table 2.1, page 11).

31 Evidence, p. S320.

32 Evidence, p. S319.

> resourcing would be likely to affect the Scheme's ability to generate existing levels of income.[33]

6.62 During the inquiry, it was argued that, if the Scheme is to achieve its objectives, it needs to be resourced adequately. In this regard, DIEA proposed various options for generating additional income for the Scheme through registration levies. One option was to increase the concessional levy. According to DIEA, the existing concessional registration levy of $100 for agents registered in their own right and $50 for employees of registered agents is not excessive in comparison with the fees charged by those agents. DIEA noted that a random survey of 50 agents who paid the concessional levy showed that the fees paid by clients of those agents varied from $100 to $4 500, with the average fee being $817. On this basis, DIEA suggested a two-fold increase in the concessional registration levy which, based on projected income for 1994-95, would generate approximately $70 000 in additional revenue per annum.[34]

6.63 A second option suggested by DIEA was to abolish the concessional registration levy altogether and to set a single registration levy at a lower rate than the existing levy, for example $500 for agents registered in their own right and $250 for agents registered as employees of registered agents. According to DIEA, based on 1994-95 projected income estimates, this would generate approximately $130 000 in additional revenue per annum.[35]

6.64 A third option suggested by DIEA was to establish a nominal registration levy for voluntary workers of, for example, $20. DIEA noted that, on the basis of 1994-95 projected income estimates, this would generate additional revenue of $120 000 per annum.[36]

6.65 In suggesting these options, DIEA acknowledged that there have been criticisms that the full registration levy is excessive, particularly when compared to the registration fee payable by other types of agent, for example an $80 registration fee payable by taxation agents. DIEA also indicated that there have been some criticisms that agents do not get sufficient benefit in return for the registration levy which they pay.[37]

33 Evidence, p. S320.

34 Evidence, p. S321.

35 Evidence, p. S321.

36 Evidence, p. S321.

37 Evidence, p. S320.

6.66 Such criticisms of the registration levy were expanded upon in submissions and at public hearings. In particular, witnesses indicated that the cost of registering as a migration agent and renewing that registration is prohibitive, particularly when considered in conjunction with the cost of maintaining a migration practice. As noted by one registered migration agent:

> . . . a reasonable library on migration matters has a direct capital and maintenance cost of approximately $1 500 per year. PAM II alone costs $450 per year subscription and extra to obtain back issues.
>
> It therefore seems unduly onerous to charge $1 000 to an agent for the privilege of being an agent when that means (for the conscientious practitioner) further costs of equipping a library and undergoing additional and ongoing training for himself and key staff.[38]

6.67 One suggestion made to the Committee was that lawyers should be exempt from paying the registration because of the costs they already occur in establishing a legal practice. Members of the legal profession noted that, as they already are liable to pay several thousands of dollars to establish their practice, the additional cost of registering as a migration agent is excessive. The Legal Aid Office of the Australian Capital Territory stated:

> The requirement that legal practitioners pay further fees is arguably unconscionable, unnecessary and yet a further impost which increases the cost of and hence access to justice for people whom the Scheme was established to protect.[39]

6.68 Another criticism made to the Committee was that the registration fee is unduly high in comparison to the registration fees payable in other professions. One migration agent, Mr Clarke, commented:

> The fee of $1 000 is unduly high for registration. It is twice the fee for a Licensed Estate Agent in Victoria. An estate agent will usually make several times the money for his practice than what a migration agent will, and it seems very inappropriate the migration agent should be paying such a high fee. A fee of $250 per annum would be more in line with the comparative earnings of a migration agent.[40]

38 Evidence, p. S11.

39 Evidence, p. S146.

40 Evidence, p. S7.

6.69 Various witnesses submitted that the registration levy is excessive given that, aside from gaining the right to practise, registered agents receive little additional benefit from paying the levy. The Law Council of Australia, for example, commented:

> The services provided by the Board to the majority of agents do not represent value for money. Basic applications for registration are not difficult to assess: either the applicant has the prescribed qualifications and other attributes, or does not.
>
> Likewise, maintenance of registered status for agents during the period of registration entails little work for the Board. Unless a complaint is received which the Board then investigates, the registration fee appears to cover nothing other than a system which generates annual reminders, requests for registration fees, etc.[41]

6.70 It was suggested to the Committee that migration agents should be entitled to certain benefits as a result of paying such a high registration fee. According to DIEA, the Migration Institute of Australia has indicated that it considers the levy to be excessive unless substantial additional benefits are made available to migration agents, such as direct access to DIEA 'help desks', a priority mail box for the use of agents in regional offices, and the provision of DIEA instructional material free of charge or at a reduced cost.[42]

6.71 In a similar vein, Mr Henry, a registered migration agent, proposed that the registration levy should be a fee for service, and not a tax as it presently is structured. Mr Henry suggested that registered agents should be provided with on-line access to relevant information, including legislative and policy amendments.[43]

6.72 Another proposal was to increase the tiers of registration levy. In this regard, the Office of Regulation Review noted that the existing concessional fee structure, whereby agents who conduct six cases per year are required to pay $900 more in registration fees than agents who conduct five cases per year, could result in an excessive proportion of agents each handling too few applications, thereby

41 Evidence, pp. S208-S209.

42 Evidence, p. S320.

43 Evidence, p. S90.

giving rise to inefficiencies in the industry.[44] On this point, the Law Council of Australia stated:

> Whilst it is appropriate that the reduced fee is significantly less than that charged 'full time' agents, the reduced fee does nothing to help those legal practitioners who handle six or more applications each year but have no significant practice in the field. The full fee deters well qualified practitioners from establishing a limited practice in the field.[45]

6.73 Commenting on the inefficiencies arising from the existing registration levy, a representative of the Law Council stated:

> In my case, I probably would do between six and ten a year, and I am paying the $1 000 a year. But somebody who has a practice consisting entirely of migration matters might well be doing 500 cases a year, and they are getting it at the same money I am. If it is related to volume, the present system is a pretty inefficient instrument.[46]

6.74 The Law Council suggested that fees should be scaled according to the number of applications handled in the registration year.[47] An alternative proposal from a registered agent was that agents should pay a percentage of the fees they charge, rather than a flat registration levy.[48] While it was acknowledged that a tiered registration fee structure would increase the administrative complexity of the Scheme, it was suggested that adoption of a tiered structure would overcome existing anomalies which discourage agents from commencing a sixth case in any given registration period.

Conclusions

6.75 The Committee is of the view that if the Migration Agents Registration Scheme is to operate effectively, adequate resources need to be made available for the Migration Agents Registration Board to carry out all of its functions efficiently. To date, one of the principal objectives of the Migration Agents Registration Scheme, that it be self-funding, has not been achieved. Indeed, on advice from DIEA, it is

44 Evidence, p. S162.

45 Evidence, p. S209.

46 Evidence, p. 535.

47 Evidence, p. S209.

48 Evidence, p. 624.

likely that this objective will not be achieved in the foreseeable future unless changes are made to the existing structure of registration fees.

6.76 In this regard, it is clear that, because of the high percentage of agents who are paying a concessional levy for registration and renewal of registration, the Scheme is not generating the income which was anticipated when the Scheme was established. In the Committee's view, the use of the concessional levy has gone beyond what was intended originally by the Parliament.

6.77 During the parliamentary debates on the establishment of the Scheme, a concessional registration levy was agreed to because of concerns that the flat fee structure originally proposed would discourage solicitors in small country towns who deal with only a few immigration cases each year from registering as migration agents. It was argued that this would disadvantage persons living in such communities who may require immigration assistance but are unable to access alternative sources of advice. Given that 39 percent of registered agents were paying the concessional levy as at 30 June 1994, it is clear that the concessional levy now applies to a much broader category of adviser than was intended when the amendments to the original fee structure were agreed to by the Parliament.

6.78 Evidence to the inquiry also suggested that the existing concessional fee structure, whereby agents who undertake six cases per year pay a significantly higher registration fee than agents who undertake no more than five cases per year, is likely to discourage persons from developing their migration practices. In the Committee's view, the Scheme should be structured so as to encourage the development of an experienced and established industry rather than a fragmented industry comprising a large number of operators who have limited experience and deal with only a few immigration cases each year.

6.79 Further, the Committee considers that the concessional levy structure increases the administrative complexity of the Scheme by requiring DIEA to monitor whether agents who have paid the concessional levy undertake more than five cases in a year. Given the advice of DIEA that migration agents have undertaken over 11 000 transactions since the establishment of the Scheme, this monitoring function is time consuming and can tie up DIEA resources which could be devoted more productively to the monitoring and investigation of the conduct of migration agents.

6.80 Accordingly, the Committee considers that the general concessional levy should be abolished. In coming to this conclusion, the Committee acknowledges the original concerns that a flat fee structure may discourage solicitors in remote locations who deal with few immigration cases from becoming registered, thereby disadvantaging persons in those communities who need immigration assistance. To overcome these concerns, the Committee considers that registered agents who live in towns and regions where there is no access to alternative immigration assistance and who provide immigration assistance in less than six cases per year should pay a concessional levy of $100 for agents registering in their own right and $50 for agents registering as employees of registered agents. In this way, the concessional levy will apply only where the circumstances of the agent and the community which

that agent serves warrant the approval of a particular concession. The concession should not apply to migration agents operating in the larger metropolitan centres or in any of their associated firms which may be located in outlying areas.

6.81 In recommending that the concessional registration levy apply only to particular migration agents, as identified above, the Committee accepts that the existing registration fee is set at a high level. For those who do not have a substantial migration practice, the existing registration fee may be perceived as a barrier to entry. In particular, it may discourage well qualified persons in the legal profession, who already have significant expenses in establishing a practice and for whom migration work does not constitute a significant proportion of their practice, from providing immigration assistance. In the Committee's view, this would not contribute to the development of a competitive and professional industry. Accordingly, the Committee considers that the registration levy and renewal levy should be reduced to $500 for agents registering in their own right and $250 for agents registering as employees of a registered agent. Agents who do not charge a fee for their services should continue to be exempt from paying a registration fee.

6.82 Effectively, the Committee is endorsing the second option put to it by DIEA. The combined effect of the Committee's proposals would be that agents would be required to pay the full registration fee unless they satisfy the remote locality and minimal case load criteria for a concession, but that a significant proportion of agents would pay a substantially reduced registration fee. According to figures provided by DIEA, this would reduce the financial cost of registering for a significant proportion of agents, and is likely to generate additional revenue for the Scheme of around $130 000 per annum. The Committee's proposals are likely to encourage some agents to take on additional cases, and are likely to free up those DIEA resources which to date have been devoted to monitoring the number of cases undertaken by agents paying the concessional levy.

6.83 As for the suggestion that agents should gain some additional benefits in return for paying a registration fee, the Committee notes the advice from DIEA that it is responding to proposals from within the industry and, for example, has conducted seminars and briefings on changes to migration law and practice. Such initiatives should continue to be supported.

6.84 Finally, the Committee notes that it was intended originally that grants to community immigration advice organisations, under the Immigration Advisory Services Scheme, were to have been funded from revenue generated by the Migration Agents Registration Scheme. A shortfall in such revenue has meant that the grants have had to be funded from other sources within DIEA. If the Committee's proposals noted above are adopted, it is likely that the revenue generated from migration agent registration levies will increase significantly. In the Committee's view, this revenue should be directed first to improving the operation of the Scheme, including investigations by the Migration Agents Registration Board. Thereafter, it should be directed to providing and enhancing community immigration advice services, but only in circumstances where the organisation which provides the assistance imposes

a requirement that persons who are not in financial need must make a financial contribution to the organisation for the advice or assistance which is provided.

Recommendations

6.85 **The Committee recommends that:**

27. the existing concessional registration and renewal levies for migration agents be abolished, but that migration agents who operate in towns and regions where there is no access to alternative immigration assistance and who undertake less than six immigration cases per year continue to pay a concessional levy of $100 for migration agents who register in their own right, and $50 for migration agents who register as employees of a registered migration agent or employees of a partnership or corporation at least one of whose members is a registered migration agent;

28. subject to the adoption of recommendation 27, the general annual registration and renewal levy for migration agents be reduced to $500 for migration agents registering in their own right and $250 for migration agents registering as employees of registered migration agents or employees of a partnership or corporation at least one of whose members is a registered migration agent; and

29. revenue generated from the registration and renewal levies paid by migration agents be directed first to improving the operation of the Migration Agents Registration Scheme, including investigations by the Migration Agents Registration Board. Secondly, the revenue should be used to provide and enhance community immigration advice services as long as persons who are not in financial need are required to make a financial contribution for the advice or assistance which those services provide.

Chapter Seven

PROFESSIONAL AND ETHICAL CONDUCT

Introduction

7.1 As noted in the previous chapters, one of the principal objectives of the Migration Agents Registration Scheme is to improve standards of professional conduct in the migration advice industry. To this end, the Scheme establishes a Code of Conduct (the Code) for migration agents. Under the Migration Act, registered migration agents are required to conduct themselves in accordance with the Code. When introducing the migration agents legislation into the Parliament, the then Minister stated:

> The code will go beyond a listing of general objectives often associated with such a document. It will delineate a range of unacceptable behaviour to provide a guide to agents and consumers alike.[1]

7.2 The Code establishes a standard of professional conduct for registered agents and places certain obligations on registered agents in relation to the conduct of their business. It assists agents and consumers to determine acceptable standards of behaviour and acts as a guide for the Board in deterring and penalising unacceptable conduct.

7.3 According to DIEA, the Code was drafted following extensive consultations with the Attorney-General's Department, the Department of the Prime Minister and Cabinet, the Trade Practices Commission, the legal profession, the Migration Institute of Australia, the Federation of Ethnic Communities' Councils of Australia, the Refugee Advice and Casework Service, the Immigration Advice and Rights Centre, and the Australian Council of Social Service.[2]

7.4 In this chapter, the Committee examines the principles of professional and ethical conduct for migration agents, as embodied in the Code of Conduct. In particular, the Committee considers the adequacy of the existing Code. The enforcement of the Code through disciplinary action is considered in Chapter Eight.

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1 Parliamentary Debates (Hansard), House of Representatives, 27 May 1992, p. 2937.

2 Evidence, pp. S313-S314.

Defining ethical conduct

7.5 In general terms, codes of conduct seek to define ethical behaviour within a given profession. Commenting on the nature of ethics, Sir Gerard Brennan of the High Court of Australia stated:

> The first and perhaps the most important thing to be said about ethics is that they cannot be reduced to rules. Ethics . . . are not so much learnt as lived. Ethics are the hallmark of a profession, imposing obligations more exacting than any imposed by law and incapable of adequate enforcement by legal process. If ethics were reduced merely to rules, a spiritless compliance would soon be replaced by skilful evasion. There is no really effective forum for their enforcement save individual acceptance and peer expectation. However, among those who see themselves as members of a profession, peer expectation is sufficient to maintain the profession's ethical code. Ethics give practical expression to the purpose for which a profession exists, so a member who repudiates the ethical code in effect repudiates membership of the profession.[3]

7.6 In many professions, including the migration advice industry, codes of conduct provide a set of principles which establish the boundaries of ethical and professional conduct. Those codes provide guidance for consumers, professionals and regulators in determining what is acceptable behaviour. For migration agents, the Code of Conduct is legally binding.

7.7 The Trade Practices Commission, in its *Guide to fair trading codes of conduct*, noted that consumer affairs agencies and business groups alike increasingly have recognised the potential of codes of conduct to deliver benefits. Those benefits can include the following:

- industry ownership of a code may result in a greater commitment to making it work–compared to legislatively imposed rules;
- they can be a way of dealing with major consumer problems in a pre-emptive way;
- they can be used to address market failure problems on an industry-wide basis, thus enhancing the competitive process;

3 Hon Sir Gerard Brennan, 'Ethics and Procedure', Bar Association of Queensland Conference, Noosa, Queensland, 3 May 1992, pp. 1-2.

- they can provide a more flexible and cost effective approach than government regulation;
- they can be tailored to industry and consumer needs and can be more readily adapted to meet further problems as they arise, i.e., they can respond more readily to the dynamics of the market place;
- codes developed by an industry in consultation with consumer affairs agencies can set agreed minimum quality standards of work, serving as a benchmark in settling disputes between industry members and consumers;
- they can provide public access to quick and informal complaint handling mechanisms;
- they can provide a positive guide for ethical practitioners on agreed best practice benchmarks–going further than outlining minimum legal behaviour;
- by addressing recurring problems or problems caused by failures in the organisational policies or procedures, code principles can establish a form of industry quality control;
- they can be written in language readily understood by operators in a specific industry, making them suitable as a 'rule book' covering both standards and fair trading principles;
- they provide a sector of an industry wishing to gain a competitive advantage with the means to contend that it meets higher standards of fair trading than others in the industry;
- they have the potential to improve both the overall 'image' of an industry and public confidence in it; and
- adherence to a code of conduct written as a condition of contract allows for a private right of action for remedies where there is a breach of the code.[4]

4 Trade Practices Commission, *Guide to fair trading codes of conduct*, October 1994, p. 6.

7.8 The Trade Practices Commission noted that, to be effective, codes of conduct need to be tailored to individual industry circumstances. It also indicated that codes of conduct can be instrumental in gaining fair trading outcomes, provided that the relevant industry has the necessary resources and commitment.[5]

7.9 In this regard, the Trade Practices Commission noted that legislative backing sometimes is needed to make a code effective, for example to ensure sufficient coverage of an industry or to provide enforceable sanctions. Such backing might involve provision under general law for private rights of action, the establishment of a specific regulatory authority, a requirement under the law that all members of an industry adhere to an approved code, or provision for intervention by an existing enforcement agency. According to the Trade Practices Commission, the degree of legislative backing needed will differ from industry to industry.[6]

7.10 One drawback of defining ethical principles as legally enforceable rules is that practitioners may focus on the wording of the rules rather than the principles involved, and may seek to circumvent those rules to the benefit of their clients. As noted in relation to the legal profession:

> Lawyers tend to see rules as things to be circumvented in the pursuit of the client's interests. [Rules] . . . may be honoured in the letter but ignored in the spirit. This is a particularly dangerous situation, for if lawyers approach codes of professional ethics in the same way they approach, say, revenue law the underlying aim soon becomes avoidance rather than compliance. This is, of course, the type of complaint commonly made of lawyers.[7]

The ethics of immigration assistance

7.11 As noted by the then Minister, when the scheme was established the migration advice industry was fragmented and comprised a number of disparate groups. As a consequence, the industry did not develop on its own initiative a Code of Conduct which reflected commonly agreed principles. Rather, as indicated at paragraph 7.3, the Code was drafted by government in consultation with a range of industry participants.

5 ibid.

6 ibid.

7 Ken Crispin, QC, 'Professional Ethics and the Prosecutor', unpublished, 1992.

7.12 As the Code of Conduct is binding and legally enforceable, it is not simply framed as a statement of acceptable practice, but also is proscriptive. The Code takes its imperative not just from the conscience of the agent, but also from the compulsion which arises from the threat of sanction.

7.13 The key obligation in the Code is that migration agents must act in accordance with the law and in the legitimate interests of their clients. As far as clients are concerned, immigration advisers occupy an important position within the general framework of immigration practice. As one writer observed, migration agents 'fight for the hopes and dreams of their clients'.[8] Immigration clients generally share a common goal in that they seek to gain entry to or residence in the country of their choice either for themselves, their families or their employees. As discussed in earlier chapters of this report, such persons will seek out migration agents in the expectation that an agent will assist them to achieve their goal.

7.14 In assisting their clients, migration agents sometimes may come into conflict with a wider responsibility to the proper workings of the immigration system. In all immigration systems, there is scope for abuse of the rules. The proper workings of an immigration system can be undermined if visa applicants enter into sham relationships in order to secure residence. In addition, unmeritorious visa applications may produce delays in the decision making process because such applications are lodged not with any expectation of success, but simply to buy further time in the country during processing. In such instances, migration agents may be culpable if they encourage unmeritorious visa applications or connive at the sham relationship. The Code of Conduct is aimed at overcoming such conflicts by emphasising that a primary obligation of migration agents is to act in accordance with the law.

7.15 In this chapter, the Committee has examined the Code of Conduct for migration agents with a view to determining the extent to which the Code has contributed to the development of ethical principles and professional conduct in the migration advice industry.

Objectives of the Code of Conduct

7.16 Section 314 of the Migration Act states:

> (1) The regulations may prescribe a Code of Conduct for migration agents.
>
> (2) A registered agent must conduct himself or herself in accordance with the prescribed Code of Conduct.

8 Queensen, C. M., 'The Sea of Dragons Trio: Adventures in Immigration Law', *Litigation*, 1987, Vol. 13, No. 3, 1987, p. 52.

7.17 The Code is set down in the Migration Agents Regulations. The objectives of the Code, as detailed in clause 2, are:

- to establish a proper standard for the conduct of business as a migration agent;
- to set out the minimum attributes and abilities that a person must demonstrate in order to perform as a registered migration agent under the Code–these include:
  - being of good character (a definition of 'good character' is set out in the Migration Act);
  - knowing the provisions of the Migration Act and Migration Regulations in sufficient depth so as to offer sound and comprehensive advice to a client, including advice on the completing and lodging of application forms;
  - being able to perform diligently and honestly; and
  - being able and willing to deal fairly with clients;
- to set out the duties of the migration agent in relation to clients, their own employees and the Commonwealth and its agencies;
- to establish procedures in relation to the setting and charging of fees;
- to establish a standard for a prudent system of office administration; and
- to require an agent to be accountable to the client.

7.18 As noted at clause 3, the Code is not intended to list exhaustively the acts and omissions which may fall short of what is expected of a competent and responsible migration agent. Nevertheless, as noted at clause 4, the Code imposes on a registered agent the overriding duty to act at all times in the lawful interests of the agent's client, and any conduct falling short of that requirement may render the agent liable to deregistration.

Obligations under the Code of Conduct

7.19 The Code of Conduct for migration agents details a range of obligations which an agent must satisfy in dealing with clients, in representing clients and in conducting the practice of a migration agent.

7.20 The Code sets down various principles governing the relationship between migration agents and their clients, including general principles of ethical behaviour and requirements for competence. With regard to an agent's relationship with his or her clients, the Code provides that registered agents must:

- act in accordance with the law and in the legitimate interests of their clients;
- treat clients fairly and give due regard to their dependence on the agent's knowledge and experience;
- preserve the confidentiality of their clients;
- not coerce or intimidate clients or unreasonably or unlawfully withhold documents belonging to a client;
- advise clients that they are entitled to copies of applications and related documents;
- charge fees which are reasonable;
- on the commencement of work for a client, provide a statement of fees and an estimation of the likely time to be taken;
- ensure a client has access to an interpreter where necessary;
- not create the impression that they are accredited by the Government to do work on behalf of the Commonwealth or that a special or privileged relationship exists between the agent and the Minister or staff of DIEA; and
- not commission misleading or false advertising in relation to their registrations.

7.21 In terms of professional competence, the Code provides that a registered agent must:

- have a sound working knowledge of the Migration Act and Regulations and a capacity to provide timely and accurate advice; and
- take appropriate steps to maintain and improve his or her knowledge of the Migration Act and Regulations and keep that knowledge up to date.

7.22 The Code also sets down the principles governing the manner in which registered agents are required to conduct their business. The Code provides that registered agents must:

- refer to their registration numbers in advertising;
- maintain proper records and keep clients' funds separate from each other;
- properly supervise work carried out by staff for or on behalf of the agent;
- make all employees, including those not involved in giving immigration assistance (e.g., receptionists and typists), familiar with the Code of Conduct;
- ensure that their employees are of good character and act consistently with the Code of Conduct in the course of their employment;
- notify the Board when renewing their registrations if, having become registered as non-fee charging agents, they commence practice as commercial fee charging agents; and
- display a Code of Conduct in their offices.

7.23 Further, the Code sets down the principles governing the manner in which migration agents are required to represent their clients in relation to an immigration application. These principles require agents to assist with, or not impede, the proper and efficient workings of departmental decision making. The Code provides that an agent must:

- be frank and candid about the prospects of success of an application and not make statements of support or encourage what the agent believes to be false or misleading statements;
- not encourage the lodgement of vexatious or grossly unfounded applications; and
- provide sufficient details and threshold documentation to enable full consideration of an application.

7.24 Non-compliance with the Code may result in the Board cautioning an agent or suspending or cancelling a registration. Such decisions are reviewable by the AAT.

Inquiry evidence

7.25 During the inquiry, the Committee received limited evidence on the operation of the Code of Conduct. Some information was provided by DIEA on the workings of the Code. In particular, DIEA provided information on the most common complaints which have been received regarding breaches of the Code. Those complaints generally concerned matters of competence, misrepresentation and fees. On the issue of competence, the most common complaints have included:

- loss of review rights because the agent did not advise clients of the outcome of their applications; and
- lodging visa or review applications out of time.[9]

7.26 On the issue of misrepresentation, the most common complaints have included:

- unregistered practice;
- lodging applications which have no chance of success or clearly do not meet the prescribed criteria;
- misrepresentation as to the outcome of an application, for example, guaranteeing the success of an application, often within a certain time frame;
- requesting clients to sign blank application forms; and
- submitting false or misleading claims on behalf of an applicant without the applicant's knowledge or instructions.[10]

7.27 On the issue of fees, the most common complaints have included:

- charging for advice that subsequently was found to be incorrect, or failing to perform work for which payment was accepted;
- refusing to return documents, for example, claiming a lien over documents for unpaid services;
- overcharging of fees or refusal to refund fees; and

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9 Evidence, p. S488.

10 Evidence, p. S488.

- failing to provide the client with a proper statement of fees.[11]

7.28 DIEA indicated that it may be timely to review the Code in order to assess its effectiveness in regulating the conduct of migration agents.[12] Other witnesses indicated that the Code is an appropriate statement of principle, but identified particular problems or deficiencies which have become apparent during the first two years of the Scheme's operation. These are discussed in the sections which follow.

Obligations to clients

7.29 In relation to an agent's obligations to clients, the following issues attracted comment in submissions:

- disclosure of fees to clients;
- disclosure of fees to DIEA;
- whether there should be a scale of fees for work undertaken by migration agents;
- handling of client funds by migration agents; and
- whether agents should be required to carry professional indemnity insurance.

Disclosure of fees

7.30 A migration agent's obligations in relation to fees are detailed in section 313 of the Migration Act and clauses 22, 23 and 24 of the Code of Conduct. Section 313 of the Migration Act states:

> (1) A registered agent is not entitled to be paid a fee or other reward for giving immigration assistance to an entrance applicant or cancellation review applicant unless the agent gives the entrance applicant or cancellation review applicant 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) Where:
>
> (a) an entrance applicant or cancellation review applicant has paid a registered agent for giving immigration assistance without the entrance applicant or cancellation review applicant having received a statement of services; and
>
> (b) the entrance applicant or cancellation review applicant does not receive a statement of services within 28 days after the making of the final decision about the entrance application;
>
> that entrance applicant or cancellation review applicant may recover the amount of the payment as a debt due to the entrance applicant or cancellation review applicant.
>
> (4) This section does not apply to the giving of immigration legal assistance by a lawyer.

7.31 Clause 22 of the Code of Conduct states:

> An agent must provide a signed declaration to be attached to the Departmental application form citing his or her full name, migration agent's registration number and his or her entire fee for each immigration case. An agent must also sign the declaration or, where provision exists, the application form which he or she assisted in preparing, citing his or her full name and migration agent's registration number.

7.32 Clause 23 of the Code of Conduct states:

> There is no statutory scale of fees. Nonetheless, an agent is expected to set a fee that is reasonable in the circumstances of the case. A migration agent must provide a statement of fees at the start of work for a client in the form of charges per hour, or per particular service and an estimation of likely time to be taken in performing a service. An agent:
>
> - should not carry out work in a manner that unnecessarily increases his or her cost to the client;
> - should, where outside expertise is to be engaged and the client agrees, fully inform the client of the likely extra cost;

11 Evidence, p. S488.

12 Evidence, p. S316.

should, 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:

- any need to engage and pay expert witnesses;
- the need to meet legal costs if a case were lost;
- the need to pay Department fees.

7.33 Clause 24 of the Code of Conduct states:

An agent should advise clients of the method of payment of fees, including Departmental fees.

7.34 The effect of these provisions is that migration agents who charge for their services are required to charge fees which are reasonable in the circumstances of the particular case, are required to provide clients with a statement of the services which are to be provided and the charges in respect of each of those services, and are required to disclose to DIEA the entire fee which is charged in every such case. No specific guidance is provided in the legislation or the Code as to what constitutes a reasonable fee.

Disclosure of fees to clients

7.35 As noted above, section 313 of the Migration Act places an obligation on migration agents to provide their clients with a statement of services, including the charges for each service performed. The Code of Conduct requires that those charges must be reasonable in the circumstances.

7.36 The Migration Institute of Australia suggested that all migration agents should be required to enter into written agreements with their clients regarding the fees and terms relevant to the agent's engagement. According to the Migration Institute, agents should be obliged by statute to:

- set out in reasonable detail what work they will do for prospective clients;
- set out an approximation of how long matters will take;
- set out the rate to be charged for the work based on one of the following:
  - an agreed hourly rate;

  - an all embracing one off fee; or
  - an agreed blend of the above;
- record the above information in a short, easy to read letter of engagement signed by both the agent and the client; and
- advise prospective clients that they are not obliged to accept the rates proposed by the agent but are free, should they wish, to instruct another agent who may charge a different fee.[13]

7.37 The Migration Institute argued that a contract of engagement, if properly used in accordance with the Code of Conduct, can advantage clients because it will:

- enable clients to engage an agent in full knowledge of what the agent can do, will do and will charge;
- enable clients to negotiate a fee consistent with the agent's prior experience and the requirement of the client;
- enable clients to negotiate special fee arrangements consistent with the particular requirements of the client; and
- promote competition between agents as to price and market share.[14]

7.38 In considering the Migration Institute's proposal, the Committee was aware, from its own investigations, of fee disclosure requirements already operating for barristers and solicitors in New South Wales. The New South Wales *Legal Profession Act 1987* requires barristers and solicitors to disclose various matters to their clients before they are retained, or as soon as practicable after being retained. Clients are to be told the amount of costs or, if not known, the basis of calculating the costs, as well as the billing arrangements, including the client's right to receive a bill of costs and the client's right to a review of costs. Disclosure concerning costs must be in writing and expressed in clear plain language. A failure to make disclosure concerning costs as required has the effect that the client is not required to pay the costs of the legal services unless the costs have been assessed by the Supreme Court.

13 Evidence, p. S141.

14 Evidence, p. S142.

Disclosure of fees to DIEA

7.39 A second issue raised in submissions concerned the obligation on agents to disclose to DIEA the entire fee charged in each and every 'immigration case'. The term 'immigration case' is not defined. It certainly includes a visa application in which an agent gives paid assistance, but also may include assistance given in respect of a proposed visa cancellation.

7.40 The Code of Conduct requires that for each immigration case migration agents must lodge with DIEA a migration agents declaration (Form 932) disclosing the fee charged in every such case. This form is intended to serve a dual purpose. First, it enables DIEA to determine the number of cases which an agent undertakes and, therefore, whether agents who have paid a concessional registration levy, because they intend to give paid immigration assistance in no more than five immigration cases per year, have exceeded that case limit. Where the case limit is exceeded, an agent who has paid the concessional levy is liable to pay the full registration levy within two months of commencing the sixth case or is subject to deregistration. Secondly, it also was intended that such disclosure of fees to DIEA would allow the Board to monitor the fees charged by agents as a means of detecting and acting against overcharging.

7.41 DIEA noted that thousands of such forms have been lodged since the establishment of the Scheme. From the evidence provided to the Committee, it appears that few if any of these forms have been examined or investigated to determine the incidence of overcharging among migration agents. Commenting on the usefulness of Form 932, DIEA stated:

> The Department has no way of confirming that all forms are lodged as required, or that the fees are always correctly stated. The usefulness of this information is also limited by the fact that it is not possible to tell what services are provided for the fees charged.[15]

7.42 The Law Council of Australia and the Migration Institute of Australia argued for the abolition of this disclosure requirement. The Law Council submitted that the requirement to declare fees has limited value and is invasive of privacy. It stated:

> Apart from identifying the number of applications completed by an agent, it appears that Form 932 is of limited use, as it has not elicited evidence of overcharging which, at the time of its introduction, was thought to be widespread.

15 Evidence, p. S316.

> In requiring the disclosure of confidential information passing between an agent and his or her client, Form 932 is unnecessarily intrusive. The disclosure of this information may be in breach of privacy legislation and in breach of the contractual duty of confidence between solicitor and client[16]

7.43 The Law Council also submitted that in many situations it may be impossible to comply with the requirement to disclose the entire fee for a particular case. According to the Law Council, many practitioners 'time cost' their clients' cases on an hourly basis, and additional work on a case may take place after the application and declaration have been lodged. The Law Council argued that declaration should only be a requirement for those agents who have paid a concessional registration levy, in order that the number of cases lodged by such agents may be monitored.[17]

7.44 The Migration Institute of Australia commented that the requirement for a declaration of fees creates unnecessary paperwork. The Migration Institute stated:

> The Institute strongly objects to the present requirement to disclose fees and the completion of a Form 932. Most clients and especially commercial clients are highly fee conscious and protection of clients through a fee disclosure system to a third party is unnecessary and simply creates additional paperwork.[18]

Scale of fees

7.45 A separate proposal put to the Committee was that an indicative scale of fees should be introduced for work undertaken by migration agents. In some submissions, it was argued that an indicative scale of fees would act as a guide for agents, consumers and the Board as to what is reasonable. IARC, for example, stated:

> IARC is aware that many people have paid excessive amounts (an IARC client was charged $18 000) to a migration agent because they often lack knowledge of what is a legitimate amount to pay for the kind of service provided. As vulnerable consumers of migration agent services people have no real way of assessing what is a reasonable charge. The introduction of a scale of fees for

16 Evidence, p. S205.

17 Evidence, p. S206.

18 Evidence, p. S132.

> migration advice would act as a guide for consumers so that they can make more informed choices between migration agents through a comparison of value for money i.e. what service is offered for how much.[19]

7.46 The Legal Aid Commission of New South Wales agreed with the proposal to introduce a scale of fees, noting that currently fees can vary by very wide margins for the same work. The Commission argued that a scale of fees would provide prospective applicants with benchmark figures of recommended costs to be charged by migration agents. It suggested that a scale of fees could be structured in two ways:

- an hourly rate for assistance such as taking instructions, perusal of documents, research, preparation of the application, typing and photocopying; or
- an outline of fees for common types of work which could act as a benchmark for uncomplicated applications.[20]

7.47 The Legal Aid Commission emphasised that the scales only would be recommended fees, with the agent and applicant always having the option of preparing a cost agreement which reflected the particular requirements of the application.[21]

7.48 DIEA also supported the introduction of an indicative scale of fees. DIEA commented that such a scale would provide the Board with an initial point of reference for handling complaints about overcharging, and would enable informed clients to gauge for themselves whether fees charged or quoted were within reasonable bounds. DIEA, however, indicated that a scale of fees should not be included in the legislation, and should not result in any additional monitoring than is already provided for in the Code. DIEA warned that any such move would be against the thrust of the recommendations in the Hilmer Report on National Competition Policy.[22]

7.49 The Migration Agents Registration Board suggested that discussions should be undertaken with the various agencies which represent agents to establish a schedule which would detail a recommended range of fees for each visa category. The Board submitted that such a schedule should not be compulsory, but that agents

19 Evidence, p. S271.

20 Evidence, p. S48.

21 Evidence, p. S48.

22 Evidence, p. S317.

should be required to give a copy of the schedule to the clients. Commenting on the benefits of a recommended fee schedule, one member of the Board stated:

> I think the argument is that if you put a ceiling everyone will charge the ceiling. I do not subscribe to that view. I think that competition will exist provided someone can charge under the ceiling. But what we are assured of, if you do put that ceiling in, is that you do not have $7 000 charged for a job that might, in terms of time and energy, only be worth $500. I think that would make prosecution and investigation of these matters far easier and quicker.[23]

7.50 In contrast, the Migration Institute of Australia submitted that, instead of a scale of fees, it may be appropriate to adopt some other means of providing clients with relevant and useful guidance on fees, such as the periodic publication of surveys of fees actually charged for a range of services. The Migration Institute argued against the introduction of a prescribed schedule of fees, commenting that the fixing of fees to a prescribed statutory rate would be anti-competitive. The Institute submitted that fee scales can:

- reduce or eliminate price competition, which is an essential feature of effective competition;
- reduce the incentive to economise on costs and to adopt innovations in management, business structure and service delivery;
- limit the capacity of more efficient service providers and new entrants to attract clients by discounting; and
- discourage the supply of high quality services at rates above the scale.[24]

7.51 The Migration Institute suggested that an unrealistic prescribed schedule of fees could drive experienced, competent and well respected operators from the migration consulting industry, thus leaving the consumer at the mercy of the very people the system is trying to eliminate, namely the fringe and questionable operators.[25] The Institute also argued that it would be extremely difficult to

23 Evidence, p. 586.

24 Evidence, p. S140.

25 Evidence, p. S133.

establish a schedule of fees which adequately could take into account the range of variables which could apply in any application. The Institute stated:

> No prescribed schedule of fees, unless it has hundreds of variables and subcategories can start to provide for the numerous procedures, applications, advice and representations which agents make upon a regular basis or indeed work done urgently, or to meet deadlines imposed by statute.[26]

7.52 Mr Henry, a registered migration agent, also suggested that it would be difficult to establish an appropriate scale of fees. He stated:

> . . . it would not be practical to develop a fee regime based on a fee for service basis given the many permutations and combinations of applications, the different levels of complexity involved in them, and the different levels of assistance that particular clients applying for the same visa class may need. While it may be possible for the industry to devise a guideline schedule of hourly rates for work handled by agents with different levels of expertise and experience, most clients want to be billed on a fee for service basis. The best advice that consumers can be given is to shop around and this should be the message which the Department provides in any information which it puts out about the scheme.[27]

Handling of client funds

7.53 A further fee related issue raised during the inquiry was the existing requirements which the Code imposes on agents in relation to the handling of client funds. As noted, the Code provides that an agent should maintain proper records of all financial transactions with clients, and has a duty to keep clients' funds separate from each other and from the agent's funds.

7.54 During the inquiry, the Committee was told that it is common practice for agents to require the payment of fees up front prior to commencing work on a client's case. The fee received generally is deposited directly into an operating account. Difficulties can arise if a client claims that work has not been carried out satisfactorily. It was submitted that, in such situations, repayment is difficult to enforce.[28]

26 Evidence, p. S138.

27 Evidence, p. S89.

28 Evidence, p. S271.

7.55 In addition, agents can hold, on the client's behalf, monies which are to be paid to DIEA. These monies can include a visa processing fee, which is payable to DIEA on the lodgement of a visa application. Such processing fees can vary depending on the nature of the visa application. In some instances, the applicant is not charged for visa processing. By contrast, in various visa classes fees ranging from $30 to $1 715 are payable to DIEA for the processing of a visa. In addition to lodging such sums temporarily with their agents, clients also may entrust agents with other monies payable to DIEA prior to the grant of a visa, such as health and education charges or, for overstayers seeking a visa in Australia, the tax owing under the *Migration (Delayed Visa Application) Tax Act 1992*. Under this Act, certain overstayers applying for visas in Australia are required to pay a tax of $3 000 for each year they have remained in Australia without a visa.

7.56 The Committee received little evidence about problems with agents handling client funds in an inappropriate manner. Nevertheless, DIEA indicated that there may be a need to introduce more stringent requirements for holding and spending clients' monies, and greater accountability through notification and reporting requirements.[29]

7.57 In two submissions, it was suggested that migration agents should be required to operate trust accounts.[30] It was proposed that any fee paid in advance to an agent should be held in a trust account and should be transferred to the agent's account only when the work which has been paid for has been undertaken. In addition, monies which are payable to DIEA but which are lodged temporarily with an agent while the agent prepares the application also would be required to be held in a trust account until the application and accompanying payment was lodged with DIEA. IARC submitted that the use of trust accounts would offer protection to clients who pay in advance and would provide a realistic chance of restitution if required.[31]

7.58 The Migration Institute of Australia, by contrast, suggested that the establishment of a formal trust account may not be practicable due to the high fees and administration costs of such a system. Nevertheless, the Migration Institute proposed that registered agents should be required to operate a separate account for a client's application fees and other outgoings relevant to a client's application.[32]

29 Evidence, p. S482.

30 Evidence, p. S64, p. S271.

31 Evidence, p. S271.

32 Evidence, p. S131.

Indemnity insurance

7.59 Another proposal put to the Committee was that all migration agents should be required to carry professional indemnity insurance. In support of this proposal, the Law Council of Australia stated:

> . . . unless agents carry professional indemnity insurance and fidelity cover (cover for dishonest misappropriation of clients' funds), the client has no real redress in the case of negligent or dishonest conduct on the part of the agent.[33]

7.60 The Law Council noted that because legal practitioners already are required to hold professional indemnity insurance and contribute to fidelity fund coverage, clients who use agents who are not legal practitioners are at risk.[34]

Conclusions

7.61 It is evident that a primary concern of those requiring immigration assistance is the price they have to pay for that assistance. Indeed, concerns about overcharging were a major catalyst for the establishment of the Migration Agents Registration Scheme.

7.62 Migration agents have broad discretion over the level of fees which they charge for immigration advice and assistance. The consumer is provided with no guidance as to what might be a reasonable fee to pay a migration agent for work undertaken in relation to a particular visa application. The Code of Conduct simply provides that the fees charged by an agent should be reasonable in the circumstances of the case. The legislation and the Code do not specify what is reasonable in any circumstances.

7.63 The suggestion that an indicative scale of fees be introduced for work undertaken by migration agents drew a mixed response from participants in the migration advice industry. Some suggested that adoption of such a proposal would be anti-competitive and would be in direct contrast to developments in other professions aimed at reducing adherence to standardised fees. Others suggested that an indicative scale of fees would assist consumers in making informed choices, would reduce the capacity of unscrupulous agents to overcharge for their services, and would assist the Board to investigate and take disciplinary action in response to instances of overcharging.

33 Evidence, p. S206.

34 Evidence, p. S206.

7.64 In the Committee's view, the lack of guidance in relation to fees is a noticeable deficiency within the existing Scheme. As the migration advice industry is still developing, it is likely that many agents will not have the necessary experience to determine the appropriate level of fee to be charged for a particular case. In addition, many consumers of immigration advice are uninformed about the visa application process, and may have little opportunity or ability to shop around for a better deal.

7.65 The Committee, however, is not in favour of establishing scales of fees for migration agents. Such a move would be contrary to the competition policy reforms recommended in the Hilmer report on national competition policy and being pursued by the Commonwealth and State Governments. It also would be contrary to efforts by the Trade Practices Commission in recent years to remove pricing controls and increase price competitiveness within professions, including, for example, the legal profession.

7.66 Instead, the Committee considers that a survey of fees charged by migration agents should be conducted and published on a regular basis. Such a survey should indicate the range of fees which migration agents generally have charged for various types of work undertaken in relation to various visa classes. The survey could become an indicative guide for consumers and migration agents regarding the fees which can be expected to be charged for particular services. This will assist consumers in negotiating service agreements with registered agents, and will assist agents in setting reasonable fees. Such a survey also can be used by the Board as a guide for determining whether an investigation for overcharging is warranted.

7.67 In the Committee's view, the survey of migration agents' fees should be conducted and published by the Bureau of Immigration, Multicultural and Population Research, in consultation with representatives from the migration advice industry. An appropriate commencement point for the survey would be the thousands of migration agent declarations lodged with DIEA, which contain information on the fees charged by registered agents and which should be made available to the Bureau.

7.68 If the Committee's proposal in relation to a survey of migration agents' fees is adopted, then the need for migration agents to disclose fees to DIEA diminishes. In this regard, it is relevant to note the advice from DIEA that the existing practice of disclosing fees to DIEA yields little benefit in terms of assisting in a determination of whether agents are overcharging. Clearly, DIEA does not have the resources to examine and investigate the fees disclosed in the thousands of declarations lodged to date. The requirement that migration agents lodge declarations with each and every visa application for which they receive a payment creates much unnecessary and unprofitable paper work and should be abolished. Given that the Committee already has recommended the abolition of the concessional registration levy for the majority of migration agents, Form 932 is unnecessary. Registered agents should continue to be required to sign and include their names and registration numbers on client application forms.

7.69 On another issue, the Committee considers that the existing requirement for migration agents to keep client funds separate from the agent's funds should be stated more emphatically within the Code of Conduct. In the Committee's view, clause 28 of the Code should be redrafted to provide specifically that migration agents must keep separate client accounts in which all outgoings relevant to a client's application are held prior to payment of such monies to DIEA or other relevant agencies, and where client fees are held until such time as the work which has been contracted for has been completed satisfactorily.

7.70 As for the suggestion that migration agents should be required to take out professional indemnity insurance, the Committee is not inclined to recommend that such insurance be compulsory at this time. The Committee, however, considers that agents should be encouraged actively upon registration to take out such insurance.

Recommendations

7.71 **The Committee recommends that:**

30. as an indicative guide to fees charged by migration agents, the Bureau of Immigration, Multicultural and Population Research, in consultation with representatives from the migration advice industry and by reference to the migration agents declarations (Form 932) lodged to date with the Department of Immigration and Ethnic Affairs, conduct and publish on a regular basis a survey of fees charged by migration agents for the various types of work undertaken in relation to various visa classes;

31. the Code of Conduct for migration agents be amended to abolish the requirement for migration agents to lodge with each immigration application in relation to which they have provided paid immigration assistance a migration agents declaration (Form 932) disclosing the entire fee charged in relation to that application;

32. clause 28 of the Code of Conduct for migration agents be amended to clarify a migration agent's obligation to maintain client and agent funds in separate accounts; and

33. migration agents be encouraged but not be required to take out professional indemnity insurance.

Obligations for professional conduct

7.72 As noted above, alongside their obligations in relation to clients, migration agents also have obligations to assist, or not to impede, the workings of departmental decision making processes. The Code of Conduct requires migration agents to act in accordance with the law (clause 2), and contains various other clauses which seek to ensure that agents do not misrepresent their clients' cases, and do not lodge unfounded or vexatious claims.

Misrepresentation

7.73 The Code of Conduct seeks to ensure that migration agents do not misrepresent their clients' cases when making applications to DIEA or when seeking review of migration decisions. Clause 8 of the Code of Conduct states:

> Whilst an agent cannot be responsible for misinformation provided by a client, an 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.

7.74 In addition, Clause 18 states:

> Subject to a client's instructions, an agent has a duty to provide sufficient relevant information to the Department of Immigration and Ethnic Affairs, to allow a full assessment of all the facts against the relevant criteria. For example, an agent should 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.

7.75 During the inquiry, the Committee was provided with some evidence on the extent to which migration agents breach the Code of Conduct by misrepresenting their clients' cases. The RRT noted:

> We find that a large number of submissions are just plainly incorrect, misleading and sometimes drawn up on standard lines. They have a standard submission which they put in with slight variations from case to case. The standard submissions usually contain passionate pleas based on country conditions and generally without reference or taking instructions from the applicant. In many instances, the tribunal member has asked an applicant about certain matters set out in an application

and the applicant has reacted with a great deal of surprise.[35]

7.76 In one recent RRT case, for example, the RRT member noted that the 'inconsistent, confused and rhetorical' statement which the applicant's solicitor had prepared was inconsistent with the applicant's repeated claims concerning his political involvement in his country of origin, and was 'highly damaging' to the applicant's case in many respects. The RRT described certain passages in the solicitor's submission as being 'not English except in the sense that the words are taken from the English language'. The RRT commented further that as an effective communication of the applicant's claims, the solicitor's submission was 'close to worthless'.[36] Observations of this kind feature in various RRT decisions.[37]

7.77 The issue of misrepresenting clients, and the effectiveness of the Code of Conduct in dealing with this problem, attracted little comment in submissions or at public hearings. One witness suggested that the Code of Conduct should be strengthened by incorporating within the Code a definition of professional misconduct.[38] DIEA indicated that it may be appropriate to consider the way in which professional conduct is defined in the Code, so that more specific guidance is given to the Board as to the sort of behaviour which may require action by the Board.[39]

Unfounded or vexatious claims

7.78 The Code of Conduct also seeks to ensure that migration agents do not lodge unfounded or vexatious claims on behalf of clients. Clause 14 of the Code states:

> An agent should not encourage the lodgement of vexatious or grossly unfounded applications under the Migration Act or Migration Regulations; eg applications under the Migration Act or Migration Regulations which have no hope of success.

7.79 This rule concerning lodgement of vexatious and unfounded claims does not state that migration agents are acting improperly if they lodge a vexatious or grossly unfounded application. Rather, it requires that migration agents should not

35 Transcript of briefing, 29 September 1994, p. 11.

36 RRT Ref. N93/01046, 28 June 1994, Sydney, transcript pp. 22-25.

37 see footnote 53, Chapter Three.

38 Evidence, p. S63.

39 Evidence, p. 747.

encourage the lodgement of such applications. The distinction is an important one, particularly in the context of the applications which may be required to be made in order to access ministerial consideration of particular cases.

7.80 The Migration Act is drafted so that a visa applicant who wishes to seek ministerial discretion for entry or stay which is not in accordance with the migration rules must lodge a visa application, be refused that application, seek a review of that application and then approach the Minister to set aside the negative decision of the review authority. In order for visa applicants to be considered by the Minister for entry to and stay in Australia on discretionary compassionate or humanitarian grounds, it may be necessary, in certain circumstances, for migration agents to lodge applications which on their face may lack merit. Under present arrangements, the Minister can grant such entry or stay on public interest grounds only by setting aside a review authority's decision. In such cases, the original visa application may be entirely unmeritorious, in that it may be clear that the applicant does not satisfy the criteria for that visa class. Nevertheless, in order to access ministerial discretion, the visa application must be lodged and refused, and an application for review of that refusal decision must be lodged and rejected by the review authority before ministerial discretion can be exercised.

7.81 The existing legislation and Code contain no guidance as to the types of application which could or should be considered unfounded or vexatious. In this regard, the Law Council of Australia argued that there are many cases which at the outset appear to have no hope of success but which ultimately succeed.[40]

7.82 The Law Council also submitted that, in circumstances where a client wishes to proceed with an application, even where a lawyer advises the client that there is no chance of success, the lawyer is placed in a situation of conflict between the lawyer's obligation to the client and the obligation under the Code of Conduct not to lodge vexatious or grossly unfounded applications. Commenting on this dilemma, Mr Cunliffe, representing the Law Council, stated:

> If a client comes to me and says that they want to make a refugee application, I will counsel them as to what I believe are their prospects of success in that application. If they insist that they want to make the application although I say that I think that they have not got any chance of succeeding, it is my duty as a lawyer–which perhaps conflicts with the duty under this code of practice–to say, 'I do not think you are going to succeed, and I advise you not to do so. But if those are your instructions, I will proceed'.[41]

40 Evidence, p. 527.

41 Evidence, p. 525.

7.83 On this point, the lawyer member of the Migration Agents Registration Board suggested that while the specific circumstances of a case may create some uncertainty, as a general principle, a lawyer's duty to the law precedes his/her duty to the client. Mr Power stated:

> As a past secretary of the ethics committee of the legal profession in Victoria, I would like to say that while the facts situation obviously can become uncertain, it is clear that the duty of a solicitor to the court and to the law precedes that duty that a solicitor should have to his client and to other practitioners. The hierarchy goes: law, court, client, other practitioner. There is a clear hierarchy of duties, every solicitor must operate by these duties, and the duty to the law and to the court is at a far higher level than that duty which exists to his client, as a general principle.[42]

7.84 Generally at law, lawyers can be penalised for pursuing frivolous or vexatious claims. In many instances, such claims can be struck out, or the lawyer who proceeds with such a claim may be liable personally for the costs of such litigation. In one Federal Court case, a solicitor who lodged an entirely unmeritorious visa application, and who represented the client in an application to review the refusal of that unmeritorious visa application, was ordered by the Federal Court to pay both the client's and DIEA's costs in relation to that litigation. The Federal Court observed that the application lodged by the solicitor reflected a serious failure to pay reasonable attention to relevant law and fact and adversely affected the client, disentitling her from applying for another entry permit.[43]

7.85 In examining this issue, the Committee had regard to immigration litigation in other jurisdictions in which the issue of unfounded or vexatious immigration claims has been considered. In the United States of America, for example, disciplinary action or penalties have been imposed on immigration attorneys who have lodged unfounded or vexatious claims.

7.86 In the United States, filing a frivolous petition for immigration review in federal court may not be, of itself, sufficient grounds to warrant disciplinary measures. However, repeated use of the appellate process solely to delay an alien's deportation, without any legal basis, may be sanctionable. United States courts have been reluctant to interfere with an attorney's duty to represent clients zealously, but have not tolerated dilatory and groundless tactics. In some instances, frivolous immigration appeals have resulted not only in disciplinary action against the attorney, but also in the imposition of damages and costs against both the attorney

42 Evidence, p. 570.

43 *Da Sousa v Minister for Immigration and Ethnic Affairs*, Federal Court, French J, WAG 22 of 1992, 5 April 1993, unreported.

and the client. Attorneys have been reminded to confine their zealous representation of clients within the bounds of the law.[44]

7.87 In one such case, re Bithoney, an attorney filed but did not proceed with nine frivolous petitions for review of immigration decisions. In disciplinary proceedings against the attorney, the attorney argued that his filing of frivolous claims was not improper but rather was required by the attorney's obligation to zealously represent his clients. The United States Federal Court stated:

> The mere finding that a position advanced was frivolous must not be cause for discipline of the attorney because of the danger that such action might inhibit the bar from the most vigorous advocacy of clients' positions and thus restrict meaningful access to the court. Furthermore, an attorney would face an intolerable dilemma when the needs or instructions of his client would force him to argue a position which he personally may feel to lack merit, and which could lead to punitive action against him by the court.
>
> Sensitivity to these considerations requires that we . . . insure that there is breathing room for the fullest possible exercise of the advocacy function. But there must be limits . . . the duty of a lawyer is to represent his client zealously, but only 'within the bounds of the law'. The processes of this court are made available for the general good; to the extent that they are abused they become less available to those genuinely in need of them. Such abuse also lowers public esteem for the judicial system and, particularly in the situation presented here, can unjustifiably result in unmerited benefit.[45]

7.88 In this case, the attorney's licence was suspended and the attorney was fined five hundred dollars.

7.89 In another case, where the attorney lodged baseless appeals against a deportation decision and petitioned for the client to be considered an immediate relative and a refugee, the Second Circuit Court directed the applicant and attorney

44 Heiserman and Pacun, op. cit., p. 986.

45 486 F. 2d. 319 (1st Cir. 1973), in ibid. at 982-983.

to pay double the costs and $1 000 damages for filing the frivolous motions. The Court stated:

> The petition appears to represent one more step in an outrageous abuse of civil process through persistent pursuit of frivolous and completely meritless claims in an effort to stall a deportation that has been repeatedly ordered by the Board and has been affirmed by us. [T]here is not even a colorable legal or factual basis for the relief sought before the Board or here . . . our government should not be forced to tolerate the practice, all too frequently adopted by aliens once they become subject to a deportation order, of using the federal courts in a seemingly endless series of meritless or dilatory tactics designed to stall their departure as long as possible.[46]

7.90 The extent to which there are problems in Australia with unfounded immigration applications is unclear. While the existing arrangements for accessing ministerial discretion may appear to invite applications from those who otherwise would not gain entry or stay under the migration rules, at the same time the legislation precludes applicants from making repeat applications if they are refused a visa in Australia. While limited evidence was received on this matter during the inquiry, the issue, nevertheless, is an important one, as it impacts on the efficient operation of on-shore decision making processes.

Conclusions

7.91 During the inquiry, little evidence was presented to the Committee concerning the lodgement of unfounded and vexatious claims by migration agents, and the adequacy of the Code of Conduct in dealing with this problem. Few witnesses commented on the provisions within the Code of Conduct for migration agents concerning vexatious and unfounded claims.

7.92 The Code, as currently drafted, simply outlines broad principles discouraging agents from presenting vexatious or grossly unfounded claims. No guidance is provided in the migration legislation or the Code as to what types of application could and should be considered vexatious or grossly unfounded. Clearly, the matter is contentious and requires clarification.

7.93 In the Committee's view, the Code of Conduct should be amended to provide specifically that migration agents should not lodge vexatious or grossly unfounded immigration applications. The current wording of clause 14 of the Code, which states that migration agents should not encourage such applications, should

46 *Der-Rong Chour v INS*, 578 F. 2d. 464 (2nd Cir. 1978), cert. denied, 440 US 980 (1979) in ibid., 984.

be strengthened. In addition, the Code of Conduct should contain guidance as to what constitutes a vexatious or grossly unfounded application. In this regard, DIEA and the Board should initiate consultations with representatives from the migration advice industry with a view to providing within the Code of Conduct more specific guidance as to what constitutes a vexatious or grossly unfounded immigration application, and what an agent's obligations are when clients seek to lodge such applications.

Recommendations

7.94 **The Committee recommends that:**

34. clause 14 of the Code of Conduct for migration agents be amended to provide that a migration agent should not lodge vexatious or grossly unfounded applications under the *Migration Act 1958* or Migration Regulations; and

35. the Department of Immigration and Ethnic Affairs and the Migration Agents Registration Board initiate formal consultations with representatives from the migration advice industry with a view to providing within the Code of Conduct for migration agents more specific guidance as to what constitutes a vexatious or grossly unfounded immigration application, and what an agent's obligations are when clients seek to lodge such applications.

Chapter Eight

MONITORING AND DISCIPLINING MIGRATION AGENTS

Introduction

8.1 The Migration Act provides a range of sanctions applicable to migration agents. As noted by the then Minister when introducing the migration agents legislation into the Parliament:

> The Scheme is backed up by tough penalties reflecting the Government's concerns.[1]

8.2 The Migration Act proscribes as criminal offences certain conduct relating to the provision of immigration advice and assistance. In addition, the Migration Act provides a disciplinary mechanism allowing for the suspension or deregistration of migration agents.

8.3 A primary function of the Migration Agents Registration Board is to monitor the conduct of migration agents, and take or initiate disciplinary action for conduct which is unlawful or in breach of the Code of Conduct. To this end, the Board has powers to investigate and act on complaints against migration agents.

8.4 In this chapter, the Committee examines the processes for investigating complaints relating to the provision of immigration advice and assistance, as well as the arrangements for monitoring and disciplining migration agents.

Sanctionable conduct

8.5 The Migration Act and Migration Agents Regulations set down in detail the standards of conduct which are to be followed when giving immigration advice and assistance. In Chapter Seven, the Committee considered the Code of Conduct which migration agents are required to observe. Breaches of that Code can lead to disciplinary action against an agent.

8.6 At the same time, the Migration Act proscribes certain conduct relevant to the giving of immigration advice and assistance which may make a person liable to criminal sanctions. Those sanctions can be imposed on registered agents as well as persons who give immigration advice and assistance without being registered.

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1 Parliamentary Debates (Hansard), House of Representatives, 27 May 1992, p. 2939.

8.7 Certain sanctions provided for in the Migration Act are applicable to persons who are not registered as migration agents and who provide immigration advice or assistance, make representations on immigration cases, or advertise their services as migration agents. Under section 280 of the Migration Act, persons who provide immigration assistance without being registered are liable to a penalty of up to $5 000. Under section 281, unregistered persons who provide immigration assistance for a fee or reward, or who seek a fee or reward for making immigration representations are liable to imprisonment for up to 10 years. In addition, a person is liable to imprisonment for up to two years if he/she:

- make false representations that he/she is a registered agent (Section 283);
- advertises the provision of immigration assistance if not registered (Section 284); and
- advertises that another person who is not a registered agent can provide immigration assistance (Section 285).

8.8 Other sanctions in the Migration Act are applicable to both registered migration agents and unregistered persons who, in the course of giving immigration assistance, misrepresent their powers or abilities to influence the making of a particular immigration decision. Under section 334 of the Migration Act, persons are liable for up to two years imprisonment if they knowingly or recklessly make a false or misleading statement about their abilities or powers, or another person's abilities or powers, to induce or influence the making of decisions, or of a particular decision, under the Migration Act. Under section 335, persons are liable for up to two years imprisonment if they undertake, in return for a payment or other reward, that a decision under the Migration Act to a particular effect will be made. Alongside these penalties, section 336 empowers the Court to order reparation where a person has suffered as a result of an offence committed under section 334 or section 335.

8.9 The Migration Act also provides sanctions for migration agents who fail to notify the Board of changes in their circumstances or the arrangements in relation to their practice. Under section 312 of the Migration Act, a registered migration agent is liable for a penalty of up to $10 000 if he/she does not notify the Board as soon as is reasonably possible after any one of the following events occurs:

- he/she becomes bankrupt;
- he/she applies to take the benefit of any law for the relief of bankrupt or insolvent debtors;
- he/she compounds with his/her creditors;
- he/she makes an assignment of remuneration for the benefit of his/her creditors;

- he/she is convicted of an offence under a law of the Commonwealth or of a State or Territory;
- he/she becomes an employee, or becomes the employee of a new employer, and will give immigration assistance in that capacity;
- he/she is a member or an employee of a partnership, gives immigration assistance in that capacity and a member of that partnership becomes bankrupt; or
- he/she is an executive officer or an employee of a corporation, gives immigration assistance in that capacity and a receiver of its property or part of its property is appointed, or it is placed under official management, or it begins to be wound up.

The complaints mechanism

8.10 Under the Migration Act, the Migration Agents Registration Board is empowered to initiate investigations into and take disciplinary action against migration agents who do not act in accordance with the law or who breach the Code of Conduct. Section 331 of the Migration Act states:

> The Board has the power to do all things necessary or convenient to be done for, or in connection with, the performance of its functions.

8.11 Section 307 of the Migration Act empowers the Board to initiate any investigation which is necessary to fulfil its functions. The Board can request the Secretary of DIEA to carry out such investigations (see paragraph 8.18).

8.12 There are no provisions in the Migration Act dealing with the lodging, investigation or determination of complaints made against migration agents. It appears to have been intended that the Board be proactive in initiating investigations into matters within its jurisdiction.

Lodging of complaints

8.13 Despite the lack of legislative provisions dealing with a complaints process, the investigatory and disciplinary processes of the Board generally are set in train when a complaint is made against a migration agent. As noted by one member of the Board:

> [The Board] was always going to be a complaints driven regulatory body. I think that is how it was conceived . . .

> A regulatory body is what it is; it deals with issues as they arise.[2]

8.14 There are, however, no provisions in the Migration Act concerning the manner or method by which complaints against migration agents are to be made. The Migration Act is silent as to who can make a complaint, how that complaint should be made, and with whom the complaint is to be lodged. Instead, the Board, relying on its general power to do anything which is necessary or convenient in the performance of its functions, has directed that any complaint made against a migration agent is to be referred to the Board for its consideration.[3]

8.15 Brief reference to the Scheme's complaints mechanism is provided in a DIEA Fact Sheet on the Scheme. In that Fact Sheet, it is stated:

> If a person is dissatisfied with the advice or services provided by an agent, they should contact the Migration Agents Registration Section of the Department of Immigration and Ethnic Affairs . . . A written statement outlining the complaint is required . . . A complaint can be lodged at any time, and will be considered by the Migration Agents Registration Board, which has the power to apply penalties ranging from warnings to deregistration.[4]

8.16 While the Fact Sheet emphasises that clients can make complaints against their agents, in effect any person can make a complaint about a registered agent. In Chapter Three, the Committee detailed the statistics on complaints made against migration agents since the establishment of the Scheme. Those figures, from 21 September 1992 to 6 May 1995, show that:

- 47 percent of complaints were made by DIEA officers;
- 47 percent of complaints were made by clients of migration agents;
- 3 percent of complaints were made by anonymous sources;
- 2 percent of complaints were made by the IRT; and
- 1 percent of complaints were made by the RRT.[5]

2 Evidence, p. 588.

3 Evidence, p. S124.

4 Evidence, p. S365.

5 Evidence, p. S504.

Handling of complaints

8.17 As noted, all complaints against registered migration agents and persons who have applied for registration are referred to the Board for consideration. The Board is not empowered to investigate complaints against persons who either are not registered or are not seeking registration as migration agents. Investigation of such persons is carried out by DIEA independent of the Board.

8.18 Various options are available to the Board in considering complaints against registered agents. The Board may:

- consider the complaint and decide that no action is warranted;
- direct that the complaint be investigated by the Secretary of DIEA and that a report be presented to the Board for its consideration; and
- publish the complaint to the agent and request a response from the agent.

8.19 In accordance with section 307 of the Migration Act, the Board may request the Secretary of DIEA to arrange for the making of any investigation which the Board thinks necessary in order to fulfil its functions, and to give the Board a report of that investigation together with any material relevant to the consideration by the Board of a registration application or a possible disciplinary action under section 303.

8.20 Investigations are conducted on behalf of the Board by DIEA's specialist investigation unit located at the Bankstown Regional Office in Sydney, New South Wales. According to DIEA, where the Board requests the investigation of a complaint, the person against whom the complaint is made is given an opportunity to respond to the allegations which have been made.[6]

8.21 Under section 308 of the Migration Act, the Board also may require a registered agent at any time to:

- make a statutory declaration in answer to questions in writing by the Board; or
- appear before the Board, or a single member of the Board, and answer questions; or
- provide the Board with specified documents or records relevant to the agent's continued registration.

6 Evidence, p. S312.

8.22 As the Migration Act contains no provisions on the complaints mechanism, the Board's ability to refer a complaint to an agent who is the subject of the complaint is constrained by the provisions of the Privacy Act. In this regard, the Board advised that it has adopted procedures whereby the Board seeks the permission of the complainant before the complaint is published to the agent. According to the Board, if that permission is not given, no further action is taken in relation to the complaint unless information on the complaint can be put to the agent without disclosing the identity of the complainant.[7]

8.23 In cases where, after the receipt and investigation of a complaint, the Board considers that disciplinary action against an agent is required, the Board is required under section 309 of the Migration Act to inform the agent and provide the agent with an opportunity to comment. Section 309 states:

> (1) If the Board is considering refusing a registration application, the Board must inform the applicant of that fact and the reasons for it and invite the applicant to make a further submission in support of his or her application.
>
> (2) If the Board is considering the cancellation or suspension of a registered agent's registration, or cautioning the agent, it must inform the agent of that fact and the reasons for it and invite the agent to make a submission on the matter.
>
> (3) In this section:
>
> 'submission' means:
>
> (a) a statutory declaration; or
>
> (b) a written argument.

8.24 The Board advised that its usual practice is to give a person 21 days to provide a submission relating to a complaint.[8]

8.25 When the Board receives such a submission from an agent, it may, in accordance with section 310 of the Migration Act, either decide the matter on the basis of the submission, or give the person who made the submission the opportunity to appear before the Board and then decide the matter. The Board advised that its usual practice is to invite a person to appear before it when it is considering the cancellation or suspension of an agent's registration, or when it is considering rejection of a person's application for registration on the grounds of integrity.[9]

7 Evidence, p. S453.

8 Evidence, p. S454.

9 Evidence, p. S454.

There are, however, limited provisions in the Migration Act dealing with the conduct of such hearings. Section 311 of the Migration Act states that the Board, in considering a registration application or a possible disciplinary action under section 303, is not bound by technicalities, legal forms or rules of evidence, and must act according to substantial justice and the merits of the case. The Migration Act does not specify whether a person can be represented at such hearings, whether the person can or must be given an opportunity to cross examine a complainant, or whether the person simply answers questions from the Board.

8.26 From 21 September 1992 to 22 November 1994, the Board considered a total of 233 complaints concerning 111 registered agents or applicants for registration. In that period, thirteen agents appeared before the Board. Seven more agents were scheduled to appear before the Board at its first meeting for 1995. As at 22 November 1994, the Board had finalised 96 complaints against 53 registered agents or applicants, and 137 complaints against 72 agents remained outstanding. According to the Board, it was waiting for either a response from the agents, or for investigations to be finalised, or for decisions to be served.[10]

8.27 The complaints finalised by the Board took an average of 25 weeks to complete. As at 22 November 1994, the complaints which had not been finalised had been outstanding for an average of 39 weeks.[11]

8.28 The Migration Act provisions concerning the manner in which decisions of the Board, and the reasons for those decisions, are disclosed to the relevant agent are somewhat ambiguous. The Migration Act refers to publicising decisions which may refer to a public disclosure that a decision to deregister or suspend an agent has been taken. In this regard, Section 305 of the Migration Act states:

> If the Board cancels or suspends the registration of a registered agent, and it is no longer possible for the cancellation or suspension to be set aside on appeal, the Board must publish a statement that:
>
> (a) sets out the decision of the Board to cancel or suspend registration; and
>
> (b) sets out the reasons for the decision; and
>
> (c) sets out the Board's findings on any material question of fact; and
>
> (d) refers to the evidence or any other material on which the findings of fact were based.

10 Evidence, p. S454.

11 Evidence, p. S454.

Disciplinary action

8.29 At the completion of the investigatory process, the Board has the power to initiate disciplinary action against registered agents where the Board finds that such action is warranted. Section 303 of the Migration Act states:

> The Board may:
>
> (a) cancel the registration of a registered agent by removing his or her name from the register; or
>
> (b) suspend his or her registration; or
>
> (c) caution him or her;
>
> if it becomes satisfied that:
>
> (d) the agent's application for registration was known by the agent to be false or misleading in a material particular; or
>
> (e) the agent becomes bankrupt; or
>
> (f) the agent is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance; or
>
> (g) an individual related by employment to the agent is not a person of integrity; or
>
> (h) the agent has not complied with the Code of Conduct prescribed under section 314.

8.30 Under section 304 of the Migration Act, if the Board suspends the registration of a registered agent, the Board may:

- set a period of suspension of not more than five years; or
- set a condition or conditions for the lifting of the suspension, one of which may be that at least a set period of suspension has ended.

8.31 As noted in Chapter Three, as at 6 May 1995, of the 400 complaints received against 163 registered migration agents or applicants, the following outcomes had been achieved:

- 76 complaints involving 16 people resulted in registration being refused, cancelled or suspended;

- 185 complaints involving 111 people were not substantiated or were found to have no case to answer; and
- 139 complaints involving 36 people were before the Board.[12]

8.32 As at 3 March 1995, the Board had cancelled one agent's registration and three agents had been suspended, two for six months and one for 31 months.[13]

Prosecutions

8.33 Alongside the disciplinary action which can be taken by the Board, the conduct of migration agents also can be referred to the Director of Public Prosecutions for prosecution. In addition, persons who provide immigration assistance without being registered can be prosecuted. In relation to complaints concerning unregistered practice, DIEA noted that, where there is no malpractice, DIEA's usual policy is to inform the person against whom the complaint is made of the requirement for registration. Action is taken by DIEA if a further complaint is received.[14]

8.34 As at 6 May 1995, 33 matters relating to migration agents had been referred to the Director of Public Prosecutions.[15] DIEA advised that most referrals are in relation to allegations about unregistered persons providing immigration assistance and/or advertising that they are providing immigration assistance. Other grounds for referral have included making false statements, forging documents and obtaining benefit by deception.[16]

8.35 As noted in Chapter Three, of the 33 matters referred to the Director of Public Prosecutions, the results as at 6 May 1995 were:

- 5 summonses issued but not served;
- a guilty finding in 7 matters;
- 1 matter before the court;

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12 Evidence, p. S505.

13 Evidence, p. S486.

14 Evidence, p. S312.

15 Evidence, p. S505.

16 Evidence, p. S490.

- no action proposed by the Director of Public Prosecutions in 8 matters; and

- 12 matters pending.[17]

8.36 The sentences handed down in these matters ranged from a three year good behaviour bond to a fine of $3 000. In addition, as noted at paragraph 3.45, separate police action has resulted in eight migration agent matters being brought before the courts, with seven matters resulting in guilty findings and one matter yet to be heard. The sentences in these matters have ranged from 12 months imprisonment to a $3 000 fine.[18]

Inquiry evidence

8.37 Evidence received by the Committee relevant to the monitoring and disciplining of migration agents was focused on the following issues:

- the complaints based nature of the Scheme's disciplinary processes;

- the existing procedures for handling complaints against migration agents;

- the role of DIEA in the complaints process;

- the disciplinary powers of the Board; and

- public awareness of the complaints mechanism.

Monitoring of agents

8.38 As noted above, the disciplinary processes of the Migration Agents Registration Scheme are primarily complaints driven. The Board responds to complaints made against persons applying for registration and against registered agents.

17 Evidence, p. S505.

18 Evidence, p. S505.

8.39 The Board noted that in recent times the focus of its work has shifted from the registration of migration agents to consideration of complaints against agents. The Board stated:

> The first year and a half of the Scheme was almost totally taken up with considering applications for registration. Talking in round terms, it has been only in the last six months–which would constitute, probably, three meetings of the Board–that actual complaints have started to be driven via the system.[19]

8.40 The Board indicated that, in comparison to the first year of the Scheme's operation, there was a 200 percent increase in the number of complaints received during the second year.[20]

8.41 In some submissions, it was suggested that the reliance on a complaints based system may allow some unscrupulous and incompetent agents to remain undetected because of a reluctance among visa applicants to lodge complaints. It was argued that many applicants would not have the confidence to complain about their migration agents. RACS, for example, stated:

> A person new to any system is likely to be unsure and distrustful of it no matter how well-intentioned the system may be. This is particularly so where there are linguistic, cultural and experiential impediments to an understanding of the right to and value of making a complaint.[21]

8.42 It also was suggested that visa applicants may be reluctant to complain about agents for fear that they may prejudice the outcome of their applications. The Springvale Community Aid and Advice Bureau commented:

> Where appropriate we have encouraged our client to make complaints against advisers but they have rarely agreed to do so because of the fear that it will prejudice the outcome of their case.[22]

8.43 This issue is discussed further in later sections of this chapter dealing with DIEA's role in the complaints process.

19 Evidence, p. 551.

20 Evidence, p. S453.

21 Evidence, p. S264.

22 Evidence, p. S190.

8.44 In response to these concerns, it was argued that, instead of simply reacting to complaints made against agents, the Board should adopt a more proactive role in monitoring the conduct of migration agents. The Migration Institute of Australia, for example, stated:

> There is a need for both the Department of Immigration and Ethnic Affairs and the Migration Agents Registration Board to be proactive . . . An example of this would be to monitor advertising in the ethnic press.[23]

8.45 One registered agent argued that, rather than relying solely on complaints to be lodged, a system should be established which would allow abuses of the Scheme to be identified. Mr Henry proposed, for example, that representations made to the Minister should be checked against the register of migration agents and action should be initiated immediately against unregistered agents making such representations.[24]

8.46 In response, DIEA indicated that resources are targeted to areas of immediate concern determined on the basis of information which becomes available to the Board or DIEA, often through complaints.[25] In this way, the finite resources available to the Board and DIEA are utilised in targeting problems which are known to exist, rather than in searching for problems which may have yet to be identified.

8.47 Related to this issue, a separate proposal was that the IRT and RRT should become more proactive in reporting to the Board incompetent agents who appear before the Tribunals. The Springvale Community Aid and Advice Bureau argued that where individual members of the IRT or RRT have concerns about the performance of a particular agent, they should be empowered to bring those concerns to the attention of the relevant Tribunal's Principal Member or Registrar, who should be able to refer such concerns to the Board for its consideration.[26] One member of the RRT, Ms Germov, went one step further by suggesting that the Migration Act be amended to include a provision obliging DIEA, the IRT and RRT to refer matters to the Board for investigation if the relevant body is satisfied that there has been a breach of the rules or the legislation by a migration agent.[27]

23 Evidence, p. S134.

24 Evidence, pp. S89-S90.

25 Evidence, p. 707.

26 Evidence, p. S190.

27 Evidence, p. S66.

8.48 In response, the IRT objected to the proposal to include a mandatory reporting requirement as suggested by Ms Germov. The IRT argued that such a requirement would remove from the IRT any discretion in determining whether a matter was sufficiently serious to warrant being reported. According to the IRT, a mandatory reporting requirement could result in the IRT being required to refer to the Board any instance of a false or misleading statement made in an application prepared with the assistance of a migration agent, whether that be incorrect spelling of names or more serious matters involving an attempt to mislead DIEA. Commenting on the potential ramifications of a mandatory reporting requirement, the IRT stated:

> Not only would this have a deleterious impact on the Tribunal's resources but it would also potentially be damaging to community perceptions of the Tribunal. The Board would perceive the Tribunal as wasting time with trivial matters. Agents whose conduct was reported to the Board could justifiably feel aggrieved if the conduct involved was trivial. Applicants to the Tribunal could justifiably feel that the Tribunal was behaving more like a police officer in respect of agents rather than a merits review tribunal and that it was being distracted by this reporting function from carrying out its primary task, namely to provide a mechanism for the merits review of certain migration decisions. Finally, community confidence in the Tribunal could suffer if it was known that it was making a stream of trivial reports or reports which proved upon investigation to be unfounded to the Board.[28]

8.49 While accepting that its members should report breaches of the Code of Conduct which come to its attention, the IRT argued that referral of matters to the Board should be left to its members' discretion. In this regard, the IRT advised that its Principal Member has written to IRT members and staff reminding them of the need to give consideration to referring to the Board instances of misconduct or incompetence on the part of registered migration agents.[29]

8.50 The Principal Member of the RRT also wrote to members on the procedures to be adopted for making complaints against advisers. The Principal Member indicated that complaints to the relevant legal bodies and the Migration

28 Evidence, p. S423.

29 Evidence, pp. S424-S425.

Agents Registration Board should be made through the RRT's Director of Research, with the Principal Member retaining the discretion to determine the fate of any such reference. The Principal Member stated:

> . . . members are reminded that the Tribunal is not a compliance body and that only clear breaches of professional ethics or practices should be referred. Members must be conscious of the general interest of the Tribunal's relations with the professions and advisers and of its power to affect the reputation of advisers.[30]

Complaint handling process

8.51 During the inquiry, some concerns were expressed about the existing process for handling complaints against migration agents. In particular, those concerns were focused on the timeliness of the existing process, and the extent to which that process affords natural justice to migration agents.

Timeliness

8.52 In some submissions, concerns were expressed about the time which is required to finalise complaints made against migration agents. As noted at paragraph 8.27, complaints finalised as at 22 November 1994 had taken an average of 25 weeks to complete, and complaints yet to be finalised had been outstanding for an average of 39 weeks.[31]

8.53 In this regard, the Legal Aid Commission of New South Wales was critical of the existing administrative arrangements for considering complaints against migration agents. The Commission noted that because Board meetings are scheduled at intervals of six weeks, it can take six weeks before the Board decides whether to consider the complaint. According to the Commission, another six weeks will elapse before the Board can give the matter any consideration, with a decision on whether to refer the matter for investigation being made only at the third meeting, a further six weeks away. The Commission indicated that this can result in a minimum time lag of three months before any action is considered. Given the necessary requirements of investigation, notification of the agent and the

30 Evidence, p. S375.

31 Evidence, p. S454.

opportunity for response by the agent, it may take six months before any disciplinary action is recommended by the Board. The Commission commented:

> During this time unfit agents can continue to operate with impunity and without future applicants being aware that the agent is being considered for disciplinary action by the Board.[32]

8.54 The Legal Aid Commission of New South Wales suggested that the Board should develop a procedure for 'fast tracking' repeated complaints about a migration agent which indicate that there may be gross violations of the Code of Conduct.[33]

8.55 Supporting the need for an expeditious complaints process, RACS stated:

> . . . there can be few areas where there is a greater need for expeditious investigation and action in relation to complaints than in the areas of immigration and refugee law where the consequences of negligent or dishonest advice can be so severe.[34]

8.56 The Migration Institute of Australia, which also called for more expeditious handling of complaints, suggested that delays in the complaints process are due mainly to resource availability. The Institute stated:

> In this regard, the government should place more resources in place and broaden the makeup of the Migration Agents Registration Board to properly deal with complaints.[35]

8.57 In a similar vein, the Ethnic Communities' Council of New South Wales proposed that there should be an increase in resources for the Scheme, in order to ensure the functioning of proper powers of investigation and to enable efficient monitoring of activities by registered agents.[36]

32 Evidence, p. S53.

33 Evidence, p. S54.

34 Evidence, p. S264.

35 Evidence, p. S134.

36 Evidence, p. S180.

8.58 In response to the criticisms of delays in the complaints process, the Board suggested that various factors contribute to the slow nature of that process. First, because the Board operates only on a part-time basis, and the power to initiate investigations rests only with the Board, there is an inevitable delay between the time when a complaint is made and the time when the Board is able to consider the matter at the next available meeting. According to the Board, this problem is exacerbated by the volume of matters which it is required to address at each meeting. Secondly, there is an inevitable time lag associated with the establishment and conduct of a proper investigation. The Board indicated that generally the relevant agent is interviewed as part of the investigation and a detailed report is prepared for the Board's consideration. As the investigations are conducted by DIEA officers based in Bankstown, New South Wales, the time required for interviewing agents can increase where investigations or interviews have to be conducted interstate. Thirdly, the requirement to comply with natural justice principles results in inevitable delays, because the Board is required to seek the response of migration agents concerning allegations made against them before it can make a decision on the complaints. As noted previously, the usual practice of the Board is to give migration agents 21 days to respond by way of a written submission to complaints made against them. In addition to considering that written submission, the Board also may choose to interview the agent, which can delay the process further.[37]

8.59 One Board member suggested that the complaints process could be expedited if there was a full-time commissioner responsible for investigations on behalf of the Board, or more flexible arrangements for delegating the Board's powers. Mr Power stated:

> It is built into the system that it is going to be slow, because we are part-time. It would need a full-time commissioner with powers to conduct the investigation and bring a completed investigation to the next meeting of the Board, or the Board would need to be allowed to delegate such powers back to the secretariat . . . It is very difficult to conduct investigations on an eight-week, six-week or five-week lead time when virtually every step has to be condoned by the Board; whereas if the power of investigation was a bit more flexible, so that the officers of the Department could get the response, conduct automatic investigation processes, complete the investigation and then bring it to us and let us see what the evidence is, it would cure the time problem.[38]

37 Evidence, pp. 592-593.

38 Evidence, pp. 592-593.

Natural justice

8.60 A separate criticism of the complaints process made to the Committee concerned the extent to which natural justice principles are adhered to in the consideration of complaints. One registered agent suggested that the existing process for handling objections to registrations and complaints against migration agents is not in accordance with natural justice principles because agents are not informed of complaints made against them, and are unable to respond to those complaints, until the Board has considered the matter and decided that the agent has a case to answer. Mr Joel stated:

> Implicit in the nature of the current legislation is the abandonment of the assumption of innocence . . . In other words, your opportunity to redress whatever complaint that you might have rests only after condemnation by the secretariat and the Board. Then you are notified that there has been a complaint.[39]

8.61 Mr Joel suggested that the system is unjust because the Board can consider any complaint against an agent, or any objection to a registration, no matter how unfounded or sinister, can have that complaint or objection investigated, and can come to the view that disciplinary action may need to be considered, or a registration refused, before an agent is made aware of the complaint or objection and given an opportunity to respond. According to Mr Joel, there is no requirement for a migration agent to be notified of a complaint, or to be given an opportunity to respond to the complaint, until the Board has come to a view that disciplinary action against the agent should be considered.[40]

8.62 Mr Joel also expressed concern that, within the Migration Act, there are no provisions which set out the minimum time frame in which an agent is able to respond to a complaint, and no requirement for an agent to be given a hearing concerning the complaint.[41] In an article on the Scheme provided as an exhibit to the inquiry, Mr Joel commented:

> The character of the registration scheme is in danger of displaying the unintended consequence of the application of a militant form of McCarthyism–perhaps even worse when one considers a person is without the guaranteed right of a hearing.[42]

39 Evidence, p. 252.

40 Evidence, p. 252.

41 Evidence, p. 252.

42 Adrian Joel, 'Procedural structure is faulty, Migration Agents Registration Scheme', *Law Society Journal*, August 1994, p. 45.

8.63 In response to these criticisms, the Board advised the Committee of the procedures it has adopted to ensure that natural justice is provided to agents against whom a complaint is made, and that privacy principles are upheld. As noted at paragraph 8.22, when the Board receives a complaint regarding an agent, it seeks permission from the complainant to publish the complaint to the agent and, on obtaining that permission, gives the agent 21 days to respond to the complaint. After the agent's response is received, the Board considers the complaint. The Board noted that if it comes to the view that there is merit in the complaint, the Board usually invites the agent to come before the Board to discuss the matter in more detail and to give the agent an opportunity to present his/her case. In this regard, the Board stated:

> The reason one cannot go straight from receiving the complaint to dealing with it is because of the provision of natural justice that is contained within the Act and the fact that we are conscious that procedural fairness has to be extended to these people.[43]

8.64 As for Mr Joel's criticism that registered migration agents or applicants for registration are not made aware of complaints against them before such complaints are referred to the Board, the Board stated:

> . . . advice from the Attorney-General's Department was that there was no obligation on the Secretary or his delegate to ask an applicant to comment upon adverse third party material before the matter was referred to the Board.[44]

8.65 In relation to this matter, the Board suggested that part of the problem is the wording of the provisions in the Migration Act dealing with referrals to the Board. The Board commented:

> . . . people take exception to the fact that within the correspondence that passes from the Board to them relating to their registration we quote the wording of the Act. The Act talks about a person not having integrity. That raises the hackles of most people, at least those who have come back to us . . . People immediately take umbrage at the fact that they are being accused of lacking integrity . . . But it is the wording of the Act.[45]

43 Evidence, p. 580.

44 Evidence, p. 581.

45 Evidence, p. 582.

Role of DIEA

8.66 The role of DIEA in the complaints process also attracted comment during the inquiry. In particular, some concern was expressed that DIEA's involvement in various aspects of the Scheme gives rise to potential conflicts of interest which can affect the operation of the complaints mechanism.

8.67 As noted in Chapter Six, DIEA has multiple roles within the Scheme. First, the Secretary of DIEA receives registration applications from migration agents, considers and approves straight forward applications, and refers controversial applications to the Board. Secondly, the Secretary of DIEA is Chairperson of the Board. Thirdly, the Board's secretariat is provided by DIEA. Fourthly, investigations requested by the Board are undertaken by DIEA's investigation staff located at Bankstown, New South Wales. In addition to these roles, DIEA officers also are able to lodge complaints against migration agents, based on information made available to those officers when dealing with immigration cases. Indeed, as noted at paragraph 8.16, up to 6 May 1995, 47 percent of complaints against registered migration agents had been lodged by DIEA officers.

8.68 As discussed in Chapter Six, DIEA's multifaceted involvement in the Scheme has given rise to criticisms that the Board which administers the Scheme is not independent of one of the major stakeholders in the Scheme, and that DIEA has undue influence within the Scheme. A particular concern was that DIEA officers are able to lodge complaints against migration agents, which in turn are investigated by DIEA, whose representative in turn presides over the decision which is made by the Board in relation to the complaint.

8.69 In this regard, one proposition put to the Committee was that DIEA officers may be using the complaints mechanism unfairly because they are privy to the content of visa applications before DIEA, which may be the basis for their own justified or unjustified conclusions. According to IARC, this perception can create mistrust of the Scheme's operation.[46]

8.70 In a similar vein, Mr Joel suggested that DIEA is able to use the complaints mechanism and its position on the Board to act against agents who pursue cases aggressively and irritate DIEA.[47] No specific evidence was provided

46 Evidence, p. S274.

47 Evidence, p. 252.

to support this suggestion. Indeed, in response, the Board indicated that DIEA does not influence decisions of the Board. As stated by one Board member:

> The only dependence that we have on the Department is that they carry out the secretarial work and work which the Board directs the Department to do to gather information. The Board makes its own decisions.[48]

8.71 A separate concern, as noted at paragraphs 8.41 and 8.42, was that many visa applicants may be reluctant to lodge a complaint against a migration agent either because they fear that it will have an adverse affect on their chances of success, or because they may be illegal entrants and may be fearful of compliance action against them. This concern arises because DIEA officers receive and investigate such complaints and would be duty bound to report irregularities in a complainant's status to DIEA's compliance section. In this regard, IARC commented:

> Although there are no statistics available it is IARC's belief that only a small number of clients who have legitimate complaints actually pursue their options. Our anecdotal evidence suggests that this is because the client is either illegal and believes a complaint will result in compliance action, unaware that a complaint mechanism exists or is under the mistaken belief that a complaint will in some way adversely affect an application which has already been lodged.[49]

8.72 In a similar vein, VIARC stated:

> The complaints mechanism currently in place has encountered difficulties in operation peculiar to the sphere of migration. The consequences of acting on inappropriate advice often leads to expiry or cancellation of an entry permit. The applicant may then be classified as an illegal entrant, possibly without the right of review. In anyone's terms, this means the applicant will be frightened about detection by the Immigration Department and, in turn, worried that a formal complaint with an officer of what appears to be the same department, may lead to such detection. While not all incorrect or misleading advice leads to such a dire situation, it is our experience that fear of reporting an agent remains very prominent in an applicant's mind.[50]

48 Evidence, p. 594.

49 Evidence, p. S272.

50 Evidence, pp. S197-S198.

8.73 IARC proposed that to overcome this reluctance to complain about unscrupulous and incompetent migration agents, complainants who are illegal entrants should be provided with a guarantee that their presence will not be communicated to DIEA.[51] VIARC agreed that some form of confidentiality provision would be the only mechanism to solve this dilemma.[52]

Strengthening the Scheme

8.74 Alongside the criticisms of the existing complaints and disciplinary processes of the Scheme, various suggestions were made for improving those processes. Those suggestions included proposals for strengthening the powers of the Board and improving public awareness of the Scheme and its complaints mechanism.

Powers of the Board

8.75 During the inquiry, it was suggested that the Board should have additional powers to ensure the effective operation of the Scheme. In particular, it was argued that the Board should have increased investigatory powers and greater flexibility in relation to disciplinary action. Many of the proposals were put forward by the Board itself, based on its experience with the operation of the Scheme to date.

8.76 Under existing arrangements, the Board is able to require only registered migration agents to provide information to the Board. It does not have the same power in relation to applicants for registration. The Board proposed that its power to request information under section 308 of the Migration Act should be extended to applicants for registration as migration agents, in order that the Board can have before it all the necessary information relevant to the consideration of an application. The Board suggested that a time limit should be specified by which an agent or applicant must respond to the Board's request. According to the Board, failure to meet the time limit should be an offence.[53]

8.77 The Board also was concerned that there is no specific provision within the Migration Act which empowers the Board to deal with complaints against migration agents. According to the Board, it relies on section 331 of the Migration Act, which empowers the Board to do all things necessary to fulfil its functions. In the Board's view, the authority to investigate complaints should be stated explicitly in the Migration Act, and that the term 'complaint' should be defined to mean anything which is not in support of an application or agent.[54]

51 Evidence, p. S273.

52 Evidence, p. S198.

53 Evidence, p. S123.

54 Evidence, p. S124.

8.78 Another proposal from the Board was that it be empowered to take evidence on oath or affirmation, and that a penalty be introduced for a refusal to be sworn or answer questions before the Board.[55]

8.79 The Board also proposed that there should be greater flexibility in the type of sanction which the Board is able to impose on migration agents who do not act in accordance with the Code of Conduct. As noted previously, the Board currently has the power to caution an agent or suspend or cancel an agent's registration. The Board suggested that there should be scope for agents to be fined by the Board. In this regard, one Board member, Mr Power, stated:

> I think it would enhance the efficiency and the reputation and substance of the system if we had a greater range of punishment powers . . . such as fining. It is a little bit difficult when your only powers of punishment are cancellation, which is clearly affecting someone's livelihood, or suspension, and there is nothing much in between until you get to an admonishment or a reprimand.[56]

8.80 In addition, the Board submitted that it should have the authority to to direct an agent to refund any part or all of the fee charged, and that this authority should extend to the refund of DIEA's visa application lodgement fee where a visa applicant has paid this fee to the agent and the agent has failed to lodge the application. The Board also proposed that failure to comply with a Board directive on this matter should be an offence.[57]

8.81 The suggestions for more flexible sanctions and the power to order consumer redress was supported in various other submissions. Ms Germov, a full-time member of the RRT, stated:

> There should be provisions in the Act which specifically provide for a wider range of sanctions such as reprimands, fines, suspension, damages and awards of costs.[58]

55 Evidence, p. S123.

56 Evidence, p. 585.

57 Evidence, p. S122.

58 Evidence, p. S65.

8.82 On the issue of consumer redress, the New South Wales Department of Consumer Affairs commented:

> It appears that the Registration Scheme has no special provision for consumer redress and relies on existing court or tribunal mechanisms. As sums up to $21 000 have been involved in complaints handled by the Department, this may be an area where change is desirable.[59]

8.83 An associated concern in some submissions related to the consequences of an agent being deregistered or suspended. It was noted that the Scheme provides no mechanism for managing the caseload of a suspended or deregistered agent. The Board suggested that agents who cease to practise should be obliged to notify their clients in writing of this fact and inform them that they should either deal directly with DIEA or approach another agent. According to the Board, failure to do so should be an offence.[60] Other proposals on this point were that the Board should have the power to administer the deregistered agent's caseload, or that a receiver should be appointed so that clients are not disadvantaged as a result of an investigation and subsequent finding of guilt by the Board.[61]

8.84 A further suggestion was that the Board should have a specific power to refer complaints about lawyers to the relevant law societies and bar associations. The Law Council of Australia stated:

> Perhaps it ought to be a recommendation of this Committee that the migration legislation be strengthened to make it explicit that complaints received about practising lawyers can and should be referred to the relevant law society, law institute or other body.[62]

Public awareness

8.85 Alongside the suggestions for increasing the powers of the Board, it was argued in various submissions that, if the Scheme is to operate efficiently and effectively, there needs to be greater community awareness of the Scheme and its complaints mechanism.

59 Evidence, p. S172.

60 Evidence, p. S123.

61 Evidence, p. S180.

62 Evidence, p. 523.

8.86 The Migration Act requires that certain information regarding the Scheme be made available to the public. Section 289 of the Migration Act requires that the Secretary of DIEA must publish in the Commonwealth Gazette details of any registration application received by the Secretary, so as to provide an opportunity for any member of the public to object to the registration of the applicant within six weeks of the gazettal. Section 287 requires that the Secretary of DIEA maintain a register of registered migration agents which must be available for inspection by any person. Section 305 provides that the Board must publish a statement regarding the cancellation or suspension of a registration.

8.87 DIEA advised that, alongside these legislative requirements, various initiatives have been adopted to publicise the Scheme, including:

- at the commencement of the Scheme, a publicity campaign in the mainstream and ethnic press which aimed at advising potential and practising migration agents about the requirement to register and the transitional arrangements which would apply;
- a pamphlet on the Scheme, available through DIEA regional offices;
- information sheets on the Scheme, providing information on what assistance can be given without registration, the complaints mechanism and the use of migration agents;
- since November 1993, a fact sheet on the Scheme providing information on the number of registered agents, the qualifications necessary for registration, fees and the complaints process;
- information seminars on the Scheme and the complaints process conducted in all capital cities and selected regional centres; and
- some use of bilingual information officers to inform ethnic communities about the Scheme.[63]

8.88 During the inquiry, however, various criticisms were made regarding the lack of publicly available information on the Scheme. The Ethnic Communities' Council of New South Wales, for example, commented:

> Two years since its inception, very little information is publicly available about the implementation and

63 Evidence, p. S314.

> operation of the Scheme; the effectiveness of its complaints mechanisms and monitoring activities; and compliance with on-going training requirements.[64]

8.89 Various witnesses suggested that persons who seek immigration assistance have little knowledge regarding their right to complain about an agent, and how such complaints should be made. One registered agent even suggested that he had not met any client who knows of the complaints mechanism.[65]

8.90 Alongside such general criticisms, concerns also were expressed about the lack of public information made available by the Board regarding its investigations and disciplinary actions against agents. The Legal Aid Commission of New South Wales stated:

> The Board does not make publicly available any information about its investigation and disciplinary actions against agents. It is therefore difficult for practitioners in this jurisdiction to understand what is considered by the Board to be a breach of the Code, and what sanctions may apply.[66]

8.91 The Legal Aid Commission of New South Wales argued that it is in the interests of better practice to inform registered migration agents and interested members of the public about the Board's disciplinary actions and the extent of investigations undertaken by the Board. The Commission indicated that it is only through the provision of such information that migration agents can develop a clear understanding of what the Board considers to be acceptable standards of conduct.[67]

8.92 In a similar vein, the Legal Aid Commission of Victoria submitted that the reporting of outcomes may lead to greater confidence in the complaints mechanism and may serve as an educative tool for migration agents.[68]

8.93 In various submissions, suggestions were made for improving community awareness of the Scheme. An often stated view was that there should be

64 Evidence p. S177.

65 Evidence, p. S18.

66 Evidence, p. S54.

67 Evidence, p. S55.

68 Evidence, p. S279.

increased publicity about the Scheme. In this regard, the Migration Institute of Australia stated:

> In terms of positive steps which could be taken to improve the effectiveness of the Scheme, the Institute suggests that there could be more widespread publicity of the fact that registration is a prerequisite of practising migration agents.[69]

8.94 In earlier consultations with DIEA, the Migration Institute suggested a number of initiatives to improve the awareness of clients, particularly those applying from overseas. These included:

- an information box on major application forms to explain the added protection provided by dealing with a registered agent;
- brochures which are more oriented towards the information needs of overseas clients which should be made available in processing offices in Australia and overseas; and
- signs, posters and advertisements advising potential clients about the Scheme and the risks of dealing with unregistered agents.[70]

8.95 In other submissions, it was suggested that increased publicity about the Scheme should be targeted specifically to the ethnic community media. One member of the Board argued that advertising in the ethnic press, radio and television was required on an ongoing basis.[71] In support of the suggestion for increased publicity about the Scheme among ethnic communities, the Ethnic Communities' Council of New South Wales stated:

> It is a well known fact that some migration agents target certain ethnic communities in their provision of advisory activities. In cases where migration agents were deregistered as a result of the Board's investigation, no publicity about this fact was available in community languages. This needs to be rectified in an attempt to alert potential clients who are members of these targeted groups.[72]

69 Evidence, p. S131.

70 Evidence, p. S94.

71 Evidence, p. S571.

72 Evidence, p. S178.

8.96 Another proposal put forward by the Board and endorsed by other witnesses was that the Board should publish an annual report which could include statistical data of the Board's activities, outcomes of investigations and short case notes on disciplinary and relevant criminal hearings.[73]

Conclusions

8.97 To operate properly, any registration scheme requires an effective and efficient process for monitoring industry participants and taking disciplinary action where their conduct is not in accordance with industry rules and regulations. A registration scheme without appropriate disciplinary mechanisms, or which has disciplinary mechanisms which are used infrequently or with infrequent success, will do little to increase public confidence in that industry.

8.98 During the inquiry, many criticisms of the Migration Agents Registration Scheme were focused on its lack of success to date in removing unscrupulous and incompetent agents from the industry. Witnesses suggested that the disciplinary processes of the Scheme are overly reliant on complaints from consumers, are not well known, are too slow and are ineffective. In response, the Board and DIEA indicated that their success in dealing with miscreant agents is improving over time as the Scheme is becoming better known and as the focus of the Board is switching from the registration process to the monitoring and disciplining of registered agents.

8.99 Recent statistics which indicate an increasing number of complaints against registered agents and an increasing number of disciplinary actions suggest the Scheme's disciplinary processes are beginning to show results. Nevertheless, the Committee considers that these processes need to be improved if the Scheme is to become truly effective.

8.100 The Committee considers that the functions and powers of the Board should be expanded to improve its effectiveness. In particular, the Board, with the assistance of its secretariat, should adopt a more proactive role in identifying unscrupulous and incompetent practice among migration agents. One specific measure could include monitoring of press advertising by migration agents particularly to determine whether agents are meeting the requirements of the legislation and Code of Conduct.

8.101 The Board also should have the power to deal with instances of unregistered practice. Given that a primary emphasis of the Scheme is to ensure that all persons providing immigration assistance are registered, the Board's lack of jurisdiction over unregistered practice is a noticeable omission which should be rectified. Specifically, the Board should be able to refer cases of unregistered practice to DIEA for action.

73 Evidence, p. S55.

8.102 It also appears that there is minimal contact between the Board and State law societies and bar associations regarding instances of unethical conduct by migration agents who are lawyers. In this regard, it is important to note that the legislation already provides the Board with the power to investigate and refer to the appropriate legal bodies any instances of unethical conduct by lawyers when undertaking immigration legal assistance. As recent statistics indicate that a significant percentage of complaints in relation to immigration assistance relate to work undertaken by lawyers, the Board should also have the specific power to refer to the relevant legal bodies unethical conduct by lawyers when providing immigration assistance.

8.103 A specific concern expressed to the Committee by the Board related to the Board's powers to obtain information from applicants seeking registration as migration agents. Presently, the Board's powers to request information and require persons to attend before it relate only to registered agents. The Committee agrees with the Board that there is a real need to extend these powers to applicants for registration as migration agents so that the Board can have all the information before it which the Board considers necessary for the proper determination of an application for registration.

8.104 Another specific concern raised during the inquiry was that the part-time nature of the Board can lead to lengthy time delays before the conduct of specific agents can be brought to the attention of the Board for consideration, investigation and decision. As indicated in evidence to the Committee, the disciplinary processes can take many months to run their course, during which time an agent may be able to continue practising. In the Committee's view, this problem could be alleviated if an independent Chairperson were appointed to the Board, as proposed at recommendation 24, and that Chairperson were granted the power to initiate and undertake investigations utilising the Board's secretariat and DIEA investigators. In this way, the independent Chairperson would not need to wait for a Board meeting to undertake an investigation, thereby helping to speed up the overall consideration of the case, which would still go before the Board for decision.

8.105 A further concern of the Committee is that while the disciplinary processes of the Scheme generally are initiated through complaints, the process for making complaints is not set down specifically in the Migration Act or Migration Agents Regulations. In the Committee's view, this omission should be rectified by specifying in the legislation how the complaints mechanism operates, including how a complaint should be made, how the complaint is dealt with, the rights of the complainant and the agent against whom the complaint is made, and the process by which decisions are handed down.

8.106 The Committee considers that it should be specified that any person can make a complaint against a registered agent, but that the complaint must not be anonymous. Complaints should be required to be made in writing to the Chairperson of the Board outlining the name of the agent against whom the complaint is being made and the nature of the complaint.

8.107 Under existing arrangements, the handling of a complaint, including decisions about whether an agent has the opportunity to appear before the Board, is left to the discretion of the Board. Given that decisions of the Board can affect a person's livelihood, the Committee considers that the process for dealing with a complaint should be set down in the legislation. In particular, it should be specified that an agent has a right to a hearing before the Board when the Board is considering a suspension or cancellation of the agent's registration. The process for conducting such a hearing also should be set down specifically. In this regard, the Board should have the power to take evidence on oath or affirmation. The legislation also should specify the rules concerning the status of interested parties, including the complainant, and the rules concerning the examination and cross-examination of witnesses. In addition, the Board should have the power to call relevant witnesses to give evidence before the Board and, where necessary, be cross-examined by and before the Board. It also should be specified that decisions of the Board must be provided to the agent in writing, outlining the reasons for the decision, and that a copy of the decision is to be provided to the complainant. Further, there should be penalties for obstruction of the Board's investigations and adjudications.

8.108 Better public information about the complaints process and about the disciplinary actions of the Board also is necessary if the Scheme is to be effective. The Board should be proactive in notifying the public of instances where agents have been suspended or deregistered in order to ensure that such agents do not continue practising because of community ignorance about their status. Specifically, notices about the agent's suspension or deregistration should be placed in DIEA offices and, where an agent has worked with members of a particular ethnic community, notices also should be placed in the relevant ethnic press. In addition, agents who are suspended or deregistered should be obliged to notify their clients of this fact. Failure to do so should be a punishable offence.

8.109 The Committee also considers that the Board should be provided with a broader range of sanctions which can be imposed on migration agents. Existing sanctions only allow for measures which prevent an agent from practising, thereby removing the agent's livelihood. In various circumstances, such a sanction may be inappropriate or too severe. Accordingly, the Committee is of the view that the Board should have the power to impose a sanction which will not only chasten the agent but also will serve to improve the agent's conduct and provide some restitution for the aggrieved client. In particular, the Board should have the power to impose fines, order the refund of fees, order the return of a client's documents, order payment of compensation, order an agent to undertake further education, and make orders relating to the management or employment practices adopted by agents in the conduct of their business. By providing additional disciplinary powers, the Board will have greater flexibility in taking action against migration agents where their conduct does not warrant suspension or deregistration.

8.110 In light of the enhanced role and powers of the Board proposed by the Committee, the Committee is of the view that cases considered by the Board should not be appealable to the AAT. Appeals on Board decisions should be allowable only to the Federal Court on a question of law.

8.111 Finally, the Committee agrees with the suggestion that the Board should produce its own annual report, to be presented to the Minister and tabled in the Parliament. This could become an important source of information on the operation and outcomes of the Scheme.

Recommendations

8.112 **The Committee recommends that:**

36. the Migration Agents Registration Board be proactive in monitoring the activities of migration agents, including by monitoring advertising by migration agents in the ethnic press, to ensure that agents comply with their obligations under the *Migration Act 1958*, Migration Regulations and the Code of Conduct for migration agents;

37. the Migration Agents Registration Board be provided with the specific power to refer instances of unregistered practice to the Department of Immigration and Ethnic Affairs for action;

38. the Migration Agents Registration Board be provided with the specific power to refer complaints about migration agents who are lawyers to the relevant law societies and bar associations;

39. the Migration Agents Registration Board be provided with the power to require applicants seeking registration as migration agents to provide further information and attend before the Board where necessary;

40. the independent Chairperson of the Migration Agents Registration Board, as proposed at recommendation 24, be provided with the power to initiate and undertake investigations of migration agents utilising the Board's secretariat and Department of Immigration and Ethnic Affairs investigators, and to present the findings of the investigations to the Board for consideration;

41. the process for making complaints against migration agents be defined in the legislation specifying that:

- **any person can make a complaint but the complainant must not be anonymous; and**
- **the complaint is to be made in writing to the Chairperson of the Migration Agents Registration Board detailing the name of the agent against whom the complaint is made and the nature of the complaint;**

42. the process for dealing with complaints against migration agents be specified in the legislation to provide that:

- **an agent has the right to a hearing before the Migration Agents Registration Board where the Board is considering suspending or deregistering the agent;**
- **the Board can take evidence on oath or affirmation; and**
- **the Board can call witnesses to give evidence and be cross-examined;**

43. penalties be included in the *Migration Act 1958* for obstructing the investigations and adjudications of the Migration Agents Registration Board;

44. the legislation specify that decisions of the Migration Agents Registration Board are to be provided to the relevant migration agent in writing, outlining the reasons for the decision, and that copies are to be made available to the complainant;

45. the Migration Agents Registration Board be proactive in publicising its decisions, including by way of notice in offices of the Department of Immigration and Ethnic Affairs and advertising in the media, particularly, where relevant, the ethnic media;

46. migration agents who are suspended or deregistered by the Migration Agents Registration Board be required to notify their clients to this effect, and failure by agents to so inform their clients be a punishable offence;

47. the Migration Agents Registration Board be provided with a broader range of sanctions which it can impose on migration agents, including the power to:

- **impose fines on registered agents;**
- **order the refund of fees;**
- **order the payment of compensation to a client;**
- **order the return of a client's documents;**
- **order an agent to undertake further education; and**
- **make orders in relation to an agent's management and employment practices;**

48. subject to the adoption of the recommendations for expanding the functions and powers of the Migration Agents Registration Board, decisions of the Board be appealable only to the Federal Court on a question of law; and

49. the Migration Agents Registration Board produce its own annual report to be presented to the Minister for Immigration and Ethnic Affairs and tabled in the Parliament.

SENATOR JIM McKIERNAN
CHAIRMAN

MAY 1995

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Appendix One

SUBMISSIONS

No.	Name of person/organisation
1	Mr Richard Griffiths Capital Monitor
2	Mr Richard Griffiths Capital Monitor (supplementary submission)
3	Mr Anthony Clarke
4	Confidential
5	Australian Federation of Travel Agents Ltd
6	Confidential
7	Mr Miller Harris Miller Harris Lawyers
8	E R Cope
9	Mr Eric Barr
10	Mr Justin McDonell
11	Confidential
12	Migrant Resource Centre of Newcastle and the Hunter Region Ltd
13	Coopers & Lybrand
14	Mr Harold Jones
15	Brian Murray & Associates
16	Australian Croatian Community Services
17	Legal Aid Commission of NSW
18	Ms Roz Germov

19	Ms Valerie Campbell
20	Australian Migration Program & Investments
21	Confidential
22	Mr J G McMahon J G McMahon and Co
23	Mr I Cunliffe
24	South Australian Multicultural & Ethnic Affairs Commission
25	Stirling Henry Migration Services
26	Inbound Tourism Organisation of Australia Ltd
27	Gilton Business Consultants
28	The New South Wales Bar Association
29	Immigration Review Tribunal
30	Australia India Society of Victoria Inc
31	Legal Aid Office (ACT)
32	Migration Agents Registration Board
33	Migration Institute of Australia Limited
34	Legal Aid Office (ACT)
35	Export & Commercial Research Services Pty Ltd
36	J P Migration Services Pty Ltd
37	Eaton & Associates
38	Office of Regulation Review Industry Commission
39	The NSW Cabinet Office
40	Ethnic Communities' Council of NSW Inc
41	Springvale Community Aid & Advice Bureau Inc

42	Victorian Immigration Advice & Rights Centre Inc
43	Law Council of Australia
44	Privacy Commissioner
45	Refugee Advice & Casework Service
46	Immigration Advice & Rights Centre Inc
47	Legal Aid Commission of Victoria
48	Australian Migration Program & Investments (supplementary submission)
49	Refugee Council of Australia
50	Department of Immigration and Ethnic Affairs
51	Ms Roz Germov (supplementary submission)
52	Immigration Review Tribunal (supplementary submission)
53	Chinese Australian Services Society
54	Australian Migration Programs & Investments (supplementary submission)
55	Department of Immigration and Ethnic Affairs (supplementary submission)
56	Australian Migration Program & Investments (supplementary submission)
57	Law Council of Australia (supplementary submission)
58	Migration Agents Registration Board (supplementary submission)
59	Mr Brian Murray (supplementary submission)
60	Immigration Advice & Rights Centre Inc (supplementary submission)

61	Refugee Review Tribunal (supplementary submission)
62	Migration Agents Registration Board (supplementary submission)
63	Department of Immigration and Ethnic Affairs (supplementary submission)
64	Department of Immigration and Ethnic Affairs (supplementary submission)
65	Department of Immigration and Ethnic Affairs (supplementary submission)

Appendix Two

EXHIBITS

1.	Letter dated 20 September 1994 from the Department of Immigration and Ethnic Affairs to the Legal Aid Commission of New South Wales regarding registration of Commission staff as migration agents.
2.	Letter dated 28 July 1993 from the Immigration Advice and Rights Centre to the Minister for Immigration and Ethnic Affairs regarding the Migration Agents Registration Scheme.
3.	Adrian Joel, 'Procedural structure is faulty, Migration Agents Registration Scheme', *Law Society Journal*, August 1994, p. 45.
4.	Brief by the Attorney-General's Department dated 17 October 1994 regarding the High Court case *Cunliffe v The Commonwealth*.
5.	Letter dated 29 September 1994 and 20 October 1994 from the Migration Agents Registration Board to the Springvale Community Aid and Advice Bureau.
6.	Letter dated 23 November 1994 from Mr R. Clifton-Steele, Principal Consultant BIC-Consult to Mr D.F. Castle, Chair, Law Council of Australia Migration Task Force regarding a comparison of the costs of practice of solicitors and migration agents.
7.	Brief by the Attorney-General's Department dated 10 November 1994 regarding the High Court case *Cunliffe v The Commonwealth*.
8.	Immigration Review Tribunal statistics for 1993-94 showing cases with and without advisers.
9.	Immigration Review Tribunal circular dated 8 November 1994 to IRT members and staff regarding the Migration Agents Registration Scheme.
10.	Letter dated 2 December 1994 from the Legal Aid Commission of Victoria providing information on the library resources available to Commission staff and a statistical breakdown of grants of assistance made by the Commission.

Appendix Three

WITNESSES AT PUBLIC HEARINGS

Witnesses/Organisation	Date(s) of appearances
Individuals	
Ms Giselle Bates	03.11.94
Mr Ian Cunliffe	03.11.94
Ms Rosaline Maria Germov	24.10.94
Mr John Gerald McMahon	25.11.94
Adrian Joel and Co.	
Mr Adrian Phillip Joel Principal	25.10.94
Australia India Society of Victoria	
Dr Gurdip Singh Aurora Chairman	03.11.94
Dr Kodikkakathu Saratchandran President	03.11.94
Australian Croatian Community Services	
Mr Anthony Henjak	02.11.94
Ms Rosie Jurina	02.11.94
Mr Michael Pernar	02.11.94
Ms Maria Radoslavic	02.11.94

Australian Federation of Travel Agents

Mr John Rowland Dart Chief Executive	25.10.94

Brian Murray and Associates

Mr Brian Louis Murray	24.11.94

Coopers and Lybrand

Ms Pauline Jean Mathewson	25.10.94

Department of Immigration and Ethnic Affairs

Mr David Cameron Adcock Acting Assistant Secretary	25.11.94
Mr Christopher Conybeare Secretary	25.11.94
Mr Philip Finley Director	25.11.94
Mr Edward Victor Killesteyn First Assistant Secretary	25.11.94
Mr Mark Anthony Sullivan Deputy Secretary	25.11.94

Ethnic Communities' Council of New South Wales

Ms Angela Chan Chairperson	24.10.94
Ms Eva Gerencer Regional Coordinator	24.10.94

Immigration Advice and Rights Centre Inc.

Mr Peter Blair Solicitor/Caseworker	25.10.94
Ms Jane Goddard Principal Solicitor	25.10.94

Immigration Review Tribunal

Ms Pamela Frances O'Neil Principal Member	25.11.94
Mr Richard Ben Phillips Senior Member (New South Wales)	25.11.94
Mr Giles David Short Acting Registrar	25.11.94

Law Council of Australia

Mr David Castle Chair	24.11.94
Mr Ian George Cunliffe	24.11.94
Mr Shaughn Morgan Legal Officer	24.11.94

Legal Aid Commission (Australian Capital Territory)

Mr Jason Lee Principal Solicitor	24.11.94

Legal Aid Commission of New South Wales

Mrs Elizabeth Mary Biok Legal Officer	24.10.94
Mr Harold Thomas Jones	02.11.94
Ms Patricia Geraldine Read Acting Senior Solicitor	24.10.94

Legal Aid Commission of New South Wales (cont.)

Mr John Preston Young	02.11.94

Legal Aid Commission of Victoria

Ms Elizabeth Gray Deputy Director	03.11.94
Ms Kim Magnussen Senior Migration Solicitor	03.11.94

McDonells Solicitors

Mr Justin John McDonell Solicitor	24.11.94

Migrant Resource Centre of Newcastle and Hunter

Ms Violetta Johanna Walsh Coordinator	25.10.94

Migration Agents Registration Board

Ms Carolyn Ashmore Migration Agent Representative	24.11.94
Ms Angela Chan Ethnic Communities Representative	24.11.94
Mr Steve Arthur Karas Immigration Review Tribunal Representative	24.11.94
Mr Kevin Joseph Power Lawyer Representative	24.11.94

Migration Institute of Australia

Mr Raymond John Brown Vice President	24.10.94
Mr Thomas Peter Drakopoulos National President	24.10.94

Migration Institute of Australia (cont.)

Mr Michael Thornton Member, National Executive	24.10.94

New South Wales Bar Association

Mr Matthew Smith	24.10.94

New South Wales Department of Consumer Affairs

Ms Susan Frazer Dixon Assistant Director	25.10.94

Office of the Privacy Commissioner

Mrs Helen Mary Gordon Policy Officer	24.10.94
Mr Kevin Patrick O'Connor Privacy Commissioner	24.10.94

Office of Regulation Review

Mr Paul Lawrence Coghlan Assistant Commissioner	24.11.94
Mr Blair Robert Comley Assistant Director	24.11.94

Refugee Advice and Casework Services

Ms Eve Marjorie Rose Lester	02.11.94

Springvale Community Aid and Advice Bureau

Ms Sharron Anne Dunbar	02.11.94
Ms Merle Valma Mitchell	02.11.94

Stirling Henry Migration Services

Mr Robert Stirling Henry Director	25.10.94

Victorian Immigration Advice and Rights Centre

Mr Matthew Thomas Beckmann	02.11.94
Ms Sarah Fisher	02.11.94