QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 18 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(176) Output 3.1: Indigenous Policy

Senator Crossin asked:

1. The COAG trials were kick started with the establishment of a Flexible Funding Pool of $3m for each of the years 2003/04 and 2004/05. What funds, if any are available for any further such projects?

2. The Social Justice Commission in their Report of 2003 say of these COAG trials (P46) "The lack of a clear evaluation strategy is of great concern.". What evaluation is now being made of these trials – how and by whom? Reporting to whom? What role are the Indigenous people having in this? What reports are going to Indigenous communities?

Answer:

1. Of the $3 million available in the COAG trials Flexible Funding Pool for 2004-05:

- $0.6 million currently remains available for new activities.
- $1.4 million has been committed to date, and proposals to the value of around a further $1 million are currently being finalised.

In addition, a new flexible pool of funds managed by the Office of Indigenous Policy Coordination – the Shared Responsibility Agreement Implementation Assistance program – is available to support similar projects.

The total 2004-05 appropriation for this program is $17.8 million, with around $3 million committed or expended under the previous program guidelines.

2. A monitoring and evaluation framework for the COAG trials was agreed by Commonwealth, State and Territory officials in October 2003. The Australian Government is currently refining and progressively implementing its approach to evaluating the COAG trials within that framework.

Each of the COAG trial sites is different, and there will not be a single approach to evaluation that fits the circumstances of all sites. Nonetheless, independent reviews and/or evaluations for most (if not all) trial sites should be scheduled in 2005 by Australian Government agencies, preferably in collaboration with State or Territory Government agencies and the Indigenous community involved. For example, plans or negotiations for independent reviews or evaluations are progressing in respect of East Kimberley (WA), Wadeye (NT), and Murdi Paaki (NSW). In Cape York, the

Queensland Government's evaluation of its Meeting Challenges Making Choices initiative, which coincides with the COAG trial there, will be an important element in the evaluation of that site. In respect of Tasmania, the Australian and Tasmanian Governments have agreed a framework for review in 2005.

The Office of Indigenous Policy Coordination (OIPC) will tender for an independent person to draw together and synthesise the findings and lessons learned from these individual trial site evaluations towards the end of 2005. OIPC is also looking to a subsequent round of site evaluations in 2007 or 2008.

While we cannot be prescriptive about evaluations managed under tripartite arrangements with state or territory governments and local communities, OIPC would expect the local Indigenous people to be active participants in all evaluation processes and recipients of the relevant evaluation reports.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 18 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(177) Output 3.1: Indigenous Policy

Senator Crossin asked:

1. Not so long ago we heard and read a lot in the media about "mutual obligation" agreements being signed between government and communities – the Mulan petrol bowsers was I believe the first. How many "Shared Responsibility" agreements have now been signed? Is there a list of them? What assistance and advice on options is given to the Indigenous people during such negotiations?

2. Is it correct that 8 men from Bourke are to be provided with training then be employed as Night Patrollers. A total of $150,000 a year is to come from Federal, State and Local Government? Is this correct? What is this money meant to provide for? How was the project costed and what assistance were the people given in agreeing to that sum?

3. What responsibility does the Government have (say in terms of ongoing support) after the signing of such agreements in addition to provision of funds?

4. Where are the funds for these agreements coming from? Is it existing program funds – for example where did the Mulan funds for bowsers come from - infrastructure funds, health allocation or business funding?

5. If they are coming from existing funds then at whose discretion and decision? What Indigenous input was there? (for example if the funds come from infrastructure then what input did the local Regional Council have?)

6. How many such "mutual obligation" agreements are you prepared to make – is there a limit to the number or a cap on the funding?

7. How will such agreements be monitored – in particular in terms of outcomes?

8. Will this type of agreement replace the previous application processes from organisations?

Answer:

1. As at 15 March 2005, 21 Shared Responsibility Agreements (SRAs) have been signed.

A list of SRAs is under preparation and will be released, when appropriate.

Communities are fully advised of the SRA process by Indigenous Coordination Centre (ICC) Managers during consultation sessions.

SRAs can involve all the people in a residential community or some of those people. They can be developed in remote communities, regional areas or urban areas if Indigenous people locally decide they want to make changes in this way. The Government wants to do business this way because SRAs are driven by community priorities, and provide a mechanism to deliver services with much more flexibility to tailor to community needs than has been used in the past.

2. The Bourke Community Assistance Patrol is funded through a Shared Responsibility Agreement developed under the COAG process in the Murdi Paaki region. A total of eight people are employed and undertake one day of training per week and two teams of four people work two night shifts per week for the four nights that the patrol operates.

A total of $137,000 for the first year and $90,000 for a further two years is being provided jointly by Commonwealth, State and local Government agencies. Additional funding may be provided subject to an annual review. In addition, eight CDEP places are being funded, also subject to an annual review.

The funding provides for award wages for staff and operational costs of the Community Assistance Patrol bus (ie, fuel, insurance, maintenance, etc).

The funding was discussed and agreed with all stakeholders including the Bourke Community Working Party and other government agencies.

3. Where SRAs require implementation assistance support staff or specialist expertise at the community level will be funded. Government agencies will also be working with communities to reduce the red tape around funding provision and accountability requirements.

Once an SRA has been agreed, regular feedback arrangements are negotiated between the community and government so that progress can be monitored by both partners to the agreement.

4. The Government agreed that the implementation of changed arrangements for service delivery to Indigenous communities introduced in April 2004 will be supported by access to the Shared Responsibility Agreement Implementation Assistance program which is a flexible pool of funds managed by the Office of Indigenous Policy Coordination.

The total 2004-05 appropriation for this program is $17.8 million, with around $3 million committed or expended under the previous program guidelines. Funding is available for the implementation of Regional Partnership Agreements, local SRAs, consultations on new representative arrangements, and related activities.

In addition, from 2003-04 $6 million has been available over two years for innovative activities to address priorities identified with communities in Indigenous COAG trial

regions. The Mulan funding came from this COAG flexible funding pool (Mulan community is in East Kimberley COAG trial region).

5. Applications for funding from the flexible funding pool managed by the Office of Indigenous Policy Coordination are considered from proposals developed by Indigenous Coordination Centre Managers in consultation with Indigenous communities and stakeholders in their regions.

6. There is no specific limit to the number of SRAs the Government can make with communities.

7. SRAs will build towards the long-term vision and plans that Indigenous people have for their communities, their children and grandchildren. But this does not mean they have to be complex documents that attempt to address all issues facing a particular community at the one time.

Initially we are expecting simple SRAs which provide examples for people of what SRAs can achieve and have the following key elements:

- one or more priority issues identified locally by indigenous people (eg increased school attendance, healthier kids, stronger governance, indigenous people able to get into available jobs);

- government agencies who commit to support initiatives to address community priorities;

- a description of the discretionary benefit(s) that will flow to the community;

- an outline of the obligations the community commits to in return.

These are the basic components of an SRA. Once this has been agreed regular feedback arrangements are agreed between the community and government so that progress can be monitored by all partners to the agreement.

Commitments of the partners will be measured at a community level and will include performance indicators relevant to the priority of the SRA using readily available data (such as the local school releasing school attendance data each term to the community) where possible.

8. SRAs are agreements between the government and Indigenous communities to provide some discretionary benefit in return for community obligations. Negotiations with the community will provide the necessary information for agencies to complete an assessment of the specific funding requested.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 18 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(178) Output 3.1: Indigenous Policy

Senator Crossin asked:

Where is OIPC at with inviting submissions for funding for 2005/2006 – normally these are advertised and have to be in sometime in February? Will submissions also be made as in the past – once submissions are sent in to the ICC (previously the ATSIC Regional Office) who will then process it? How will funding decisions then be made and communicated to those concerned? Have all funded organisations been made aware of these procedures and how?

Answer:

In early February 2005, the Office of Indigenous Policy Coordination wrote to all organisations that received funding in 2004-05 advising them of the process for 2005-06. Advertisements calling for submissions were then placed in national, local and Indigenous newspapers in the week commencing 14 February. These advertisements have run for several weeks.

A common program application form has been developed. It will be able to be used for the majority of programs previously administered by ATSIC-ATSIS. The closing date for submissions is 29 March 2005. This is in line with previous timeframes for submitting applications.

Applications are being sent to the local Indigenous Coordination Centre (ICC) where the review process will be coordinated. Funding decisions for each program will be made by the relevant delegate in accordance with the program guidelines. The decisions will then be communicated to applicants via a letter from the local ICC.

First payments to successful applicants are expected (as in the past) to be made in early July 2005.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 18 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(179) Output 3.1: Indigenous Policy

Senator Carr asked:

1. What directives have been given to ICC staff about communicating the new arrangements to Indigenous communities? When were any directives given, either by OIPC or by any other Department?

2. Has there been any assessment of the effectiveness of communication strategies to date or has any change been made to the communication strategy to improve its effectiveness?

Answer:

1. Since the new arrangements came into place, staff in ICCs have been talking to Indigenous communities within their region about the new arrangements, what it means for them, how to develop Shared Responsibility Agreements and possible future representational arrangements.

Information for ICC staff to use at these consultations has been distributed periodically since 1 July 2004.

These consultations have mainly been through face to face contact and are supported by other communication products such as the booklet 'New Arrangements in Indigenous Affairs', the recent CDEP consultations and information available through the web sites (www.oipc.gov.au and www.icc.gov.au).

2. At this early stage there has been no formal assessment of the communication strategy undertaken. However, OIPC has engaged consultants specialising in communications with Indigenous communities to provide strategic advice and guide appropriate communications methods and materials for communicating with Indigenous communities about the new arrangements in Indigenous affairs, particularly Shared Responsibility Agreements.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 18 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(180) Output 3.1: Indigenous Policy

Senator Carr asked:

1. Is it the case that the relevant ICC is currently negotiating a Shared Responsibility Agreement with the community of Bonya?

2. Is there a proposal, or an agreement with the Administrator, that the shop will be purchased on behalf of the community as part of this agreement? If so, who will manage the shop under the new arrangements? If not, what are the proposed arrangements in relation to the shop?

3. What proposals have been made, either by the Government or the community, about what commitments the community might make in return for the purchase of the shop? What has the Northern Territory Government put on the table?

4. Please provide details of the consultations that have been undertaken with the community in negotiating this agreement. Have interpreters been used? If not, has any assessment been made of whether it would be useful to engage interpreters to ensure that the community is fully aware of the implications of any Agreement?

5. Should a SRA not be successfully negotiated with this community, what is proposed to happen to the shop?

Answer:

1., 2., 3. & 5. Yes, negotiations have taken place over the last three months and it is likely that the SRA will be finalised shortly. It is not appropriate to comment on the negotiations with the community as the discussions are still continuing.

4. Extensive consultations have been undertaken with the community and their nominated representatives, including two full community meetings. Whilst most negotiations have been conducted out at Bonya, Community Council members have on several occasions come to the Indigenous Coordination Centre (ICC) to speak with the Manager about aspects of the Agreement during its development. The community at Bonya has a long history of interaction with non-Indigenous people including extensive engagement with the pastoral industry over many decades. Whilst interpreters have not been used in this case the two primary Government officers involved have some seventy years of experience working with remote Indigenous communities and individuals between them. These officers are of the firm opinion that the community clearly understands the implications of the

Agreement and have responded to changes the community has requested in the Agreement as it has been negotiated. The Bonya community has demonstrated its understanding of the SRA arrangements by being quick to take advantage of the new arrangements to meet an urgent need and at the same time use this to leverage improvements to their health and educational outcomes.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 18 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(181) Output 3.1: Indigenous Policy

Senator Carr asked:

1. Please provide an update to answer to question no. 116 of May 2004, on negotiations about the future of the ATSIC art collection.

2. What is the value of the art collection? When was it last valued?

Answer:

1. Preliminary discussions were conducted between ATSIS staff, the Department of Information Technology and the Arts (DCITA), the National Museum and the National Gallery in 2004. It is understood that within the DCITA portfolio, additional consultation is being undertaken of possibly interested parties.

To date, no decision has been made about the future of the art collection.

2. The Collection was revalued by the Australian Valuation Office on 30 June 2004. The total valuation was $1,763,750. A further $1.2 million worth of items are held in the collection but do not appear in the balance sheet as individually they are under the asset recognition threshold.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 18 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(182) Output 3.1: Indigenous Policy

Senator Carr asked:

Please provide a report on progress on the initiatives, outlined in question no. 106 of May 2004, aiming to provide support and advice for indigneous people on household and personal financial management.

Answer:

This issue is the responsibility of the Family and Community Services portfolio.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 18 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(183) Output 3.1: Indigenous Policy

Senator Carr asked:

1. Please provide an update of the listing of ATSIS staff given in answer to question no. 108 of May 2004, indicating the current employment status and location of the staff as listed by state/territory and regional office.

2. What has happened to the 130 ATSIS staff employed on fixed-term contracts as at 22 June 2004? How many are still employed? In what agencies, and on what terms?

Answer:

1. DIMIA is not in a position to track and report details of the current employment status and location of staff transferred to other agencies as a result of the Machinery of Government changes implemented on 1 July 2004.

2. The 130 ATSIS staff employed on fixed-term contracts as at 22 June 2004 largely had their contracts extended to end September 2004. This was to ensure continuity of services to clients when ATSIS staff and functions transferred to mainstream agencies on 1 July 2004. The gaining agencies all agreed to this arrangement. DIMIA is not in a position to comment on the employment status of staff engaged by other Commonwealth agencies.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 18 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(184) Output 3.1: Indigenous Policy

Senator Carr asked:

1. Which of the properties owned by ATSIC have now been sold? Which remain to be divested?

2. Can you explain the arrangements under which agencies other than ATSIC purchased properties – as indicated in the table attached to answer to question no. 121 of May 2004 – that have subsequently been described by you as "owned by ATSIC"?

3. Can you explain the circumstances surrounding the gift of two properties, now listed for divestment, to ATSIC, and the source of funds for the property described as "part gift" (vacant land in Sydney)?

4. Please explain why four properties listed on the attachment to question no. 121 of May 2004 are not listed on the assets register summary as provided with question no. 120 of May 2004. These are:

- Warrama, Trinity Park Qld
- Trelawney, Tamworth NSW
- "All Hallows", Wagga Wagga NSW
- various lots and 51 Broad St, Cunnamulla Qld.

5. What will happen to the office buildings in Ceduna and Bourke, as listed in the assets register summary?

6. What will happen, or has happened, to the various items of software listed in the assets register summary? Will these be used by OIPC or any other agency?

Answer:

1. Since the last advice provided to question 121 in May 2004, none of the properties previously owned by ATSIC have been sold or divested.

There were a number of decisions of the Commission to divest property by way of grant. These divestments will now be managed by the Indigenous Land Corporation (ILC) or Indigenous Business Australia (IBA) following the passage of the *ATSIC Amendment Act.*

2. The agencies identified in the answer to question no. 121 of May 2004 are all agencies which pre-dated the establishment of ATSIC and which are no longer in existence. As was the case with ATSIC, these entities had a charter to acquire land

for the social and economic benefit of local Indigenous groups. These agencies included the Aboriginal Development Commission (ADC), Aboriginal Land Fund Commission (ALFC) and the Department of Aboriginal Affairs (DAA).

3. The list of properties provided in May 2004 are properties previously held by ATSIC for the divestment to appropriate Indigenous groups.

In addition to acquiring Land, ATSIC and its predecessors on occasions were gifted land to be held in trust for particular Indigenous groups within a region. An example is the "All Hallows" property. This property was initially established as a Convent by the Catholic Church Sisters of St Dominic Order and gifted to the Aboriginal Development Commission (ADC) on 14 February 1984 for the benefit of the Aboriginal community of Bathurst to provide hostel accommodation for tertiary students.

The Property referred to in the table as vacant land Renwick Street was gifted to the ADC in 1982 by the Uniting Church to be held for the benefit of Indigenous people in the region. This property was transferred to ATSIC pursuant to section 207 of the ATSIC Act.

4. Warramarra, Trinity Park was listed on the Asset register as Woompera Farm. Trelawney Tamworth appears on the register as Trelawney Somerton.

The other two properties did not appear on the asset register as final valuations had not been received.

5. As is the case with all previous ATSIC assets, with the passing of the ATSIC Amendment Act 2004, these assets have been transferred to the Indigenous Land Corporation (ILC), Indigenous Business Australia (IBA) or the Commonwealth for the ongoing management and ownership of the asset.

6. All software will be retained by OIPC except the QATS/LLAS (Loans Management) Software which will be transferred to IBA and the CDEP Manager Software which will transfer to the Department of Employment and Workplace Relations.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 18 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(185) Output 3.1: Indigenous Policy

Senator Carr asked:

1. Can you provide a listing of contracts formerly administered by ATSIS that remain ongoing?

2. For each of those contracts, which agency now administers the contract?

3. Please provide details of any contracts terminated prematurely due to, or associated with, the abolition of ATSIS. Please provide detail of any penalties or additional costs incurred associated with these terminations.

Answer:

1. ATSIS remains in place as a Commonwealth agency until a decision is taken by Government to remove it.

2. Any Commonwealth contracts related to programs previously managed by ATSIS were transferred in accordance with the program distribution arrangements to mainstream agencies from 1 July 2004. The mainstream agencies now have ongoing responsibility for these contracts. The mainstream agencies were consulted prior to the contracts being put in place and agreed at the time that the contract process should continue for 2004-05. It is up to the mainstream agencies to now determine future contractual arrangements.

3. ATSIS has not been abolished at this point in time.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 18 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(186) Output 3.1: Indigenous Policy

Senator Carr asked:

Please provide a listing of Memoranda of Understanding and similar agreements to which ATSIC is a party, with an indication of the future status of such agreements and the agreements that will need to be replaced by new ones. In such cases, with which bodies or agencies will the new agreements be formed?

Answer:

ATSIC was party to the ATSIC/ATSIS Agreement and a range of Agreements/MOUs with various State government and other organisations, either of a general nature or with regard to specific issues (eg housing). With the abolition of ATSIC these Agreements will cease to apply. Any action by the other parties to these agreements to involve other Indigenous bodies in future arrangements will be a matter for them.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 18 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(187) Output 3.1: Indigenous Policy

Senator Carr asked:

1. Does answer question no. 125 of May 2004 imply that, henceforth, the provision by the Commonwealth of legal aid to Indigenous people will be completely separated from any and all programs of prevention and social support?

2. Is this supported by Indigenous communities and groups? How many other instances of the model mentioned in this answer, in Brisbane, will be affected? Under what program will support and prevention services now be provided?

3. In relation to submissions on the Aboriginal and Torres Strait Islander Legal Services exposure draft, since only one party making a submission requested confidentiality, what has been the delay in providing:
   - A list of organisations that have made submissions; and
   - Copies of all submissions except for the one where the organisation concerned requested confidentiality?

4. When will these be provided? If they will not be provided, why not?

Answer:

We are not in a position to answer this as it is the responsibility of Attorney-General's portfolio.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 18 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(188) Output 3.1: Indigenous Policy

Senator Carr asked:

(1) What was decided regarding funding for 2004-05 for the Western Suburbs Indigenous Gathering Place?

(2) If it received funding, how much did it receive? If it did not, why not?

(3) What program would now be able to provide finds for such a project or activity?

Answer:

(1) - (3) These matters are the responsibility of the Attorney-General's portfolio.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 18 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(189) Output 3.1: Indigenous Policy

Senator Carr asked:

Did the interpreting services for the Kimberley region, referred to in question no. 135 of May 2004, and offered by Mirima Language Centre, Kununurra, continue to receive funds in 2004-05? For how much? If not, why was funding discontinued?

Answer:

This matter is the responsibility of the Attorney-General's portfolio.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 18 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(190) Output 3.1: Indigenous Policy

Senator Carr asked:

1. Is it correct that OIPC has just employed a consultant to develop a communication strategy?

2. What is the value of this consultancy? Who has been commissioned to undertake this work? What is the aim of the consultancy? Who is the target audience?

Answer:

1. OIPC has engaged three separate consultants specialising in communications with Indigenous communities to provide strategic advice and help develop appropriate communications methods and materials for communicating with Indigenous communities about the new arrangements in Indigenous affairs.

2. Three consultants were initially engaged to undertake three pilot projects in three different regions, and subsequently two of these have been engaged to undertake further work.

One consultant, Little Fish, was paid $6,645 for work now concluded. A second, Rockpool Communications, has been paid a total of $29,449 to date and the third, Darruya, has been paid a total of $20,493 to date.

The aim of the consultancies has been to assist OIPC to develop effective and culturally appropriate methods of communicating with Indigenous communities.

The target audience is Indigenous communities around Australia.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 18 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(191) Output 3.1: Indigenous Policy

Senator Carr asked:

1. Please provide a list of all ATSIC Board decisions that the Government has not implemented in 2003-04 and 2004-05. Is it the case that decision number 86 in 2004, regarding Yipunya divestments, was not implemented?

2. Please provide reasons for any decision not to implement an ATSIC Board resolution. Was legal advice taken in relation to these decisions?

Answer:

1. Both ATSIC and Aboriginal and Torres Strait Islander Services (ATSIS) took the appropriate steps to implement lawful decisions of the Board. Following the passage of the *ATSIC Amendment Act,* the agencies now responsible will need to consider what action is to be taken in relation to previous decisions of the ATSIC Board.

YEPERENYE (no record of "Yipunya")

On 31 August 2004, the ATSIC Board agreed to the transfer of ATSIC's shares in Yeperenye Pty Ltd to a corporate trustee of a charitable trust subject to certain terms and conditions.

ATSIC had not granted the transfer of the shares because the terms and conditions of the Board's approval had not yet been met.

Following the passage of the *ATSIC Amendment Act* further consideration of this matter is the responsibility of Indigenous Business Australia (IBA).

2. See Answer to Question 1. Legal advice is sought as appropriate in relation to decisions of the Board.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 18 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(192) Output 3.1: Indigenous Policy

Senator Carr asked:

Please explain what arrangements were established, if any, to enable ATSIC to obtain legal advice in relation to the matters it was considering at Board meetings in situations where ATSIS was unable to provide such advice due to a conflict of interest. Are there any arrangements in place to fund independent legal advice for ATSIC, given that ATSIS cannot provide this advice?

Answer:

The ATSIC/ATSIS Agreement made arrangements for the provision of legal services to ATSIC, at no cost to ATSIC, subject to conflicts of interest. This included in relation to matters put to meetings of the Board of Commissioners. Where there was a conflict of interest, which could not be resolved in a reasonable time, ATSIC was able to obtain, and did obtain, its own legal advice. Payment for that legal advice was the responsibility of ATSIC**.**

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 18 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(193) Output 3.1: Indigenous Policy

Senator Carr asked:

For each region in which removal of REA is being trialled, please provide the following information:

- Who has signed up to or is planned to sign up to these arrangements on behalf of the Indigenous community?
- What consultation was undertaken within each community – in particular, with those people on income support who would be affected by the removal of RAE – prior to the commencement of the trials?
- Which Commonwealth and State/Territory agencies have been involved in developing policy or negotiating the new arrangements?
- How have the activities of Commonwealth agencies in relation to the trial sites been coordinated?
- What lessons, in any, have been learnt to date?

Answer:

The Remote Area Exemption (RAE) trials are being managed by a Deputy Secretaries Group composed of the Office of Indigenous Policy Coordination (OIPC), the Department of Employment and Workplace Relations (DEWR), the Department of Family and Community Services (FaCS) and Centrelink. Local Indigenous Coordination Centre (ICC) Managers coordinate the trials at Bidyadanga, Gunbalanya, Canteen Creek and Ali Curung. DEWR staff coordinate the trials at Yirrkala, Nguiu, Milikapiti and Pirlangimpi. Centrelink staff are talking to individual participants about participation in the trials at each site.

Bidyadanga

In Bidyadanga the RAE trial arrangement was agreed to by council members with the support of elders and after a process of widespread community consultation. Prior to signing the agreement, a number of meetings were held in Bidyadanga to explain to the Council and members of the community what the RAE trial involved. The RAE trial was also discussed and approved at the Annual General Meeting of the Council. On each occasion there was great support for the concept. The agencies involved in the community consultations included Centrelink and OIPC, with OIPC coordinating. The Broome ICC reports that the main lesson learnt to date is that it is important to involve other agencies as closely as possible in the community consultation process.

Gunbalanya (Oenpelli)

In Gunbalanya the RAE trial arrangement was signed by the Chair and CEO of the community and the Principal of the school, who is a local resident. Considerable time was spent in the community talking to local Indigenous and non-Indigenous residents on what the RAE trial involved and how people could participate. The Darwin ICC is currently recruiting a new project officer and a broker is being recruited for the community. Once these positions are in place another round of community consultations will be conducted by Centrelink, Darwin ICC and a Job Network member. The Darwin ICC coordinates the RAE trial. Discussions are in train with the NT government, DEST and DEWR. The lessons learnt to date include the advantages of developing effective working relationships between key government staff and local community residents and the need for communication tools and interpreters for use in the information sessions.

Ali Curung and Canteen Creek

The Canteen Creek Council and the Ali-Curung Council in the Tennant Creek region both signed up for the RAE trials. Consultation was undertaken at whole-of-community meetings in both sites prior to sign-up. At Canteen Creek there have been subsequent meetings with the community. At the most recent meeting, Centrelink representatives were also in attendance. In Ali Curung the trial has been delayed due to the commitments of key personnel and the need to identify another community broker. Tenant Creek ICC and Centrelink staff have attended Council and community meetings at both sites. The arrangements have been coordinated by OIPC. The lessons learnt to date in Ali Curung and Canteen Creek include the need to improve communication between agency staff and the need to act quickly in response to community expectations and operational requirements.

Yirrkala, Nguiu, Milikapiti and Pirlangimpi (Pularumpi)

The RAE trials in the Yirrkala, Nguiu, Milikapiti and Pirlangimpi communities are being coordinated by DEWR. The Council Clerk of Yirrkala Dhanbul Community Association Incorporated signed up to the arrangements in place at Yirrkala, after a community consultation process. Community consultation at all four DEWR-coordinated RAE sites has been undertaken on a number of levels and has involved representatives from DEWR, Centrelink and Job Network providers. Interpreters have been used and local people have been employed to help develop and implement the trials in these communities. DEWR is negotiating the implementation of the trial in the other 3 communities (Milikapiti, Pirlangimpi and Nguiu). The arrangements for Nguiu are close to sign-off. The lessons learnt to date have been positive in that the community elders and councils have fully supported the RAE trial in their communities. There is already an employment outcome at the school in Yirrkala as a direct result of the RAE trial.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 15 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(194) Output: Migration Review Tribunal and Refugee Review Tribunal

Senator Kirk (L&C 66) asked:

How many tenderers for the case management system were there?

Answer:

There were 5 tenderers.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 15 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(195) Output: Migration Review Tribunal and Refugee Review Tribunal

Senator Kirk asked:

In relation to tribunal members, provide a breakdown of how many of the tribunal members have a non-English background and/or are of Aboriginal descent.

Answer:

Tribunal members are not usually requested to disclose their background or Aboriginality to the Tribunals. In response to an invitation (to 98 Members) from the Principal Member to provide information identifying whether they are of non-English speaking background (NESB) and/or of Aboriginal descent, 33 Tribunal members responded as follows:

- 20 members identified as being of NESB;
- 0 members identified as being of Aboriginal descent;
- 1 member identified as not being of NESB; and
- 12 members identified as being neither of NESB nor Aboriginal descent.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 18 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(196) Output: Migration Agents Registration Authority

Senator Ludwig (L&C 21) asked:

What is the cost of the redevelopment of the web site, or the system that you have put in place?

Answer:

The MARA web site has been redeveloped to allow migration agents to login to view their personal profile as defined in s287 of the Migration Act 1958 (the Act); request alterations to their existing contact details and to add new business details to the agent's profile for the purposes of s312 of the Act and clause 3.5 of the Code of Conduct; view details about CPD activities completed by the Agent; and download the Agent's personalised repeat registration form (this particular facility is generally available from when the registration is due to expire in the following 60 days). The cost of this activity in payments to an external contractor will be in total $45,985.50 (including GST) (some invoices have not been resubmitted by the contracted organisation). Staff time has been spent in writing briefs and testing the facility prior to the site being available to agents.

QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 18 February 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(197) Output: Migration Agents Registration Authority

Senator Ludwig (L&C 21) asked:

In relation to the two discussion papers on possible options for regulating migration agents overseas and the paper on options for prescribing professional indemnity insurance requirements, provide a copy of your submissions.

Answer:

A copy of the submissions is attached.

A RESPONSE TO THE DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS DISCUSSION PAPER *OPTIONS FOR REGULATING MIGRATION AGENTS OVERSEAS AND THE IMMIGRATION RELATED ACTIVITIES OF EDUCATION AGENTS*

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The Migration Institute of Australia Ltd (MIA) is the peak association representing Australian migration service providers. MIA's mission is to provide excellent service which includes advancing the standing of all those who facilitate migration.

MIA also aims to promote standards whereby the migration customer will be given the best service and will be protected from those who would exploit their vulnerability and from those who, though honest and well meaning, do not have the competence to give appropriate advice and assistance.

Recommendation 20 of the 2001-2002 *Review of Statutory Self Regulation of the Migration Advice Industry* recommended that:

> *To strengthen consumer protection to visa applicants offshore, amend the legislation to extend registration to foreign nations.*
>
> *This would include a measure limiting the categories of people who can be appointed as representatives or agents of the visa applicant.*

At the time Ian Spicer, Chair of the External Reference Group, stated that the recommendations had been put forward for the following reasons:

> The 27 recommendations made in the Review put forward a significant agenda for change. This involves a mix of measures designed to build upon the recommendations of previous reviews to strengthen the existing scheme and to propose some new directions to improve consumer protection, enhance industry professionalism and extend registration arrangements to overseas migration agents.[1]

The MIA supports recommendation 20 as part of a considered and concerted effort to improve migration advice. The MIA has continued to actively seek to extend the regulation of migration agents offshore through out all of the industry's reviews. The MIA welcomes the

[1] Review of Statutory Self-Regulation of the Migration Advice Industry 2001-2002, page iii

current Department of Immigration and Multicultural and Indigenous Affair's (DIMIA) discussion paper as an important step towards extending registration offshore and overcoming the discrepancy in standards between onshore migration agents and off shore migration agents.

A person's decision about whether or not to come to Australia often affects the rest of their lives. In addition, because of their vulnerability, they are not always able to make an informed choice about the quality of migration advice they receive. By extending the regulatory regime off-shore, the MIA strongly believes that standards relating to knowledge, ethics and discipline can be universally enforced in the public interest. Offshore regulation will also overcome the current discrepancy between onshore and offshore agents who deal with, and should know, the same legislation and regulatory framework.

By regulating off-shore agents consistently and across all visa classes, it could be expected that there may be an immediate decrease in the fraudulent behaviour of agents as identified by DIMIA[2], as well as an increase in the lodgement of decision-ready visa applications. As a result, cost effective visa processing by the DIMIA would be facilitated and government policies would be enhanced. In addition, if the current onshore provisions in relation to 'vexatious activity' are extended, then it could be expected that there would be a foreseeable decrease in the amount of agents lodging visa applications resulting in a high refusal rate in relation to a visa of a particular class[3].

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[2] See Table 5: False Document Refusal Rates by Agent/Agency in descending percentage rate order for Beijing Post decided student cases 1 July 2002 to 30 June 2003) in *DIMIA Discussion Paper, Options for Regulating Migration Agents Overseas and the Immigration related activities of education agents, May 2004.* The MIA does not have any information as to how these figures were compiled, or how a document was ascertained by the DIMIA to be false. Accordingly, the MIA cannot comment on this Table.

The MIA also notes Attachment A, *Results of Overseas DIMIA Post Survey of Overseas Migration Agents Practice*. The MIA does not have access to the raw data from that survey and must rely upon the summary as detailed in Attachment A. The attachment does not disclose whether the study includes all overseas posts. MIA notes that all three questions that asked the overseas posts to comment on agent performance, were leading questions. The questions were:

1. a*re most (agents) knowledgeable?*
2. *are most (agents) competent?* and
3. *are their ethics good or do they harass your staff?*

The MIA notes that DIMIA's comments that key findings include: (in response to are most (agents) knowledgeable) - 'many agents do not keep up with legislation/procedural changes' does not accurately record the entire finding, that is Attachment A states:

> a majority of posts reported that despite varying standards, most agents are reasonably knowledgeable, but many clarified this by explaining that many agents do not keep up with legislation/procedural changes, frequently ask DIMIA officers very basic questions and are unaware of local conditions and documentation.

The MIA also notes that the question '*Are their ethics good or do they harass your staff?'* is curious in that harassing staff is not the diametrical opposite to good ethics or even necessarily opposed to good ethics.

[3] See Table 4: *Application Refusal Rates by Agent/Agency in descending rate order for Beijing Post Decided student cases* (1 July 2002 to 30 June 2003), above

EXECUTIVE SUMMARY

Migration Agents offshore

This paper discusses the following options for regulating offshore migration agents:

1. OPTION as at 3.1.26 of the discussion paper – the current systems testing model,
2. OPTION A - extend current registration scheme offshore in its present form
3. OPTION B - unregistered offshore migration agents could register in a limited category with limited continuing professional development.

The MIA supports OPTION A. The MIA believes that whatever system of regulation is adopted offshore, it should be the same as the onshore program and should be administered by the MARA. However, in the alternative, the MIA would support a limited category migration agent registration, but for those migration agents also practising as education agents only.

Education Agents

This paper also discusses the following options for regulating education agents

1. OPTION A – the current ESOS monitoring scheme
2. OPTION B – Encouraging education agents to become registered agents
3. OPTION C – Restricted migration agent registration
4. OPTION D – Industry/profession self –regulation

The MIA supports OPTION B and OPTION D. The MIA believes that education agents who provide immigration assistance should be registered with MARA and those undertaking immigration related activities should, in addition, be registered with a body overseeing immigration related activities.

SCOPE OF REGULATION

The principle of protecting vulnerable clients demands common criteria and common obligations of all agents whether they are onshore or offshore. Any scheme or system that adopts differing criteria can only lead to client confusion thereby undermining consumer protection and ultimately undermining confidence in both the registered migration agent scheme and the offshore scheme.

Consistent with this and keeping the principle of protecting the vulnerable clients foremost in mind it is essential that whatever system of regulation is adopted the criteria and obligations that apply to overseas agents and education agents must be at least commensurate with those that are currently and from time to time, imposed on agents who operate in Australia.

It is important that the criteria which are used to assess an overseas or education agent must be transparent and publicly available, and that there is a Code of Conduct against which such agents are measured.

Should a non transparent scheme be implemented there is the danger of individuals who have been formerly deemed "not fit and proper" by the MARA or who are otherwise clearly unsuitable, may seek to operate under the cover of registered and endorsed businesses offshore.

It has come to the MIA's attention through the DIMIA Staff News publication that education agents operating offshore and submitting eVisa applications for assessment levels 2-4 student visa applications, have formal arrangements with DIMIA including provision of a 7 digit agent number whereby they are given a logon ID password which will allow them to lodge applications electronically.

More alarmingly, it is noted that this 7 digit agent number is extended to any visa application submitted by an overseas non-registered migration agent, travel agents and education agents. This approach discriminates against Australian based businesses and exports jobs beyond Australian shores. This approach has the potential to undermine the integrity of the Australian migration system and safeguards for Australia's national security. The approach also gives such agents government endorsement while MARA registered agents are restrained from implying any relationship with the government.

We understand this 7 digit number will be used to identify the agent on future visa applications and will 'also facilitate any future regulation of overseas migration agents that might be developed in the light of the Government's issue of a discussion paper in May on this subject.[4] This is a perfect example of a second "registration" scheme that is certain to be misrepresented and create confusion in the minds of consumers.

Needless to say, these developments are viewed by the MIA with deep concern, and at face value indicate a willingness by the DIMIA to treat offshore agents markedly differently from those currently registered with MARA.

WHO SHOULD BE THE REGULATOR

The MIA considers that given the current regulatory arrangements for onshore migration agents, the Migration Agents Registration Authority (MARA), as the migration advice profession regulator, should also administer the proposed expanded migration agent scheme to offshore migration agents who provide '*immigration assistance'*. The MARA is the most obvious, consistent, experienced and cost effective option. It is considered as the most cost effective option because in the view of the MIA, the current onshore processes could be easily

[4] The DIMIA's *Staff News*, 29 October 2004 'New Tracking System For Overseas Agents', p.7

extended offshore. MARA migration agent registration processes currently allow for overseas migration agents. There are also current MARA processes in place to deliver knowledge and competence training overseas, as well as continuing professional development courses. In addition, the current MARA complaints handling processes, including current administrative and computer networks could be rapidly and easily extended overseas if resources are allocated for the task.

However, the MIA does not consider that the current regulatory model for onshore migration agents can and should monitor activity that is not considered to represent immigration assistance. That is because such activities vary considerably and involve knowledge and issues that fall outside migration. For example, the visa related activities of education agents includes knowledge about the information and procedures for the enrolment of students in education institutions as well as pastoral care arrangements, such as welfare and accommodation. The MIA considers that these visa related activities should be monitored by an organization that is able to devote its skills, time and resources to monitoring these activities only.

The MIA notes that if, for example there are two regulatory bodies, that is MARA and a regulatory body that monitors education agents, clause 2.1A(d) of the current Code of Conduct for migration agents would need to be considered. If it is considered that such activities, for example the activities of an education agent, conflict with the activities of a migration agent, then clause 2.1A(d) would need to be modified.

OPTIONS FOR REGULATING MIGRATION AGENTS OVERSEAS AND MONITORING AND IMPROVING THE PERFORMANCE OF EDUCATION AGENTS IN RELATION TO IMMIGRATION RELATED ACTIVITIES

The DIMIA Paper offers the following proposals:

Option A
Extend the current registration scheme offshore in its present form except with:

- *The threat of administrative sanction rather than criminal penalty for practising while unregistered; and*
- *A greater role for DIMIA in the disciplinary process (similar to the role of DIMIA in relation to the proposed vexatious activity scheme).*

OR
Option B
Option A, plus the introduction of restricted registration categories offshore (and onshore) so that:

- *Unregistered offshore migration agents could register as migration agents to practice within certain defined areas (eg student, business, skilled, family, protection and humanitarian visas); and while*
- *Agents registered in a limited category would be required to pay a registration fee, they would be required to undertake more limited continuing professional development (CPD) activities.*

However, before commenting on Option A or B, the MIA notes that the paper also contains the following comments:

> 3.1.26 Initially, only a small number of agents will be assisting in a systems testing phase. Following the systems testing and a positive assessment of the initiative, further agents will be granted permission to issue the e-lodgement facility for student visa applications. While there already exists an e-lodgement facility for student visas,

the current facility is limited to students from low risk countries and does not have any component of education agent involvement.

3.1.27 Eventually, students worldwide will be able to lodge applications electronically, with the requirement that their visa applications are lodge through education agents who are already known to DIMIA and have been granted access to the e-lodgement system.

3.1.28 Clearly the student area is a significant element of DIMIA's work repatriation, globalisation and e-lodgement strategy, with an increasingly important role to be played by agents in helping DIMIA to realise operational efficiencies and deliver better client service. In order to maximise e-lodgement take-up, DIMIA continues to review and enhance the efficiency and user-friendliness of its business processes and associated systems. In line with this, the e457 and e676 lodgement systems are designed to be self explanatory and easy to use.

THE SYSTEMS TESTING PHASE

The MIA is concerned that because this option is currently being trailed, and as the MIA understands, involves education agents only, it is in effect, the preferred DIMIA option. The MIA is concerned that any arrangement whereby designated persons who are not even migration agents are encouraged to perform work which includes immigration assistance would run counter to the reasons why people are registered as migration agents in the first place, that is such persons should be accountable to clients, decision-makers and the wider community for their knowledge, competence, ethics and for any complaints made against them.

The MIA understands that a number of education agents who have contractual obligations to the DIMIA including Code of Conduct obligations have been given access to the e-lodgement facility for student visa applicants. The MIA is not aware of the legal basis of the contract or its contractual obligations and therefore, its comments must be based on assumed contractual content. The MIA is concerned that the terms of the contract that presumably sets some standards, have not been publicly disclosed or subject to debate.

The MIA notes that current education agent involvement is contrary to the ideals espoused in Option A and B, that is acknowledgement that immigration assistance must be undertaken by registered migration agents only. More fundamentally however, using education agents to undertake immigration assistance is contrary to the fundamental principals of the registration scheme. It is also inconsistent with the Department's own strategic plan, *Business Directions 2002-2005*, which states that one of the DIMIA's aims is to increase the percentage of applications lodged electronically by or through *appropriate* third party providers, for example migration agents. [5]

Whilst the MIA can appreciate that the DIMIA has chosen to undertake an initial testing phase, the MIA is concerned that even this initial phase does not have the requisite components to ensure that those involved are able to be regarded by the wider community as competent and accountable. Accordingly, whilst the education agents may have some standing with DIMIA and may be accountable to DIMIA if they break their contractual obligations, or if they lodge student visa applications which are found by the DIMIA, for whatever reason, to be unsatisfactory, the education agent's accountability to vulnerable

[5] Australian Immigration – *Investing for 2005 and Beyond*. The strategic plan states that appropriate third parties include travel agents, Centrelink, migration agents, Migrant Resource Centres, Adult Migrant English Program providers, education providers, rural transaction centres. Education agents are not mentioned see http://www.immi.gov.au/department/investing2005_2.htm.

clients if a dispute arises between them, for example in regards to fees, remains unclear. In addition, the agent's standing in the wider community which comes from being accountable to a professional organization that publicly and actively educates, scrutinises and regulates their overall activities and makes them accountable to those they give advice to, and those they take money from, remains non-existent.

The MIA is also concerned that the system testing phase could be open to allegations that it lacks accountability and transparency. In addition, it could be assumed that in most cases, because complaints would arise on the basis of the contract only, then the complainant would be DIMIA, who would also be the adjudicator. The process could be open to allegations that it is unjust and unfair in that it fuses the roles of complainant with that of adjudicator. The process could also be open to the allegation that agents were denied work simply because the DIMIA did not like them. In addition, if the process were followed, then any complaint would be limited to the terms of the contract, including temporal limitations, that is, if activity that was of concern fell outside the terms of the contract, or occurred after the contract expired, for example, where it was alleged that an agent facilitated a visa holder's breach of conditions, then there would be no agent accountability.

The MIA is concerned that a contract based accountability process will do nothing to address the conduct of unscrupulous overseas migration agents who will continue to tarnish Australia's reputation. The MIA believes that such conduct can only be addressed with the introduction of benchmarks in overall behaviour that are publicly available and consistently and diligently applied over a long period of time so that standards in behaviour are learnt, understood, monitored and maintained.

At the very least, DIMIA's undisclosed contract for a limited few is an ad hoc solution which will not change overall behaviour or the conduct of unscrupulous overseas migration agents. If the contract is not even supervised, or if it its conditions are applied inconsistently or without transparency, then it runs the risk of becoming irrelevant altogether.

Of major concern are the implications for the onshore registration scheme. If, as is suggested in the discussion paper, DIMIA's global working and e-lodgement strategy will blur offshore and onshore visa operations[6], then if off-shore immigration assistance does not require registration, many onshore migration agents may seek to circumvent the onshore registration process altogether and transfer their operations offshore. This would mean that the current role of MARA and its onshore operations would be significantly undermined. The MIA notes that since 1998, MARA's operations have meant that there has been a concerted and significant change in onshore migration agent culture. Notably, onshore migration agents have become more consumer aware and they are less prepared to take clients who have no chance of visa success. The MIA is concerned that any contractually based accountability off-shore will effectively dismantle the role of MARA onshore, and with it, the current onshore culture that has been fostered and sustained over a long period of time.

Finally, it is noted that the current discussion paper states that eventually, students worldwide will be able to lodge applications electronically, with the requirement that their visa applications are lodged through education agents who are already known to DIMIA and have been granted access to the e-lodgement system. The MIA is concerned that such practices not only raise legal issues, such as whether a procedure that is in effect administrative can restrict an applicant's ability to lodge applications or can be made mandatory for a visa applicant, but may also remain inaccessible to many visa applicants. Such practices also exclude rather than includes business and therefore restricts competition. Such practises are anti competitive and are therefore not in business or the consumer's best interests. This approach specifically

[6] 2.1.16 of the Discussion paper. The paper states that even greater numbers of offshore visa applications are lodged and decided onshore.

discriminates against Australian based businesses and exports jobs beyond Australian shores and gives such agents government endorsement while MARA registered agents are restrained from implying any relationship with the government.

Summary of Systems testing phase
Overall, the 'systems testing phase' has been introduced without disclosed research or disclosed analysis or public consultation. It lacks transparency of process and is contrary to principles of public accountability. It lacks due process for agents, external review and fails to be accountable to the agent's clients. Such practices may be anti competitive and therefore not in business' or consumer's best interests. The practices also fail to take into account the potential of the system to negatively impact upon the onshore migration agent registration program.

The MIA remains concerned that if the contract based accountability process is adopted beyond the 'systems testing phase' it will be a radical departure from previous attempts to improve standards of service to migration clients. It will do nothing to build upon the recommendations of previous reviews to strengthen the existing scheme, improve consumer protection, enhance industry professionalism and extend registration arrangements to overseas migration agents. Rather, it will fail to address the concerns with the overall behaviour of overseas migration agents and may have a dramatic impact upon onshore migration agent regulation.

The MIA remains concerned that whilst it understands that the systems testing phase that is being trailed does not currently extend beyond student visas, the procedure whereby overseas non-registered migration agent's are being given a departmental 'offshore agent ID number' is the first step towards introducing a system which may not only rival the onshore migration agent registration scheme, but may also make any public discussion of an official and external overseas migration agent registration scheme obsolete.

OPTIONS A AND B
Both models acknowledge that the registration scheme should be extended to offshore agents. However, the approaches differ as to whether offshore agents could be registered to practice within certain defined areas only and as a result, be required to undertake more limited continuing professional development activities.

Extending the present form vs. offshore migration agents registering to practice within certain defined areas only

MIA is of the view that many if not all migration clients, wherever situated, seek migration advice because of the gravity of their decision to come to Australia and they are unaware of the requirements of the Migration Act or Regulations. Accordingly, they seek advice in order to obtain a migration outcome (whether it be temporary or permanent) as opposed to advice about a specific category of visa.

It is simply not realistic to 'quarantine' visa class advice so that advice is given about a certain visa class in isolation to the overall migration program because such a proposal is based on a false assumption that a person's application for one visa class is independent of immigration law in general and does not affect a person's options in relation to other visa classes. For example, as there are now well-defined study paths to permanent residence, advice about temporary student visas may not be separable from advice about permanent residence.

Accordingly, even if offshore agents do specialise in certain visa class streams, including temporary visa class streams, the MIA is of the view that they cannot provide initial advice

and subsequent casework or advocacy within a migration vacuum but must always consider general migration principles such as sponsorship, health, character, assurances of support criteria as well as cancellation and review rights. In addition, because many temporary visa applications are lodged with a view to subsequently lodging further temporary visa applications or even permanent visa applications, then migration agents routinely require knowledge and assessment of a range of visa classes before they can provide initial advice.

A member of the MIA has stated that:

> *Many agents in Australia also only have limited areas of activity, such as student visas, refugee etc, why cannot they also have limited registration?*
>
> *From DIMIA's point of view I'm sure it would be an administrative nightmare to work out which agent can say what to whom. What if a student visa applicant is simultaneously applying for migration, whom do DIMIA deal with? What if a student visa application is refused, does the agent go to the MRT or AAT for their client? How can a limited agent (student area) adequately respond to DIMIA when DIMIA make enquiries relating to s501 matters during the processing of a student visa, when they are not approved to deal with matters other than student visas.*
>
> *To split up the Migration law into separate areas of practice is a nonsense. If a limited agent is deemed to understand the fundamentals of the Act, Regulations, PAM and MSI's to a sound knowledge level in a particular area, then they would understand enough to advise on other visas and it is not sensible to restrict their activities*.

The MIA is also of the view that the visa classes themselves should not be quarantined so that only certain designated agents can apply for them. The MIA is of the view that although such an arrangement may be administratively appealing to the DIMIA, it is not legally based. The MIA is of the view that such an arrangement would also run counter to the principals of registration, that is, once registered, a migration agent should be entitled to lodge applications for any class.

This approach is also consistent with the MIA's basic belief that regulation should be universally applied, regardless of the agent's location and that offshore agents should be subject to exactly the same standards and monitoring processes as those onshore unless there are valid reasons to deviate from the onshore structure. Valid reasons may include jurisdictional issues such as extradition and extra territoriality issues or resource issues.

The MIA is also of the view that migration agent education requirements should be universally applied, unless there are valid reasons to the contrary. It is the MIA's view that because of the overlapping nature of migration law, then it is not possible to remain knowledgeable about the developments in one area of migration and ignorant about the developments in other areas. Accordingly, the MIA does not support limited continuing professional development activities.

Finally, the MIA considers that although the United Kingdom's Office of the Immigration Services Commissioner's (OISC) model makes a distinction between the following categories: asylum work, entry clearance leave to enter and remain, nationality and citizenship, EU and EEA immigration law, and detention issues, these distinctions are not visa streamed based because the 'entry clearance category' and 'leave to enter or remain' category covers all visas for entry to the United Kingdom. Rather, the model largely categorises migration agent activities according to whether they are initial advice, casework or advocacy. In contrast, Australia's immigration program is visa class based and requires a comprehensive knowledge and assessment of more than one visa class. Whilst the United

Kingdom's visa class model may also be visa class based, the OISC's competence model is not, that is, it groups most visa classes together. MIA is also of the view that dividing a migration agent's activities into initial advice, casework or advocacy, is inappropriate because the level of knowledge required to provide initial advice may also require casework and advocacy experience.

Option A remains the preferred option, however if it is not adopted, then the MIA would support the introduction of a restricted migration category but for education agents only. MIA is of the view that option B is a quick and relatively easy option that will encourage education agents who specialise in students and who may be currently engaged in giving immigration assistance offshore to become registered as migration agents. It would also mean that CPD training offered would be directly relevant to their work. It also means that whilst knowledge and competence testing and training will be limited to certain areas only, there will be regulatory standards in relation to ethics and complaints handling mechanisms.

The MIA believes that option B will also have the least impact upon education agents in the sense that although a limited number of education agents currently giving immigration assistance in student visa classes may be unable to meet regulatory standards, such as integrity and competency standards, and will be forced out of the market, this number would be greater if they were required to embrace the current registration scheme.

Administrative sanctions rather than criminal?
The MIA supports universality in relation to enforcement. However, the MIA also accepts that legal issues such as extradition and extra territoriality mean that extending criminal provisions offshore may not be a practical option. However, there has also been a suggestion from the MIA membership that in order to avoid difficulties in relation to enforcement against people who are neither citizens nor permanent residents, then membership should be restricted to Australian citizens and permanent residents. This is similar to the current situation in Canada, where membership of the Canadian Society of Immigration Consultants is limited to Canadian citizens and permanent residents. However, the MIA acknowledges that this may not be viable given that most of the experienced agents offshore may not in fact be Australian citizens or permanent residents.

The MIA supports a scheme whereby if current onshore sanctions can be legally and practically extended to offshore agents, then they should be extended. This would include sanctioning via refusal to re-registrar, and the current caution, suspension and cancellation regime. It would also include the new onshore provisions referred to as 'disciplining registered migration agents for vexatious activity.'

However, unless valid reasons are put forward, it would not include *additional* sanctions. Accordingly, it would not include 'new' automatic sanctions such as the automatic re-registration refusal when a certain number of an offshore agent's visa applications received by the Department were found to contain fraudulent documents or statements. Also, it would not include considering an application for re-registration as invalid on the basis of threshold refusal rates or threshold receipt of fraudulent documents or fraudulent statements rates. The MIA does not support a process whereby offshore agents who may have unethical clients are, as a result of their client's behaviour as opposed to their own behaviour, penalised as a result of non-discretionary mandatory provisions.

Complaints Handling
As previously stated, the MIA supports DIMIA's role in the disciplinary process for offshore agents similar to DIMIA's role in relation to the 'vexatious activity' scheme but only where that system reflects the current onshore migration agent's provisions.

The MIA considers that where ever possible, MARA should handle complaints in a similar way to its current onshore procedures. The MIA supports utilising Embassy staff for interviews and investigations (such as site visits) where it is not practical for logistical or economic reasons for MARA to do so. In addition, it considers that wherever possible, MARA staff should be given access to Embassy facilities in order to conduct those interviews (including telephones and video conferencing). Where that is not possible, then MIA considers that those investigations and reports could, at MARA's discretion, be carried out by the Department, however such reports would need to be put to a migration agent if they were to be relied upon to a migration agent's detriment. The MIA does not consider that it is appropriate that the investigation reports of the Department, who may also be the complainant, should, in any circumstances, be considered conclusive. Such an approach would potentially combine the roles of complainant and decision maker and would be counter to principles of natural justice and fairness.

What is the appropriate way in which to encourage registration?
The MIA notes that any offshore regulation that relies upon administrative sanctions only would be an appropriate incentive to remain registered. However, to be effective, a comprehensive advertising campaign followed by a communication strategy campaign about registration requirements and what is immigration assistance would be required. A comprehensive advertising campaign would include targeted information sessions to interested groups such as the agents themselves[7], non-government organizations and education providers. Communication strategy should include information about registration requirements on DIMIA websites, at Embassies and on application forms. In addition, public information about where to find information about whether a particular person is registered or not would be required.

Reciprocal registration requirements
The MIA notes that this issue is largely academic, because most countries do not regulate migration agents. However, the MIA considers that another countries approach to regulatory matters is a matter for it to pursue, although the MIA also considers that overseas migration agent registration is not intended to displace any duty or liability that a registered agent may have under the law of another country. Accordingly, if another country does regulate migration agents, then a migration agent's unwillingness or inability to be registered locally may be relevant to Australian registration because a migration agent's unwillingness or inability to be registered may impact upon the Australian 'integrity' and 'fit and proper person' requirements. In addition, the MIA would not support the registration of agents in a country that did not allow the operation of migration agents.

The MIA notes that the paper states that the New Zealand Government is examining a number of regulatory options including the idea of an expanded jurisdiction for the MARA across the Tasman. The MIA notes that if the New Zealand Government adopts its own registration scheme, then the Trans-Tasman Mutual Recognition Act 1997 will need to be taken into consideration, that is under section 16 of the Act, a person who is registered in New Zealand for an occupation is entitled, after notifying the relevant registration authority in Australia, to be registered in Australia for the equivalent occupation.

What avenues of review rights would apply to offshore registration and sanction decisions.
The MIA considers that where possible, the same avenue of review rights that apply to onshore agents should apply to offshore agents.

[7] Attachment A Results of overseas DIMIA post survey of overseas migration agents practice, above, indicates that 19 posts reported that they had contact with agents, many of them holding seminars in relation to legislation changes, particularly in relation to student and visitor visas. Twenty of the posts surveyed reported that they had little or no contact with migration agent groups.

Transitional issues

The current arrangements in Australia revolve around requiring a migration agent to register before being able to practice.

The MIA considers that these arrangements should also apply to overseas agents after an appropriate education campaign of some duration. The MIA does not support a staged implementation programme whereby registration is introduced on a geographic basis or a visa class/sub-class basis. That is because as previously stated, the MIA considers that it is not realistic to quarantine visa class advice (under section 45 of the *Migration Act 1958*, an application is made for a visa, not the subclass, and it is not legally possible to quarantine a subclass of visa without considering the other subclasses of the visa) so that advice is given about a certain visa class only in isolation to the rest of the migration program.

The MIA considers that a well targeted campaign prior to implementation will have the same effect of initial testing of the regulatory scheme for one or two visa classes, that is, it will give offshore agents who decide not to be registered and those who decide to be registered but who fail to meet regulatory standards the opportunity to gradually leave the industry without suffering from an abrupt termination of their business.

The MIA considers that the same entry-level knowledge requirements that apply onshore should apply offshore, unless there are valid reasons to deviate from those requirements. The current onshore requirements include the new Migration Advice Profession Knowledge Entrance Examination (MAPKEE), which has been designed to test a candidate for registration's knowledge of the Australian immigration portfolio; including immigration law, including immigration assistance and public administration, as well as a candidate's skills relating to the conduct of a business and that they have learned the values required of them by law.

The MIA acknowledges that there may be an impact upon competition to the extent that those unable to meet regulatory standards will be forced out of the market. The MIA believes that the benefits to consumers and to decision makers by removing unscrupulous or incompetent migration agents from the market will outweigh any supposed loss of competition. Whilst the MIA welcomes the immediate removal of unscrupulous or incompetent migration agents from the market, it remains concerned that any entry-level requirement must not also drive away honest and diligent overseas agents who are competent and indeed experienced. The MIA is aware that in other countries, there are concerns that new accreditation schemes, for example, the new accreditation scheme in Britain for publicly funded immigration solicitors and advisers, will do just that[8].

The MIA also notes that there are some practical problems with extending the current onshore scheme offshore. For example, consideration would need to be given to amending section 294 of the Migration Act which states that an applicant must not be registered unless he or she is an Australian citizen; or an Australian permanent resident or a New Zealand citizen who holds a special category visa.

Consideration would also need to be given to allowing some persons offshore to witness Commonwealth Statutory declarations or allowing offshore migration agents to provide registration applications and statutory declarations in a form that is the jurisdictional equivalent to the Commonwealth's statutory declaration. .

Finally, agents overseas should also demonstrate at the very least a basic understanding of the settlement issues which would confront a person arriving in Australia, such as its language,

[8] The DIMIA's *Staff News*, 15 October 2004, has included an article 'UK: Immigration, asylum advisers may lose jobs' from *The Guardian*, 11 October 2004.

systems, customs, taxation (including tax file numbers), medicare arrangements, its stance on equality of the law as well as Australia's policy of zero tolerance of corruption and bribes.. This extra obligation, if not taken at the time of registration, should be completed in the first year of registration, or be grounds for refusal.

The costs relating to the administration of the current statutory regulation scheme to offshore agents

It could be expected that by extending the onshore scheme offshore, there would be additional administrative costs in arranging entry-level requirements, continuing professional development, as well as communicating with and monitoring overseas agents. The MIA believes that these additional costs should be borne by the overseas agents themselves and should be reflected in a higher registration fee than that paid by onshore agents of between 10-15%.

OPTIONS FOR REGULATING IMMIGRATION RELATED ACTIVITIES OF THE EDUCATION ADVICE PROFESSION

The Paper offers the following proposals:

OPTION A - IMPLEMENT A MONITORING SCHEME

This model largely reflects the current system except that a suggestion is made that education providers could be informed of any concerns with education agents in relation to immigration and visa related matters. Providers could disassociate themselves from the particular agent if the concern is found to be valid.

A number of comments should be made. Option A provides two examples of benchmark behaviour. Firstly, information is passed on to the Department of Education, Science and Training (DEST) who could investigate the behaviour under the existing *Education Services for Overseas Students Act* (ESOS) arrangements and secondly, education providers could be informed of any 'concerns' about migration agents in relation to immigration and visa related matters and the providers could then disassociate themselves from the particular education agent.

If the existing ESOS Act is used to benchmark behaviour, then Option A is no different from the current situation, assuming of course that education providers are currently informed of concerns about their education agents. However, the proposed model fails to address any of the concerns raised by the current model, including whether the current ESOS Act should be the benchmark used by education providers to disassociate themselves from particular education agents and if not, then what benchmark should be used. In addition, the proposal fails to address whether education agents should be providing immigration assistance. The proposed model also raises new concerns about whether the process is transparent and fair.

Concerns raised by the current model including whether the current ESOS Act should be the benchmark used by education providers to disassociate themselves from particular education agents

Currently, the ESOS Act and its associated National Code of Practice envisages that education providers monitor education agents and are responsible for those acts that are misleading or deceptive. The following provisions in the ESOS Act and National Code of Practice are relevant:

> **Section 15**
> A registered provider must not engage in misleading or deceptive conduct in connection with:
> a) the recruitment of overseas students or intending overseas students; or
> b) the provision of courses to overseas students.

The National Code
Marketing and student information

The CRICOS-registered provider is responsible for the following activities, whether conducted by (i) the provider, (ii) their agents, or (iii) those involved in the provision of a course under an arrangement with the registered provider.

19. The provider must ensure that marketing of its education and training services is carried out with integrity and accuracy. It must uphold the reputation of Australian international education and training. No false or misleading comparisons shall be drawn with any other provider or their courses. The provider must not make any inaccurate claims of association with any other provider or organization, or give inaccurate advice as to acceptance into another course.
20. Where another person or business provides a course under an arrangement with a registered provider, they may only advertise the provision of that course with the express permission of the registered provider, and must identify the registered provider and their CRICOS provider number. (S107 of the ESOS Act 2000 requires written materials to identify the registered provider and their CRICOS number).
21. The registered provider must not accept an overseas student, or an intending overseas student, for enrolment in a course if the registered provider has not given to the student:

21.1 the following information about the course:
i. a general description of the content;
ii. the qualification or accreditation gained on completion;
iii. the duration;
iv. the teaching methods used (including any field trip or work experience requirements);
v. the assessment methods used;
vi. if another provider is also involved in providing the course, that fact and the location of course delivery by that provider;
vii details of any arrangements with other providers for recognition of the course or completed components of the course; and

21.2 A general description of:
i. The facilities (for example classrooms, furniture, fittings)
ii. the equipment (for example audio visual teaching aids)
iii. the learning resources (for example reference texts and software) available to students undertaking the course and;

21.3 An itemised list of all fees payable to the provider; and
21.4 Information about the minimum level of English language proficiency, educational qualifications and work experience required for the student to be accepted for the course (unless this is clearly not relevant).

Agents
49. The registered provider must not accept or continue to accept overseas students recruited by an agent, or authorise an agent to use PRISMS on their behalf, if they know, or reasonably suspect the agent to be:
49.1 Engaged in dishonest practices, including suggesting to the overseas students that they come to Australia on a student visa with a primary purpose other than full-time study.
49.2 Facilitating the enrolment of overseas students who do not comply with the conditions of their students visas.
49.3 Engaged in false or misleading advertising and recruitment practices.
49.4 Using PRISMS to create eCoEs for other than bona fide students.

Sanctions for non-compliance are listed in section 83 of the ESOS Act as follows:

Section 83(1)
The Minister may take one or more of the actions listed in subsection (3) against a registered provider if the Minister believes on reasonable grounds that the registered provider or an associate of the registered provider is breaching, or has breached, this Act, the National Code or a condition of the provider's registration...

Section 83(2)
The Minister may also take one or more of those actions against a registered provider for a course if the Minister believes on reasonable grounds that a provider that is providing the course with the registered provider is engaging, or has engaged, in misleading or deceptive conduct in connection with:

a) the recruitment of overseas students or intending overseas students to the course; or

b) the provision of the course to overseas students.

Section 83(3)
The actions are:

a) to impose one or more conditions on the registered provider's registration either generally or in respect of any one or more specified courses for any one or more specified States (see section 86);

b) to suspend the registered provider's registration for any one or more specified courses for any one or more specified States (see section 95);

c) to cancel the registered provider's registration for any one or more specified courses for any one or more specified States.

Accordingly, the Minister may impose one or more conditions on the registered provider's registration, suspend the registered provider's registration; or cancel the registered provider's registration; if the Minister believes on reasonable grounds that the registered provider or an associate of the registered provider is breaching or has breached the Act, the National Code or a condition of the provider's registration. 'An associate' is defined in section 6 of the ESOS Act and does not include an education agent.

The first comment about these current provisions is that the penalties are against the education provider only. There is no process whereby the education agent can be directly held to account for his/her own actions. Secondly, under the ESOS Act the only penalty which impacts upon an education agent is the discretionary condition imposed on the education provider which states that they will not deal with a specific education agent, that is an education provider can disassociate themselves from a particular education agent. However, even if this does occur, then unbeknown to the education provider, the education agent may continue to act for it on the basis of a sub-contractual arrangement with another education agent and in any event, the education agent remains free to continue to represent all other education providers.

Thirdly, whilst the education provider can be penalised for the education agent's actions in relation to misleading or deceptive conduct, there is no obligation on the part of the education provider or education agent to give appropriate advice. There may also be no accountability if the education agent's advice is unintentionally negligent (as opposed to misleading or deceptive). Accordingly, questions such as:

- a student's eligibility for a visa (including 'genuine student' criteria, health and character);
- ensuring that visa applicants apply for the correct visa and lodge valid applications[9] and applications which identify and address relevant subclass criteria;
- the student visa's conditions (including but not limited to the conditions under which a student may work, where they can live, and whether they can change course provider;
- whether a student can change his/her course; his/her visa or his/her temporary immigration status to permanent visa status;
- and whether and in what circumstances the visa can be cancelled,

[9] An application that is deemed to be invalid will not be accepted.

are all concerns which must necessarily influence a student's decision to study in Australia as well as their conduct once they get here. Under the current law, if the education agent is in Australia and is also a migration agent, then the agent can be sanctioned under the Migration Act for not addressing these issues or negligently addressing these issues. However, if the education agent is in Australia and is not a migration agent, then they can be sanctioned for negligently addressing these issues[10] but they cannot be sanctioned for not addressing these issues.

If the education agent is overseas and does not address these issues, or negligently addresses these issues, then there is currently no avenue under the Migration Act or the ESOS Act whereby the education provider or the education agent can be sanctioned.

Although the MIA is unaware of any comprehensive study in relation to the performance and conduct of education agents[11], the Migration Review Tribunal's website, which publishes a selection of its decisions[12], discloses complaints involving immigration assistance and visa related activities by education agents which have either been negligent or have been deceptive. In one case, an education agent omitted to provide important information in relation to visa conditions, in another case, an education agent enrolled a student into the wrong course and in another case, it was alleged that the education agent misled a student about the nature of the course in which they had been enrolled.

The following are examples only. It is evident from the Migration Review Tribunal's website that there are other cases:

Example 1
Failure of Education Agent to provide information in relation to visa conditions
In *Lai, Chen-Kee (2002) MRTA 6621* (13 November 2002) for example, the Migration Review Tribunal accepted that at no time did the education agent make the review applicant aware of condition 8206, which required him to notify the Department in the event of him wishing to change education providers. In *Veronika, Veronika (2003) MRTA 3628* (4 June 2003) the visa applicant's migration agent stated that the visa applicant enrolled in a Diploma in Business course through an education agent in Malaysia. The education agent had not informed her that she would experience difficulties if she arrived after the course commenced. Her attendance in the Spring Session was only 50% as she missed the first two weeks of the course and she was prevented from attending one subject.

As discussed, there is no current redress under the ESOS Act against a provider or education agent for 'no advice'.

In *Veronika* it could be argued that the advice related to the conditions of the visa and were therefore immigration assistance, or it could be argued that the advice related to the commencement of the course and was therefore, not immigration assistance. In either case, the student has suffered as a result of no advice.

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[10] Under section 280 of the *Migration Act 1958*, a person who is in Australia and who is not a registered migration agent cannot give immigration assistance. Criminal penalties apply.

[11] The Joint Press Release of Gary Hardgrave and Dr Brendan Nelson dated 26 May 2004 states that:

> A pilot system monitoring the compliance profiles of education agents overseas may help address potential consumer protection issues for overseas student applicants'.

See Joint media release with the Hon Dr Brendan Nelson and Gary Hardgrave, *Protection From Unethical Migration Advice*, Media Release H106/2004 – 26 May 2004, www.immi.gov.au/cam/media/media04/h04106.htm

[12] The Migration Review Tribunal reviews the decisions of the Department of Immigration, Multicultural and Indigenous Affairs in certain visa categories. Accordingly, the information obtained from its decisions is incidental to the Tribunals ultimate decision-making capacity.

Example 2
Enrolment of student in wrong course
In *Jayawardana, Navin (2001) MRTA 3796* (20 August 2001) the Migration Review Tribunal found that the visa applicant was a credible witness who had stated that he had instructed his education agent in Sri Lanka to enrol him in a Diploma in Marketing course but when he arrived in Australia he found that the education agent had enrolled him in a Diploma of Management course.

As discussed, there is no current redress under the ESOS Act against a provider or education agent for 'negligent advice'.

Example 3
Misleading students about the nature of the course they have been enrolled in
In *Mamidi, Vijay Ram (2000)* MRTA 429 (24 February 2000) the visa applicant alleged that the education agent in India told him that it would be better not to apply straight away for university but to first apply for a diploma course and obtain credits at university and had encouraged him to enrol at Chalmers. The Migration Review Tribunal found that the visa applicant had been misled by the Indian education agent about the nature of the course he had enrolled in at Chalmers and that he would not be able to use his studies as credits at universities as he had been advised.

Example 3 may be an example of a practice that the MIA understands has developed whereby students are given information that is not correct by education agents and encouraged to enrol in one course and after arrival in Australia, change course providers so that education agents can obtain further commissions.

As discussed, there may be redress under the ESOS Act against a provider for misleading or deceptive conduct, however there is no redress against the education agent.

In this case, it could be argued that the advice related to the student's eligibility for a particular visa and was therefore immigration assistance, or it could be argued that the advice related to the student's eligibility for a particular course only. In either case, the student has suffered as a result of misleading advice.

What benchmarks should be used by education providers to disassociate themselves from particular agents and whether the process is transparent and fair.
As mentioned, Option A provides two examples of benchmark behaviour, passing on to DEST information which could be investigated under the existing ESOS Act arrangements and secondly, education providers could be informed about any 'concerns' about migration agents in relation to immigration and visa related matters and providers could then disassociate themselves from a particular agent.

If this second benchmark were used, then it would be open to the charge that it was subjective and arbitrary, and failed to provide a clear and transparent or fair process that would allow migration agents to respond to alleged concerns.

OPTION B - ENCOURAGE EDUCATION AGENTS TO BECOME REGISTERED MIGRATION AGENTS

The MIA considers that registering education agents with MARA, that is the current regulatory model for migration agents, would be sufficient to educate and monitor education agents in relation to their provision of immigration assistance if it was also extended to

education agents who offer immigration assistance outside Australia. In addition, because the MIA does not believe that it is realistic to quarantine visa class advice in isolation of the migration program, and because the MIA believes that in many instances, it is not realistic to separate discussion about temporary student visas from permanent residence, then the MIA supports extending registration in its entirety, that is in it presence onshore form.

However, even if the current regulatory model for migration agents was extended, the framework does not assist in monitoring those activities that are most appropriately identified as the visa related activities of education agents. *Visa related activities* is a wider term which encompasses the broader range of services offered by an education agent. Such services include providing information about the study opportunities in Australia and knowledge about the enrolment of students in education institutions. Services relating to travel, accommodation and employment may also be offered. Services may also include 'adult care' or 'guardian like' arrangements for students under 18[13] as well as the management of their living allowances.

OPTION C - RESTRICTED MIGRATION AGENT REGISTRATION

The MIA is of the view that it is simply not realistic to 'quarantine' visa class advice so that advice is given about a certain visa class only in isolation of the migration program because such a proposal is based on a false assumption that a person's application for one visa class is independent of immigration law and general and also does not affect a person's options in relation to other visa classes.

Accordingly, even if offshore agents do specialise in certain visa class streams, such as student visas, the MIA is of the view that they cannot provide initial advice and subsequent casework or advocacy within a migration vacuum but must always consider general migration principles such as sponsorship, health, character and assurances of support criteria as well as cancellation and review rights. In addition, because student visas may be lodged with a view to subsequently lodging further temporary visa applications or even permanent visa applications, then migration agents routinely require a knowledge and assessment of a range of visa classes before they can provide initial advice.

The MIA is of the view that if an agent is deemed to understand the fundamentals of the Migration Act, Regulations and Departmental policy, they would understand enough to advise on other visas and it is not sensible to restrict their activities.

The MIA considers that this view would not be altered on the basis that the visa related activities of education agents are monitored. The MIA considers that monitoring visa related activities is a separate issue and should not be used to justify restricted migration agent registration.

Accordingly, option B remains the preferred option, however, if it is not adopted, then the MIA would support the introduction of a restricted migration agent category for education agents only. MIA is of the view that restricted migration agent registration is a quick and relatively easy option that will encourage education agents who specialise in student visas

[13] Student visa condition 8532 requires a student visa holder who has not turned 18 years of age to maintain accommodation and general welfare arrangements provided by the education provider in cases where they do not propose to live with a parent or guardian, a relative nominated by their parents or guardian while in Australia. Although it is MIA's understanding that many of the 'pastoral care' arrangements (such as welfare and accommodation) are actually undertaken by an education agent, under the Migration Regulations, it is only the Education Provider who is required to complete a declaration called the confirmation of Appropriate Accommodation and Welfare (CAAW) that is to be submitted as part of the student visa application. See Schedule 8, Migration Regulations 1994.

and who are currently engaged in giving immigration assistance offshore to become registered as migration agents. It would also mean that CPD training offered would be directly relevant to their work. It also means that whilst knowledge and competence testing and training will be limited to certain areas only, there will be new regulatory standards in relation to ethics and complaints handling mechanisms.

The MIA believes that restricted migration agent registration will also have the least impact upon education agents in the sense that although a limited number of education agents currently giving immigration assistance in student visa classes may be unable to meet regulatory standards, such as integrity and competency standards, and will be forced out of the market, this number would be greater if they were required to embrace all of the current registration scheme, including a comprehensive knowledge of the Migration Act, the Migration Regulations and the Procedures Advice Manual.

OPTION D - INDUSTRY/PROFESSION SELF - REGULATION

The MIA supports the implementation of an industry self regulation model for education agents, whereby education agents located onshore and offshore are required to register with a self regulating body which is also a peak representative body in the migration field. The peak body would regulate an education agent's visa related activities and would be independent of the MARA which would continue to regulate activities identified as constituting immigration assistance. Accordingly, the MIA would envisage the implementation of an independent Code of Conduct whereby education agents would be required to comply with certain norms of behaviour in relation to their visa related activities which would include a Continuing Professional Development scheme and which would aim to develop maintain and enhance professional standards. The MIA notes that some preliminary work has already been done in that it has held preliminary discussions with some education agents and has responded to the evaluation of *Education Services for Overseas Students (ESOS) Act 2000* conducted by KPA consulting.[14]

The MIA envisages this would be complement and be in addition to the proposed extension of the onshore migration agent's scheme offshore.

The MIA also envisages a monitoring and disciplinary function whereby education agents who contravene the Code could be sanctioned. Sanctions would range from a caution to suspension to de-registration.

By way of demonstration and taking the above 3 examples into account, if a Code of Conduct for education agents was introduced, then the behaviour of an education agent who failed to provide information, or who was negligent or who intentionally misled a student could be monitored and if appropriate, sanctioned.

The visa related activities that could be monitored include the education agent's knowledge of the ESOS Act and other related Acts and Regulations in relation to overseas students and the education agent's knowledge of the information and procedures for the enrolment of students in education institutions in sufficient depth so as to offer sound and comprehensive advice. It would also include the monitoring of monies handled by education agents on behalf of education providers as well as the living allowances handled by them on behalf of students. It would also include the monitoring and where appropriate sanctioning of the education agent

[14] A call for submissions was advertised in the press on 14 August 2004. Submissions closed on 1 October 2004.

in relation to inappropriate pastoral care arrangements secured by him/her in relation to the Declaration of the Confirmation of Appropriate Accommodation and Welfare[15].

It would also be possible to sanction registered education agents who enter into sub-contractual arrangements with de-registered education agents.

Under such a model, it would also be possible to ensure a minimum level entry requirement for those who assist with student migration. Such requirements could include fit and proper person entry criteria, English language criteria and minimum education criteria. Once registered, it would be possible to ensure that those involved continue to demonstrate the knowledge, understanding and skills needed to give assistance in the various stages of the student migration process and demonstrate a commitment to personal and professional development.

[15] Where education agents have secured pastoral care arrangements, it may also be appropriate that they are co-signatories on the CAAW.

Mandatory Professional Indemnity Insurance For Migration Agents Onshore

Implementation Issues

Migration Institute of Australia's Response to Discussion Paper

June 2004

Amendments to the *Migration Act 1958* passed by the Senate and by the House of Representatives on 24 March 2004 mean that a migration agent must not be registered unless the Migration Agents Registration Authority (MARA) is satisfied that he or she has professional indemnity insurance of a kind prescribed by the Regulations.

At the time, the Migration Institute of Australia (MIA) welcomed the change. The MIA argued that the introduction of compulsory professional indemnity insurance (PII) represented a move towards greater self-regulation in the industry.

The debate has now moved on to professional indemnity insurance coverage, the cost and any exemption to compulsory professional indemnity insurance.

The MIA welcomes this opportunity to express the views of its members.

Professional Indemnity Insurance model

What risks should be covered

MIA considers that because the migration profession is diverse and affected by a number of varying factors, including the number of clients of a migration agent, whether they give advice within or outside Australia, or whether they have a no win no fee policy, legislation should not be overly prescriptive and migration agents should be given a level of latitude as to the type of risk they seek to cover. This is because a migration agent's professional indemnity insurance may, according to the circumstances, be subject to territorial and jurisdictional limits, that is if the immigration advice is given overseas, then a migration agent may choose a professional indemnity policy without a territorial limit and a policy which covers claims brought in any country. If on the other hand a migration agent practices exclusively within Australia, then a migration agent may choose to take out a policy which covers claims arising out of acts occurring in Australia and claims brought within the Australian court system.

Professional indemnity insurance does not cover funds payable to a client under a conditional refund policy such as a 'no win no fee' policy in the event that a visa application is unsuccessful, however, some migration agents may prefer an additional 'civil liability' clause which may also indemnify them for claims arising out of any conditional refund policy.

Minimum amount of cover

Some MIA members continue to remain concerned about the affordability of professional indemnity insurance. Of particular concern is the potential cost to inactive and/or small-scale operators such as low fee earners or pro bono migration

agents whose risks may be minimised because of their low client base or in the case of pro bono migration agents, their traditionally low rates of insurance claims. MIA members have argued that premium rates must take into account an individual migration agent's circumstances to ensure that small or inactive agents are not forced out of the industry altogether.

Of the members that addressed this issue, it was argued that the mandatory cover should be comparable with that of other professions, including solicitors. On that basis, some MIA members accepted that the optimum amount of $1 million coverage should be obtained. The MIA in principle agrees that an optimum amount of $1 million per claim or in the aggregate should be considered, however migration agents should also be allowed to show cause as to why a lower insurance coverage is appropriate to their particular business circumstances, and always taking into account the minimum cost of legal representation at a hearing combined with any potential award for damages against them.

Excess and Premiums
The MIA members that addressed this issue raised concerns that they had experienced current increases in premiums despite no claims been made against their existing policies.

The MIA is not aware of the number of claims currently pursued against migration agents, however anecdotal evidence suggests that overall, the number is not high.

The MIA considers that insurance providers should allow for no claim bonuses that may be of particular importance to small-scale operators or not-for profit organisations when they take into account any additional costs associated with professional indemnity insurance.

The MIA also considers that insurance providers should consider offering low fee earner discounts as well as arrangements whereby premiums can be paid in instalments.

Run off periods
Because professional indemnity insurance operates on a claims made and notified basis (which is the date the claim is actually made against the migration agent), a migration agent may need to be currently indemnified even though the circumstances giving rise to the claim may have occurred many years ago. Current indemnity for previous negligent acts may also mean that migration agents who are sole traders who cease to operate as a migration agent or who die may not be covered for their previous negligent acts committed whilst practising as a migration agent.

Accordingly, MIA considers that run off periods need to be at least commensurate with any statute of limitation legislation applying to any potential claim.

The MIA considers that in order to avoid potential difficulties with claims arising during the run off period, then agents should be given the opportunity to pre pay for coverage during the run off period.

Should PII be per principal or per company or per agent
The MIA considers that if a company employs a migration agent, then that company should undertake professional indemnity insurance. However, because a company's professional indemnity insurance may be limited to the company's current principals and employees only and may not extend to migration agents employed on a contractual basis or to previous employees or in the case of a not for profit organisation, previous volunteers, then the company needs to make provision for these migration agents in the event that claims are made against them after they have departed but arising out of conduct that occurred whilst they were employees or subcontractors or volunteers.

In all other cases, including sole traders and partnerships, professional indemnity insurance should be taken out by individual migration agents.

Availability
The MIA would welcome more insurance providers offering insurance products that are tailored to the migration agent's individual needs and circumstances.

Exemptions to mandatory Professional Indemnity Insurance
If yes, which agents and why

The majority of MIA members suggest that pro bono agents needed the same professional indemnity coverage as full fee paying migration agents. However, it was also suggested that not for profit organisation may directly benefit from no claim bonuses and funding from the Commonwealth.

Other issues that need to be addressed in relation to PII
Whilst the MIA welcomes the introduction of compulsory professional indemnity insurance, the MIA does not consider that given the current size of the migration agent's profession, a fidelity fund is economically viable.

Time of taking out insurance
In order to ensure maximum coverage, professional indemnity insurance should be compulsory in deciding whether to grant a migration agent's registration. In the case of those migration agents who are unable to indicate that they or their current employer has insurance, then their registration application should not succeed.