Senate Legal and Constitutional Committee
Migration Legislation Amendment
(Migration Agents Integrity Measures) Bill 2003

Submitted by
The Migration Institute of Australia
October 2003

Preliminary Remarks

This Bill was introduced to Parliament on 17 September 2003 and passed by the House of Representatives on 8 October, following an unsuccessful motion to amend. Upon introduction into the Senate on 8 October, the 2nd reading was adjourned and the Bill referred to the Legal and Constitutional Legislation Committee for consideration.

The Senate would be aware that much of the content of the Bill comes as a result of recommendations arising from the Report on the 2001-02 Review of Statutory Self-Regulation of the Migration Advice Industry which was published in July 2002.

The MIA has been generally supportive of the Bill's provisions, which it regards as contributing in a practical sense to the ability of the MARA to effectively and fairly administer Part 3 of the Migration Act. The Bill clarifies and strengthens the powers of the regulatory scheme operated by the MARA, and with the exception of the areas of concern noted below, the MIA seeks, that the Bill is otherwise passed by Parliament as soon as possible.

For the reasons identified below, the MIA seeks deletion of certain provisions of the Bill to allow the prompt passage of the remaining provisions.

The MIA requests that the Government, in close consultation with all key stakeholders, develop alternative proposals to ensure recommendation 16 of the Review is practical and realistic in terms of expected integrity measure outcomes. As a key stakeholder in the migration advice profession, the MIA would be pleased to work with the Government in identifying appropriate replacement options for Division 3AA of the Bill.

Division 3AA (Section 306(AC to AM))

The MIA cannot support the chosen mechanisms contained in Division 3AA (Section 306 (AC to AM)) developed by the Minister to implement Recommendation 16 of the 2001/02 Review of Statutory Self-Regulation.

In brief our concerns relate to the following:

- While the proposal may have been developed in response to Recommendation 16 of the 2001/02 Review of Statutory Self-Regulation it in fact flies in the face of the overall findings and recommendations of that Review, which was supportive of the continued move towards self-regulation and supportive of the performance

of the MIA in its role as the MARA. This proposal is a retreat from the pathway to self-regulation and an undermining of the authority of the MIA in its MARA capacity;

- The MIA still holds to the view that the key purpose of regulation of the migration advice profession is "protecting the vulnerable". This proposal presents a major re-focus of this role to include "protecting the Minister". This dangerously muddies the purpose of regulation. The likely, although probably unintended, consequence is that the vulnerable will be less represented by the regulated migration agents and be left more exposed to unregistered practice.;

- The most vulnerable consumers of migration services and those with the greatest need of ethical professional support will often be those with the most marginal of cases. It can be argued that applicants who most clearly meet criteria and those that most clearly do not meet criteria, have the least need for professional support. Applicants on the margin require ethical professional support and advice, yet this proposal only serves to inhibit the ethical professional from rendering that support for fear of a statistical success rate below the Government barrier;

- The lack of clarity as to what constitutes "vexatious" and the mandatory nature of the decision;

- The proposal seeks to apply a mathematical formulae to a non-mathematical service, a service that relates to people and their unique personal circumstances. These can not, and should not, be formularized;

- The proposal is unlikely to achieve its purpose. In practice, it will inhibit the overwhelming ethical majority of the profession while driving the small devious cohort underground to be yet more devious.

To elaborate, the MIA regards these mechanisms as a significant backward step in the progress the MIA has been making collectively with the DIMIA towards an eventual form of self regulation of the migration advice profession. The provisions allow no decision making power or discretion to the MIA in its function as the MARA whatsoever in administering the profession where vexatious activity is reported on and decided by the Minister or her delegate from the DIMIA.

There is an understandable concern on the part of membership that the power provided for in the Bill ensures that all decision making activity in relation what is considered to be 'vexatious' rests with the Minister, or by delegation, to the DIMIA.

The Explanatory Memorandum provides that a 'mandatory decision' is defined to mean a decision of the MARA under section 306AG, and that a 'referral decision' is defined as a decision of the Minister under section 306AC. It is abundantly clear that these definitions step lightly around the fact that the real 'decisions' are to be taken by the Minister and that the appointed industry regulator, the MARA, is in effect put in a position where it has no alternative other than to 'rubber stamp' the referral decision.

There is no power within the Migration Act as it is envisaged, for the MARA to do anything other than the Minister's bidding, although it is noted that the Minister may effect a change of mind and direct the MARA to revoke the mandatory 'decision' to suspend or cancel. The MARA has no such power under the proposed legislation.

The Explanatory Memorandum, at page 31, mentions that research into Protection Visa application rates for the period 1/11/01 to 30/06/02 conducted by the DIMIA has shown the following:

- Of the 8,677 primary applications lodged during this period, 2,222 were lodged by the applicant themselves and 6,455 (approximately seventy-four percent) were presented by five hundred and twenty two migration agents. Notably, three hundred and four of these agents had a refusal rate for their applications of ninety to one hundred percent, accounting for 3,729 (approximately fifty-eight percent) of the 6,455 applications lodged by migration agents.

- In total, forty-three percent of all Protection visa applications in the period were lodged by migration agents who had between a ninety and one hundred percent refusal rate. Their activities have a clear adverse impact on the humanitarian program.

- Of the three hundred and ten complaints received by the MARA in 2002-03, four percent of these related to an agent misleading a client about the prospects of success of their application and two percent concerned agents encouraging the lodgement of grossly unfounded applications. Clearly few complaints are being made by the clients of such agents.

The MIA recognises that these comments from the DIMIA do not provide a flattering picture of a small sector of migration agents. However, it is concerned that it be recognised that this activity has occurred in a period of time when the Government's application of policy concerning entry to Australia for humanitarian reasons has been more strict and rigid than at any time in immigration history. The MIA is also of the view that the 304 agents (less than 10% of all registered migration agents) identified in the course of this research are being regarded as indicative of the general agent community, when plainly, this notion is unable to be supported by any available statistics in regard to complaints put to the MARA since 1998.

The MIA is concerned that Division 3AA is being imposed on the migration advice profession because of the behaviour of a very small number of agents in a relatively short passage of time. The MIA is equally, if not, more concerned that the comments in the Explanatory Memorandum are being arranged to extend the area of 'interest' far beyond the area of identified concern. The provisions now provide for mandatory decisions to either suspend or cancel an agents registration in both the humanitarian and non-humanitarian sectors of the migration program, without adequate consideration (for the purposes of the Bill) of whether there is demonstrated examples of 'vexatious' or 'grossly unfounded' activity.

If the provisions in Division 3AA are passed by the Parliament, the ethics and conduct of all registered migration agents in general would be unjustly characterized by the

image created by less than 10% of registered migration agents that allegedly engage in activity that all in the community find reprehensible.

The MIA has a major concern with the manner in which the formula has been created to calculate what would be known as a "high visa refusal rate". Such a refusal rate would automatically lead to the Minister determining that an agent is engaging in "vexatious" activity point blank. The arbitrary formula will mean that many of our members, including agents operating in the voluntary sector who undertake immigration casework for clients where the prospects for a successful outcome are perhaps at best 50 / 50 , however there is often no alternative but to lodge an application.

The unintended consequence of this legislation will be a grave risk that agents acting in their clients' best interests may be punished to the extent they could have their registration suspended or cancelled. Further, it will preclude visa applicants from being able to access independent technical advice from persons operating ethically within a regulatory scheme established by the Parliament. Surely that is not in the community interest.

Such situations differ greatly with that small number of situations (less than 10%) where an agent deliberately engages in activity which exploits a client through lodging a grossly unfounded application with no eligible grounds, supporting documentary evidence or submissions arguing the case. That type of behaviour is unacceptable and there is no doubt that our membership is as anxious as any member of the community for any agent found to be engaging in grossly unfounded applications to be identified and removed from the profession. The MARA is already well equipped through the Migration Agent's Code of Conduct as legislated under the existing provisions of the Migration Act to deal with such agents, at the same time allowing for procedural fairness and natural justice to be applied in a balanced and equitable manner. An agent so accused must be permitted such fairness in the process of considering such a serious complaint about their behaviour.

In considering this legislation, we should not lose sight of the fact that the MARA in its short history has overseen a number of very significant changes to the profession, many more than had the previous regulator– the Migration Agents Registration Board – who administered the scheme for a period of six years. It strikes the MIA as faint praise when the proposed Bill seeks to characterize all agents as being out of step with acceptable community standards in the same document where it states at page 9,

> 4.4 Regulatory Bodies:
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> 7.4.1 As discussed at paragraph 2.2.1 above, in March 1998 the MIA was appointed as the MARA to be the industry regulator. The MARA has invested much energy in the migration advice industry to eliminate unscrupulous practice. The MARA has leased premises and appointed staff, and has been operating successfully for the last four years. The MIA has shown a committed dedication to the industry as its peak body and there would be a substantial loss of expertise if it were to cease regulating the industry.

and further at

> 4.5 Government and Community

7.4.1 If changes were made to the regulatory framework, DIMIA could be affected by:

- increases to its processing workload if there were a reduction in the availability of competent and ethical advice provided externally;
- a need to increase staff numbers to process a potentially larger number of incomplete applications, leading to a greater burden on the taxpayer;
- a need for additional investigation of malpractice if fraudulent behaviour by agents increased; and
- a lessening of its investigation responsibilities if unregistered practice were no longer an offence

It is the view of the MIA that the provisions of Division 3AA do not sit at all well with the comments expressed above, nor do they take account of the fact that vexatious activity is demonstrably confined to a very small section of the registered migration agent community.

The MIA has accepted the responsibility to operate the MARA in the full knowledge that systems such as the complaints management process would not be an overnight success. Considerable progress has been made as identified in the Explanatory Memorandum however, and there should be no doubt as to MIA's commitment to removing from the migration advice profession those people who exploit clients by engaging in grossly unfounded advice and subsequent application lodgement. There is a distinct difference between trying one's best for a client in a difficult case and the alternative of not caring about outcomes and simply lodging applications with no merit at all.

The MIA supports strong sanctions for these agents who are small in number and who clearly and unequivocally engage in grossly unfounded applications. However, this should not be at the expense of vulnerable consumers, nor at the expense of the larger pool of well meaning competent agents, and not at the expense of the continued, independent development of the migration advice profession.

Sections 312 (A) and (B)

For reasons of sheer practicality, the MIA is opposed to the currently drafted Sections 312 (A) and (B) which require a Registered Migration Agent to notify DIMIA if they give immigration assistance to a visa applicant or review applicant. The MIA supports, and can well understand the reasoning behind the notice of appearance becoming a mandatory requirement for agents although this proposal again reflects a muddied view as to who exactly is the vulnerable that Statutory Self-Regulation is protecting. For reasons set out below we believe there is a case for a simple amendment to these provisions.

As currently drafted, these new provisions appear unworkable. The meaning of "immigration assistance" is made clear at Section 276 of the act, and includes the giving of "advice" to visa or review applicants as coming within the meaning of "immigration assistance" (276 (1) (b)). "Advice" obviously includes preliminary advice delivered orally, electronically or in writing prior to the point in time where a client instructs an

agent to proceed to prepare and lodge a visa or review application and the point where a formal agent client relationship normally begins..

Thus, under a strict interpretation, the proposed provisions would require a registered migration agent to notify the DIMIA even where preliminary advice is given to a potential client by telephone or email even though the agent is not yet formally (in accordance with the requirements contained in the Code of Conduct) acting for that client in actually preparing and lodging a visa or review application. In other cases, a client may have preliminarily consulted with and obtained advice from an agent and then proceeded to prepare and lodge their own application. In yet other cases it should be understood that clients very commonly "shop around" a number of agents for advice at the preliminary stage. A registered migration agent surely cannot be held responsible to notify of the giving of immigration assistance to the DIMIA in these common, everyday situations. The wording proposed in the Bill does not differentiate and imposes a requirement to notify the DIMIA of any such client contact where advice is given. If this was an unintended consequence of the proposed legislation there needs to be an amendment to make it fundamentally clear as to when reporting of assistance as defined in Section 276 to a client is required.

Apart from having little meaningful benefit in monitoring of vexatious behaviour by a small number of agents, the sheer quantity of notification information involving non formal client contact and advice would be cumbersome and would involve the DIMIA in a massive amount of data collection and administration. This would detract from the DIMIA's core decision making function. It should also be noted that the administrative cost of reporting assistance to clients in the form of advice would invariably be passed on in additional fees to clients.

In the view of the MIA the proposed wording contained in section 312(A) and (B), as currently worded, appears to conflict with the provisions of the Privacy Act. It interferes with the fundamental right for information discussed between an agent and their client to remain confidential. A client can instruct an agent that the discussion between client and agent must remain confidential and in such circumstances that instruction must be observed. .

Conclusion

In putting forward these issues, the MIA believes it is acting in the community interest, the interest of vulnerable consumers and the interests of its 1200 members who are generally recognised as comprising the bulk of the active, reputable and well-intentioned segment of the migration advice profession.

For reasons outlined in the above discussion, the MIA seeks the co-operation of all stakeholders in agreeing to amend the proposed legislation to rectify these areas of concern. The MIA would be pleased to contribute to this process and to do so as a matter of urgency.

However, the MIA recognises that the understandable delay that may occur in settling on the wording of such amendments would risk delaying the rest of this important body of proposed legislation in the community interest. It may be preferable, therefore, for

the provisions requiring amendment to be deleted from the current Bill, unless acceptable alternatives can be immediately achieved by consensus. There has been a great deal of comment expressed by MIA members in relation to these two areas of the Bill, and in relation to the recommendations of the Review that led to the development and introduction of the Bill into Parliament. The MIA has encouraged informed debate among the membership, and is aware that a number of members have indicated a wish to place their own submissions to the Parliament in addition to the MIA submission.

The MIA supports the views expressed by its members, and the levels of concern they harbour in relation to the intentions of 3AA.

There is a very widespread belief among the membership that the intentions expressed in division 3AA go way beyond what could ever be termed 'justifiable', and there is no identifiable support for the intentions of this component of the proposed legislation.

The MIA looks forward to the opportunity to address the Committee on its submission, and would be only too happy to participate in any discussions or deliberations that may lead to a more appropriate and targeted response to the question of grossly unfounded applications. Clearly, the MIA is also intensely interested in participating in an overhaul of the reporting requirements proposed in the Bill.