Australian Government

Department of Immigration and Citizenship

RESPONSE OF THE DEPARTMENT OF IMMIGRATION AND CITIZENSHIP TO THE DRAFT RESEARCH REPORT OF THE PRODUCTIVITY COMMISSION:

"ANNUAL REVIEW OF REGULATORY BURDENS ON BUSINESS: BUSINESS AND CONSUMER SERVICES - JUNE 2010"

DRAFT RECOMMENDATION 2.1 REGULATION IMPACT STATEMENTS
Pages XIV, XXIII, 19, 39 - 42

DRAFT RECOMMENDATION 2.1 (pages 39 - 42)

The Australian Government should improve the transparency and accountability of its consultation processes by:

- *incorporating a 'consultation' Regulation Impact Statement in the regulation-making process (in a similar manner to the COAG requirements) for use in public consultation*
- *requiring the Office of Best Practice Regulation to extend its monitoring and reporting to the quality of consultation, by explicitly reporting on compliance by departments and agencies with the best practice consultation principles*
- *using confidential consultation processes only in limited circumstances where transparency would clearly compromise policy outcomes.*

COMMENT:

The Department recognises the importance of consultation in the RIS process and the need to ensure that the Australian Government's best practice consultation principles outlined in Box 2.1 of the Report are adhered to.

The Department is currently considering ways to ensure its compliance with the OBPR regime is in accordance with best practice requirements.

DRAFT RECOMMENDATION 2.3 RELEASING SUPERANNUATION BENEFITS FOR DEPARTING TEMPORARY RESIDENTS
Pages XIV, XXIII, XXVIII, 19, 44 - 47

DRAFT RECOMMENDATION 2.3 (pages 44 – 47)
The Australian Taxation Office and the Department of Immigration and Citizenship should examine options that give departing temporary residents the ability to apply for their Australian superannuation payments at or before the time of their departure, rather than after they have left Australia.

COMMENT:

The Department recognises the importance of ensuring that the process for temporary residents to claim departing Australia superannuation payment (DASP) is a streamlined and seamless experience.

The Department notes that Investment and Financial Services Association Ltd (IFSA) has not provided quantitative evidence to support the claim that current DASP processes are inefficient due to the fact that a superannuation fund can only release benefits after receiving the DASP request and notification from the member once they have departed Australia. The Department welcomes IFSA providing any available evidence quantifying the steps of the DASP process that are perceived to be an administrative burden, so that this information may be analysed and considered further.

The Australian Taxation Office (ATO) administers legislation giving effect to the DASP scheme. As such, any changes to regulations surrounding DASP are the responsibility of the ATO. The Department notes, however, that a temporary resident who is planning to depart Australia may currently apply for DASP online prior to departure, via the ATO website. If a client makes an online DASP application prior to departure, the application can be saved until such a time as the applicant has subsequently departed Australia. After departure, the client may retrieve and submit the saved online application for assessment. Eligibility is then verified via an ATO-DIAC data exchange.

The Department also requests that the following terminology be amended prior to the draft report being finalised:

- The first sentence on page 44 under the heading '**Releasing superannuation benefits for departing temporary residents**' contains a factual error, referring only to visas that 'have been cancelled'. This sentence needs to be amended to read '…temporary residents of Australia, who have departed the country and provided evidence that their visas ***are no longer in effect***, are able to…..'
- The first sentence on page 44 under the heading '**Assessment**' implies that applications for DASP should be made at the time of physical departure from Australia at an air or seaport. The Department does not support any recommendation that would create an additional administrative burden on border (DIAC or Australian Customs and Border Protection Service) officers administering passenger movements at the point of departure from Australia. This sentence should be amended to read 'payment of superannuation benefits ***prior to departure*** rather than following their departure from Australia'.

The Department, in consultation with the ATO, is examining ways to improve client information regarding DASP lodgement procedures, including a review of web content and application forms to clarify when and how departing temporary residents may lodge their DASP applications.

TOURISM AND HOSPITALITY RELATED SERVICES
TRAVEL RELATED CHARGES

Visa charges (pages 110 – 111)

The Tourism and Transport Forum (sub. 5) noted that international delegates to conventions and exhibitions required a business visa when entering Australia. Delegates from the European Union and other European countries were eligible for an online electronic visa at no charge and other prescribed nations could obtain and electronic travel authority for $20. However, international convention delegates from other locations such as the Middle East, China and India had to apply for a 456 business visa at a cost of $105. Similarly, the Student Guardian Visa currently costs $450 and the processing time was longer for some regions and countries of origin such as the Middle East and India.

The TTF (sub. 5) considers that these arrangements placed Australia at a disadvantage in winning bids to host conventions and in the growing market for overseas students.

The Commission notes that these variations in visa arrangements and charges reflect the different processing times required for arrivals from particular destinations, which in turn reflects the relative risk of non-compliance with visa requirements and immigration regulations associated with arrivals from these destinations. Other differences are a result of agreements between the Australian Government and other countries relating to visa and entry requirements.

COMMENT:

The Department notes the Tourism Transportation Forum's (TTF) comments regarding the Visa Application Charges (VAC) for business visitors and student guardians. VAC charges have not prevented Australia from winning bids to host major events. For example, in 2009-10 Australia hosted the Lions Club International Convention, World Masters Games and the Parliament of the World's Religions. The Department welcomes dialogue with the TTF to explore this issue and address concerns around any specific events or event bids.

The VAC for visas is paid to consolidated revenue and helps to fund government functions generally. While there is no direct link between the VAC revenue and departmental appropriations, the Department is funded for processing visa applications, a range of migration-related activities, including visa compliance, border security and identity activities and humanitarian/refugee visa related activities. In certain circumstances applicants, including business visitors from the European Union, are exempt from the VAC requirement.

The Department endorses the comments made by the Productivity Commission regarding differences in visa arrangements, including processing times, being attributable to immigration risk levels, and limited VAC exemptions being attributable to bilateral government arrangements.

DRAFT RECOMMENDATION 4.2 AMENDING THE *MIGRATION ACT 1958* TO EXEMPT LAWYER MIGRATION AGENTS FROM THE MIGRATION AGENTS' REGISTRATION SCHEME
Pages XIV, XXIV-XXV, XXX, 127 - 135.

DRAFT RECOMMENDATION 4.2 (pages 127 - 135)

The Australian Government should amend the Migration Act 1958 to exempt lawyer migration agents from the Migration Agents' Registration Scheme. An independent review of the performance of lawyer agents, complaints handling and disciplinary procedures should be conducted three years after an exemption becomes effective.

COMMENT:
The Department does not agree with the Productivity Commission's position that the removal of lawyers from the regulatory framework for migration agents will not reduce the protection available to consumers. As noted in the Department's original submission, the Office of the Legal Services Commissioner (NSW) (NSW OLSC) does not consider immigration assistance to be within its remit and therefore will leave a significant proportion of the Department's clients without any form of protection. While excluding lawyers from the current regulatory framework for migration agents *may* result in a changed approach by the NSW OLSC, there is no certainty that this will happen nor that any one of the other legal services regulatory bodies will adopt such an approach.

While the Department supports moves to reduce unnecessary regulation, it does not intend to do so at the expense of a particularly vulnerable group of the consumers and does not consider an "on balance" approach appropriate here.

The Department has noted the Law Council of Australia's (LCA) statement in regards to whether the position of the NSW OLSC would be adopted nationally. While the LCA currently stated position may be that there is "little prospect" of this occurring, and notwithstanding the informal advice from the Complaints Manager of the Law Institute of Victoria (LIV), in its first supplementary submission to the *2007-08 Review of Statutory Self-Regulation of the Migration Advice Profession* (the Hodges Review) in 2008 the LCA stated that it would be "reasonable" for other jurisdictions to adopt the NSW position.

In July 2009, the Minister for Immigration and Citizenship, Senator Chris Evans invited the respective Presidents of the LCA and the LIV to clarify this position with the Department. They have yet to do so to date.

The lack of a consistent national approach to the inclusion, or otherwise, of immigration assistance within the purview of legal regulators does not support any detailed view of a 'harmonised' approach to national regulation of legal services.

The Department has previously requested the LCA's advice on how the various legal bodies have addressed complaints about lawyers providing services outside of direct legal practice in the past and how the individual state codes of conduct would apply to the provision of immigration assistance, in particular. The LCA has yet to reply to date.

The Department would also like to address the LCA's incorrect representation of the Department's position in relation to recommendations made by the Hodges Review. The Department has been moving ahead with the recommendations wherever possible. This includes continuing to seek to amend the *Migration Act 1958* to provide greater clarity to the definitions of both "immigration assistance" and "immigration legal assistance" as well as removing the ability of non lawyer migration agents to prepare documents for court.

The Department would like to take this opportunity to reject the LCA's statement in its supplementary submission that the elements of the Migration Agents Code of Conduct intended to support the efficient processing of applications for entry to, or to remain in, Australia as attempts to "control or punish" migration agents.

The Department stands by its original position provided to the Productivity Commission and will review the inclusion of lawyers with the current regulatory framework for migration agents once the national scheme for legal profession reforms is finalised. Should the Council of Australian Government's National Legal Reform process result in a true national approach to the handling of immigration assistance by lawyers, the Department would be better placed to consider the removal of lawyers from the current regulatory arrangements for migration agents. Any consideration would be predicated on assurances being received that all clients will be covered by the relevant legal body's oversight regardless of location within Australia.

COMMENTS FROM THE OFFICE OF THE MIGRATION AGENTS' REGISTRATION AUTHORITY

In addition to the above comments, the Department has consulted the Office of the Migration Agents' Registration Authority (MARA). Specific comments on issues raised in the draft report are outlined below.

4.3 Lawyers/migration agents (page 127)

The Law Council of Australia (LCA subs. 23 and 27) did, however, raise the issue of 'dual regulation' for lawyers that practise in the area of migration law. In addition to legal profession regulation, these lawyers must also comply with the Australian Government regulatory scheme for migration agents. It is argued that this is an unnecessary and costly burden, creates a major disincentive for lawyers to practise migration law, and has perverse effects for consumers.

COMMENT:

There is no quantitative evidence that the issue of 'dual regulation' creates a major disincentive for lawyers to practice migration law. Over one quarter of registered migration agents are lawyers holding a practising certificate. This proportion has increased since 2001, reflecting a higher growth than that of agents without a practising certificate.

The Office of the MARA has noted that the concessions significantly reduce any additional costs of becoming a registered Migration Agent for the holders of legal practicing certificates. For example, the cost of completing the Graduate Certificate in Australian Migration Law and Procedure (approximately $8,000) is avoided.

Harmonisation of laws across states and territories (page 129)
The states and territories, except for South Australia, have made progress in harmonising their laws, based on model provisions, but inconsistencies in rules across jurisdictions remain. Broadly, the regulations in each jurisdiction cover matters such as entry to the profession, entitlements and conditions, professional conduct and various other aspects with a consumer protection focus, including complaints handling and discipline procedures.

COMMENT:
Inconsistencies in rules across state jurisdictions can make matters confusing for vulnerable clients. The regulation of migration agents is already harmonised.

Conduct amounting to grave impropriety affecting professional character (pages 129 - 130).

The arguments that have been made to justify inclusion of lawyers agents in the regulatory scheme (see DIAC 2007 and 2008) essentially relate to the benefits of consistent treatment and a perceived need for additional protection for consumers over and above that provided through regulation of the legal profession. More specifically, the arguments in favour of maintaining the status quo include:

- *a significant number of complaints are made against lawyer agents (although the evidence suggests that they are less likely to engage in misconduct than other migration agents)*

COMMENT:
In the 3 years to March 2010, seventeen percent of all complaints received were against lawyer agents. Twenty percent of the sanction decisions made related to lawyers. More detailed analysis is required to determine whether lawyers are less likely to engage in misconduct.

Referral of complaints to legal services regulators (page 130)

The LCA states: Despite requests to the Department, the Law Council has not been provided with a single example of a complaint referred to legal services regulators, which was not duly investigated or other appropriate action taken. (sub. 23, p. 14)

COMMENT:
The issue is not the integrity of the process but communication of the outcome. With the exception of NSW, the Office of the MARA is not informed of action taken by Legal Service Regulators. In a recent matter, an agent was suspended for 12 months for not disclosing investigation by a legal services regulator that was independently brought to the attention of the Office of the MARA.

'Dual regulation' - compliance costs for lawyer agents (page 131)

'dual regulation' — including compliance with two codes of conduct and two registration fees — increase compliance costs for lawyer agents and creates a disincentive for lawyers to practise migration law, which may work against the interests of consumers and the migration advice industry as a whole. A related concern is that it restricts the capacity of community legal advice centres to provide advice because they have difficulty attracting experienced lawyers.

COMMENT:
Any need for attracting experienced lawyers relates to the provision of immigration legal assistance and this can be provided without the requirement to be a registered migration agent.

Lawyers who register as non-commercial migration agents pay a significantly reduced application fee. Pro bono services are also recognised as part of their continuous professional development. The Office of the MARA is currently looking at additional measures it may be able to take to support the pro bono sector.

Uncertainty and confusion resulting from dual regulation (page 130)

the current regime creates uncertainty and confusion, including in relation to matters such as (see LCA sub. 23, pp. 6-7):

- *the difference between 'immigration assistance' and 'immigration legal assistance', a distinction made to try to accommodate lawyers in the scheme*
- *which body is the most appropriate to address misconduct*
- *whether a client's communications with their adviser are confidential and subject to client legal privilege*

COMMENT:
Whilst it is acknowledged that legislative changes need to be made to clarify 'immigration assistance' and 'immigration legal assistance', there is no evidence to suggest there is confusion amongst consumers as to which body is the most appropriate to address misconduct. In any event, the Office of the MARA would refer a complaint it did not have jurisdiction to deal with.

Tribunal decisions in both NSW and Victoria support the proposition that a solicitor who provides 'immigration assistance' is acting in the capacity of a migration agent, not a solicitor.

Further, where a solicitor is acting in the capacity of a migration agent, only matters with the potential to impact on the fitness and propriety of a solicitor would enliven the disciplinary jurisdiction of legal regulators. This view appears consistent with the practice of the Legal Services Commissioner in NSW, who refers complaints about a solicitor agent to this Office where those complaints involve the provision of immigration assistance.

The Office of the MARA respects common law legal privilege, and that client legal privilege between the solicitor and client prevails, and will protect communication from being disclosed without the consent of the client – recognising that the privilege is that of the client and not the solicitor. The Office of the MARA manages common law legal privilege by ensuring that the client/complainant has provided written consent to waive that privilege. The Office of the MARA's approach is to resolve with the solicitor agent issues relevant to legal privilege in the interest of progressing and resolving the complaint.

Similarly, in investigating complaints concerning lawyer agents, documents requested by the Office of the MARA, and provided by the lawyer agent, are used solely by the Office for the purpose of investigating the allegations.

It is noted that where documents or information are provided to the Office of the MARA in response to the exercise of its powers, these are not admissible in evidence against the registered migration agent in any criminal proceeding (except proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* that relates to this Act or the regulations).

A lawyer agent in his or her capacity in providing legal services is not prevented from claiming a lien on client documents until outstanding legal fees are paid.

Sanctions imposed by legal profession regulations (page 132)

The Office of the MARA may deregister a 'rogue' lawyer in relation to provision of immigration assistance, but currently these individuals may escape sanction by the relevant Law Society or Legal Services Commission — on the other hand the LCA is also concerned about lawyer agents being subject to "double jeopardy", being investigated and disciplined by two regulatory authorities for the same conduct

COMMENT:
The fact of deregistration is publicly available information, as are sanction decisions by the Office of the MARA. The relevant legal professional regulator is not prevented from considering a sanction where appropriate. Where the Office of the MARA decides not to investigate a complaint but refer it to the relevant legal profession regulator, the current legal framework specifically guards against double jeopardy (refer section 319 of the *Migration Act 1958*).

Distinction between lawyer agents and non-lawyer agents (page 132)

There is no distinction made between lawyer agents and non-lawyer agents and some non-lawyer agents hold themselves out to clients as lawyers

COMMENT:
When this is brought to the attention of the Office of the MARA, it is followed up and appropriately actioned.

Referral of complaints about lawyer agents (page 132)

Although the 2007-08 Review by DIAC recommended that lawyer agents continue to be included in the regulatory scheme for migration agents, it also found there was a case for greater cooperation between the Office of the MARA and other regulators such as the Legal Services Commissioners. Further, it recommended: That complaints about lawyer agents be referred to relevant Legal Services Commission/Ombudsman for investigation. Resulting decisions from investigations to be subject to review by the migration advice regulator. As the requirement of the migration advice regulator to allocate resources to address complaints about lawyer agents would decrease, the registration fees payable by lawyer agents be decreased as appropriate. (DIAC 2008, p. 77)

COMMENT:
The Office of the MARA currently refers complaints involving immigration legal assistance to the relevant regulators. Resultant decisions by that regulator can be taken into consideration at the next anniversary of the lawyer agent's re-registration, but not before due to the operation of section 319 of the *Migration Act 1958.*

Non-lawyer agents misrepresenting themselves as lawyers (page 132)

In relation to the concern about non-lawyer agents holding themselves out to clients as lawyers, the Commission supports the Review's recommendation that the public register of migration agents provide for all agents to have relevant qualifications listed (including a legal practising certificate and/or specialist accreditation from a Law Society, where relevant). The Commission is not aware that any action has been taken to implement this or any of the other recommendations of the 2007-08 Review relevant to the issue of the inclusion of lawyer migration agents in the Migration Agents' Regulatory Scheme.

COMMENT:
The Office of the MARA has identified system improvements which would make the listing of lawyers with practising certificates feasible, and is planning to have these improvements in place within the next three months. This will also provide a search facility.

The only other recommendation of the 2007-08 Review relevant to the inclusion of lawyer migration agents in the scheme, was the recommendation that they remain within the scheme.

The Review made 57 recommendations of which 16 have been finalised, including the key ones of establishing the Office of the MARA and the Advisory Board. The Department has fully implemented 10 out of the total of 57 recommendations that were made as part of the Review. Of the remaining recommendations:

- 3 were superseded or addressed through the establishment of the OMARA and the Advisory Board;
- 3 required no further action; and
- the remaining 41 recommendations are at varying stages of progress.
    - For example, the recommendation in relation to the higher English language standard has been implemented for initial registration, and the Office of the MARA is working on repeat registration.

Other recommendations relating to the communications strategy have also been progressed and full implementation is currently underway.

OLSC NSW referral of complaints to The Office of the MARA (page 133)

The LCA acknowledge that the Office of the Legal Services Commissioner in NSW now takes the approach of referring all complaints falling within the definition of 'immigration assistance' to the Office of the MARA for investigation (LCA sub. 27). While DIAC argue that this means that 'in NSW, and any other jurisdiction which opts to take the same interpretation, the impact of dual regulation is seen to be minimal' (sub. 25, p. 1), the LCA consider that it creates confusion and uncertainty and 'migrants are even more vulnerable in NSW than in any other jurisdiction' (sub. 27, p. 2).

COMMENT:

The approach taken by the OLSC is very clear and works well. There is no evidence that complaints from clients are adversely affected by these arrangements. There may be some confusion in other states because other Legal Regulators do not follow the same procedures.

The Office of the MARA and the Department remain committed to continuing to work with the LCA to identify areas of reform that will both enhance integrity and reduce unnecessary burden on lawyer agents.