DUAL REGULATION OF LAWYER MIGRATION AGENTS

The MIA is appreciative of this opportunity to comment on the Productivity Commission recommendations. In particular we wish to address Draft Recommendation 4.2 - *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*

As the MIA membership represents both lawyer and non-lawyer agents, we feel we are well placed to comment. The MIA believes that there are some sound arguments in favour of the current system of dual regulation of migration agents who hold legal practicing certificates. These include;

- Consistency in the consumer protection, as created by the current system, is vital. Abandoning dual regulation would create inconsistencies in the regulation governing migration professionals, who are undertaking the same work, for the same clients.

- The fact that migration law is a complicated area subject to frequent changes and therefore frequent continuing specialist education is required.

- The MIA does not necessarily accept that consequences of misconduct for a lawyer are more severe than for a migration agent. We note that some lawyers have received only minor sanctions from legal regulators for actions that have caused great disadvantage to their migration clients[1] or have received sanctions from legal regulators only after a considerable delay[2].
- The consequences of abandoning dual regulation may outweigh any so called 'perverse' effects that flow from dual regulation

The MIA also recognises that there are problems with dual regulation, many of which have been mentioned in the submission by the Law Council of Australia.[3] A survey of MIA members indicate that the respondents were evenly divided over the question, but were overall in favour of a common compliance system. However, over

[1] For example, compare the sanction received in Legal Services Commissioner v Wong (Legal Practice) [2009] VCAT 318 (2 March 2009) to the MARA sanction received by the same practitioner, available at https://www.mara.gov.au/MARADocuments/AgentsSanctions/Jonathan%20Wong%20-%20(9358785).pdf.

[2] For example, the legal regulatory system took some seven years from the date of the complaint to sanction Mr Issac Brott (Brott v Legal Services Commissioner [2009] VSCA 55 (2 April 2009)) whereas the migration agent regulatory system acted within six months of receiving a complaint; see https://www.mara.gov.au/MARADocuments/AgentsSanctions/0428346%20-%204505.pdf

[3] Please note that the MIA does not adopt the Law Council submission or its underlying reasoning in its entirety.

70% of the lawyer agents who responded to the survey indicate that they are against or have strong concerns with the current dual regulation.

Those lawyers who do not agree with the current system of dual regulation have identified costs, duplication of requirements and conflicts in requirements as reasons for so doing . There is some support for the idea of separate regulation, but keeping - both lawyer agents and non- lawyer agents being registered with MARA, so consumers would have the benefit of a central register of all persons who can provide immigration assistance and their respective qualifications. The recent decision of the 'MARA to publish the details of those agents who are also legal practitioners is welcomed by them.

Another argument advanced against the current system is that it is entirely inappropriate for the OMARA - which is part of DIAC - to be regulating professionals who make representations on behalf of their clients to DIAC. This is a clear conflict of interest and will lead to bias in the OMARA's decision making. We note that regulation of lawyers by the OMARA is inconsistent with the Recommendations of the Review into the Migration Advice Profession 2007/08. The review recommended that the conduct of lawyer agents be referred to the relevant State/Territory body regulating the legal profession.

The Institute believes that the division of feeling on this matter, and the fact that a significant number of lawyer agents are actually in favour of dual regulation, indicates that the issue is not clear cut. In addition, the changes to the Migration Act and Regulations that may be required are considerable and the current legal situation is unclear, as demonstrated by the different treatment of migration practice in various states. For example, some members feel that currently there is ambiguity arising from the OLSC referring complaints in NSW to the OMARA where the conduct of lawyers involves giving immigration assistance or, more broadly, migration law advice. What this in effect means is that there are no immigration lawyers acting as lawyers in NSW – they are all just registered migration agents.

The Institute therefore calls for further research and discussion from all relevant parties, with the intention of identifying changes to be adopted following the creation of the new national legal disciplinary system. Until a uniform national system is in place, the diverse treatment of migration work makes regulation through the office of the MARA the only element of consistency for consumers.

However, the MIA supports the position that the regulatory requirements on lawyer agents are onerous and excessive and therefore agrees with the Law Council submission that the re-registration requirements for lawyer agents should immediately be streamlined to reduce compliance costs. Subject to further investigation, such changes could include;

- Further reducing the number of CPD points that lawyer agents are required to earn, to reflect the fact that they are required to earn CPD points to maintain their legal practicing certificates by abolishing the requirement for lawyer

agents to attend CPD sessions on the mandatory components (Accounts Management, Business Management, Ethics and Professional Practice, and File Management) as these areas are covered by their membership of the legal profession CPD scheme.

- Focussing on harmonising the CPD sessions provided for lawyers and for lawyer agents in order to maximise the number of MARA CPD points that lawyer agents can earn in the course of satisfying their lawyer's CPD requirements.
- Removing the requirement for lawyer agents to operate a separate clients' account for their migration work, as long as funds paid by migration clients are paid into a lawyer's trust account.
- Permitting lawyer agents to produce their legal practicing certificate as evidence that they have complied with many of the requirements for annual registration. This will reduce the requirement for lawyer agents to complete the current 37 page form.
- Reducing registration fees in recognition of the fact that streamlined registration requirements for lawyer agents will reduce costs to MARA.
- The MIA believes that the Law Council's claim that lawyer agents receive proportionately fewer complaints and sanctions requires further examination. However, should this be proved, lawyer agents should receive a further reduction in their registration fees in recognition of the smaller proportion of MARA resources that go into handling lawyer agent-related complaints.
- The MIA believes that streamlined registration for lawyer agents would also reduce the impact of dual registration on the pro bono and legal assistance sectors.

The MIA agrees with the Law Council's submission that the lack of a fidelity fund for non-lawyer agent results in a lower standard of consumer protection. The MIA supports the position and again urges DIAC to use the surplus funds gathered from agents before July 2009 as the basis for a fidelity fund that would cover all agents.

The MIA further agrees with the Law Council's submission that the definition of "migration assistance" be reinforced in order to ensure that migration agents who are not legally qualified do not appear before the courts. However, the MIA notes that there is no clear evidence that this has been a major problem.

Conclusions

Everyone working as a migration advice profession should be regulated to practice as a Migration Agent.

Migration law is complicated –and all practitioners should be expected to have the specialist knowledge required to give advice. Clients deserve nothing less. Consistency in the consumer protection, as created by the current system, is vital.

Abandoning dual regulation would create inconsistencies in the regulation governing migration professionals who are undertaking the same work, for the same type of clients.

Onerous duplicate costs should be eliminated and duplicate requirements on migration advice practitioners should be removed where possible.

DIAC AND REGULATORY IMPACT STATEMENTS

In relation to Draft Recommendation 2.1, the Institute supports any moves to improve the transparency and consultation processes of the Commonwealth Department of Immigration and Citizenship.

The Migration Institute of Australia considers that there is an increasing burden faced by the migration advice profession and their clients as a result of poorly instituted policy and regulatory changes The Institute has concerns in relation to the Department of Immigration and Citizenship (DIAC's) failure to follow best practice in the drafting of regulations and Regulatory Impact Statements (RIS's). Recent sweeping changes to the migration system have highlighted that, contrary to the intentions of the RIS system, DIAC does not consult and apparently does not appear to consider those who will be most affected by changes to the migration system, namely visa applicants and the migration advice profession.

The regulation changes imposed by DIAC have enormous effects on one of the most basic factors facing any person – their country of residence – with all the resulting effects on their career, housing, economic circumstances and basic quality of life. Many overseas students had chosen their course of study specifically to allow them to qualify for residence in Australia. Many other applicants had made major decisions (such as career changes, taking or refusing lucrative redundancy packages, or housing, family, educational and financial investments) based on their likelihood of obtaining a visa grant. DIAC's apparent failure to consider such impacts has adverse effects on the reputation of the entire migration system and profession.

The MIA is concerned that DIAC has failed to consult visa applicants and their professional representatives when making changes to the Migration Regulations and has therefore apparently utterly ignored these critical factors.

In addition, the MIA believes that DIAC has repeatedly failed to consider the impact of regulatory changes on the migration advice profession itself. The profession, which consists of over 4,300 registered agents and a considerable number of ancillary staff, has been savagely affected by the number and nature of regulatory changes, which have often made it impossible to offer advice to clients or to complete services that have been paid for, and have therefore made it extremely difficult to operate a viable business.

Some regulatory changes and their effects

In general, the changes introduced by DIAC have been a major cause of net overseas migration reducing by 20% at the end of the 2009-2010 financial year *"in response to government reforms to temporary and permanent migration and*

economic conditions".[4] This reduction has been caused by several significant regulatory changes that appear to have been introduced without consulting or considering the effect on visa applicants or the migration advice profession. The following are examples of this failure by DIAC;

1. DIAC stopped accepting applications for several of the most popular visas for skilled migration (namely subclasses 175, 176 and 475) on 8 May 2010 *"to facilitate the transition from the current Skilled Occupation List (SOL) to the new SOL"*.[5] This interruption continued until July 1 2010.

   Almost 40,000 applications for these visas (often involving more than one person) had been received in the four quarters prior to the announcement, which demonstrates that DIAC decision had a great impact on thousands of applicants. Despite this, the relevant Legislative Instrument indicates that *"(t)he Office of Best Practice Regulation's Preliminary Assessment Checklist was used to determine that there will be no compliance cost on business and no other impact on business and individuals or the economy in relation to these amendments.....No consultations were conducted because there are no implications for any external agencies or other bodies in relation to these amendments."*

2. According to DIAC figures, over the four quarters prior to the announcement of the changes, registered migration agents had lodged over 27,000 visas in these affected classes.[6]

   Fees charged by agents for such applications ranged from $1400 to $4000, probably averaging in the region of $2000 or more. These visa classes represented approximately one third of the visas lodged by the profession and generated more income than many other visa classes. The changes instituted by DIAC therefore caused a temporary cut in the profession's turnover by approximately one third, yet the Legislative Instrument indicates that this was ignored by DIAC when considering the impact of the regulatory change. The MIA, as the major professional body for registered migration agents, was not consulted before these changes were made.

3. On 14 September 2009, DIAC introduced new "Worker Protection Laws" that affected subclass 457 visas. A ministerial release noted that *"[t]here has also been a dramatic reduction in the number of visas granted. Primary visa grants in January 2010 were 45 per cent lower than January 2009 and 6 per cent lower than December 2009."*

   The release confirms a direct link between the 14 September 2009 changes and the drop in 457 visas, which obviously had a major impact on subclass 457 visa applicants. Figures provided by DIAC and MARA indicate that 52% of the 37,000 applicants in 2008-2009 had used migration agents, at a cost of

[4] Ministerial release dated 26 May 2010.
[5] Ministerial release date 7 May 2010.
[6] Despite the global financial issues, in the three previous quarters applications by agents still averaged 1700 per month.

some $2,200 to $5,000 each. Therefore, the 45% reduction in applications for these visas caused a major financial loss for the migration advice profession.

However, it appears that these factors were not considered by DIAC. The relevant legislative instrument[7] records that *"the Office of Best Practice Regulation's Best Practice Regulation Preliminary Assessment was used"*, however it provides no evidence that DIAC consulted representatives of the visa applicants or the migration advice profession or considered the effect on those parties. Once again the MIA was not consulted regarding these changes.

4. All offshore General Skilled Migration applications lodged before 1 September 2007 will have their applications withdrawn. These are people who applied overseas under easier standards, including lower English language skills and a less rigorous work experience requirement. It is expected more than 20,000 people fall into this category.[8]

   While DIAC has agreed to refund the Visa Applicant Charge it has levied these unsuccessful visa applicants, it has refused to reimburse them for the remainder of the expenses involved in their application. These can include;

   - English language test charges of $150 to $400 or more;
   - Medical and police clearances totalling $350 or more;
   - Migration agent fees ranging from $1500 to $4000;
   - Skills assessment fees of $300 to $400;
   - Fees for translating documents of several hundred dollars.

   While not all of the unsuccessful visa applicants are required to pay all of these charges, others have had to pay them more than once. It is likely that the total direct cost of lodging an application (ignoring disruption to their lives and opportunity costs) to applicants is vastly greater than the Visa Application Charges that DIAC is refunding - yet according to the explanatory statement accompanying the instrument[9] DIAC neither consulted the applicants or the migration advice profession nor deigned to mention them in the RIS.

5. The costs of this change to the migration advice profession have also been high, and in many cases crippling. Approximately 52 % of General Skilled Migration applicants employ the services of a migration agent, at a cost of approximately $1500 to $4000 [10]. Many agents operate under a contract that provides for much or all of their fees to be paid when the visa is granted. These agents are therefore likely to receive no payment for work already carried out. While the MIA cannot produce any precise figures of the loss to agents, it is likely to be in the region of millions of dollars, a significant cost for the profession. DIAC's determination that there was *"no compliance cost on*

[7] Select Legislative Instrument 2009 No. 230
[8] Ministerial release 8 February 2010.
[9] IMMI 10/023
[10] 2010 figures from the Migration Agents Registration Authority.

business or impact on competition in relation to this instrument"[11] is incorrect and indicates that DIAC failed to follow the aims of the RIS scheme.

Conclusions

1. Contrary to the requirements of the Office of Best Practice Regulation and the RIS system, DIAC has failed to consult visa applicants and their representatives about the great impact that regulatory changes may have on their lives. The enormous disruption to tens of thousands of people who had lodged or were lodging visa applications has had considerable consequences to their advisers in the migration advice profession.

   The MIA believes that DIAC must, in the future, follow the goals of the Office of Best Practice and the RIS system and consult visa applicants and their representatives when assessing the indirect effects of further regulatory changes on the migration advice profession.

2. Contrary to the requirements of the RIS system, DIAC has failed to consult the migration advice profession about the direct impact of regulatory changes on the profession. DIAC also appears to have failed to consider the direct effects of their regulatory changes on the profession. This has resulted in great and sometimes grave strain on migration agencies and their employers.

   The effect on the profession can be illustrated by the recent collapse of the award-winning practice of *LiveInAustralia.com*, which went into receivership. The many changes in migration laws contributed to the company being unable to complete existing work and unable to take on new work. As a result of the collapse around 1000 clients lost fees, of up to $5000 and a significant number of suppliers and employees have lost significant funds.

   The MIA expects that the current market conditions caused by such changes will see further migration practices collapse. Many agents report that they are facing the end of their career and the businesses they have spent years developing, yet such impacts have been completely ignored by DIAC in its RISs. The MIA submits that DIAC must therefore follow the legislation and the requirements of the Office of Best Practice and consult the industry and consider the effects before making regulatory changes.

Migration Institute of Australia August 2010

[11] Explanatory Statement for IMMI 10/023.