PUBLIC CONSULTATION PAPER

The Office of the Migration Agents Registration Authority (the Authority) is proposing amendments to the Code of Conduct for registered migration agents (the Code).

Minor amendments were made to the Code recently, and which came into effect on 1 January 2012.

The proposed amendments are set out in this Paper.

ADVERTISING REQUIREMENTS

Provisions in the Code dealing with advertising the services of an agent are set out in Part 2 (clauses 2.10, 2.11, 2.12, 2.14 and 2.16) and in Part 11 (clause 11.4).

The Authority proposes to consolidate the existing provisions that relate to advertising into one part of the Code. In addition, the Authority is proposing the following amendments to the advertising provisions in the Code:

a. To add a new provision that an agent will have to prove a claim made in an advertisement that has been questioned or challenged by the Authority on the basis that it may be false or misleading advertising.

b. To add a new provision requiring an agent not to use the word “specialist” or make claims of providing specialist immigration services, unless the agent holds specialist accreditation. For example, if the agent is an accredited specialist in immigration law.

c. To add a new provision requiring an agent not to display the Commonwealth Coat of Arms in any advertisement.

d. To amend clauses 2.11(a) and (b) to:

    i. Require that an agent must include his or her name and Migration Agents Registration Number (MARN) in all advertising. This is in addition to the existing requirement to include the words “Migration Agents Registration Number” or “MARN” followed by the agent’s individual registration number.

    ii. Include a requirement that an agent who has an internet website must prominently display his or her registration details on the website (in a similar manner to the amendment proposed above).

e. To include in clause 2.12(c) a requirement that an agent must not create a registered business name or trading name, or website title or address or stationery (such as business card, letterhead) that could imply, or be interpreted as having, a relationship with the Department.

f. To amend clause 11.4 to require that an agent who has an internet website to display the Code in a prominent part of his or her website.

For an agent associated with a corporation or business, the Authority proposes to amend the Code to require that an agent:

g. Disclose any association with a business including a business operating overseas that purports to provide immigration assistance, and

h. Is prevented from requesting that an individual or business advertise the agent's registration if the agent has no association with the individual or business for the purpose of providing immigration assistance.

Would there be greater clarity and compliance with the advertising requirements if the provisions were combined into one distinct part of the Code?

Would the proposed amendments cover all types of advertising used by agents?

Could the advertising requirements be further strengthened in relation to agents associated with a business noting that the Authority's power is to regulate individuals and not the business entity?

OBLIGATION TO DISCLOSE A FINANCIAL OR OTHER BENEFIT

It is proposed to amend clause 2.2 to require that an agent must disclose "any personal interest or advantage." This would build upon the existing requirement that an agent must disclose "that they may receive a financial benefit". The existing requirement does not require that the details of the financial benefit be disclosed, but only the fact that the agent receives a financial benefit.

In circumstances where an agent provides advice of a non-migration nature (for example in relation to education activities) in the course of giving immigration assistance to a client, the agent should make full disclosure of any intended or likely benefit the agent may receive from his or her client.

This proposed amendment would be similar to the United Kingdom Code of Standards which contains the following provision:
…

15. An adviser must explain fully and clearly to the client any circumstances in which they might have any personal interest or advantage in acting for the client.

…

The amendment would require an agent to make full and frank disclosure to clients:

- of the details of any commissions received. For example, in circumstances where the agent refers the client (visa applicant) to an education provider to enrol in a course in support of the visa application and receives a commission from the Education provider for the referral, the agent would be required to disclose the relationship and the receipt of the commission to the client in writing.

- where a direct financial interest is received. For example, where an agent has a financial interest in, or receives a financial benefit from, the client's business sponsor or a company promoting a business venture for the purpose of the client applying for a visa.

- where an advantage or interest of an indirect nature is received. For example, where an agent refers a client to an Education provider with whom the agent has a personal association such as, the agent's spouse is the owner of the provider.

In addition to expanding clause 2.2 to include "any personal interest or advantage" should the amendment also require an agent to disclose the details of the financial benefit? For example the actual commission or payment received by the agent?

OBLIGATION NOT TO PREVENT A CLIENT FROM MAKING A COMPLAINT

It is proposed to add a new provision in the Code or a new subclause be included in clause 2.15 requiring an agent not to attempt to seek a release or indemnity from a dissatisfied client that would prevent the client from lodging or pursuing a complaint or alternative avenue of redress.

Currently, clause 2.15 of the Code provides that an agent must not intimidate or coerce any person for the benefit of the agent. It also provides examples of actions that would constitute intimidation or coercion.

The current wording does not cover circumstances where an agent seeks to obtain a release or indemnity from a client that would prevent the client from lodging a complaint.

This issue usually arises in circumstances where the agent and the client have resolved the financial aspect of a dispute (the cost issues) in relation to the agent's provision of immigration assistance, but the client seeks to lodge or pursue a complaint in relation to matters relevant to the agent's professional conduct. For example, those matters in Part 2 of the Code which are relevant to agents standards of professional conduct such as whether the agent dealt with the client competently, diligently and fairly.

The proposed amendment would prevent the agent from seeking to obtain a release from the client that would prevent the client from lodging a complaint. If a complaint is subsequently lodged, the Authority may in the circumstances of the case, take the fee resolution into account as a mitigating circumstance.

In the Administrative Appeals Tribunal decision of *Roszy and MARA* [2005] AATA 420 it was found that the seeking of an agreement or release from a dissatisfied client that the client would take no action or complain about the agent was not in accordance with the law.

The proposed amendment would ensure that a client retained their right to lodge or pursue a complaint.

Is the proposal beneficial in the interests of consumer protection?

AN AGENT'S REQUIREMENT TO ACT WITH FAIRNESS, HONESTY AND COURTESY

It is proposed to add a new provision in the Code requiring that an agent must act with fairness, honesty and courtesy in his or her dealings with clients, the Authority, the department and the Review Tribunals.

This new provision would be consistent with the requirements of existing clause 4.5 which requires that an agent must act with fairness, honesty and courtesy when dealing with other registered migration agents.

It is reasonable to expect that agents in their professional capacity should deal with all parties fairly, honestly and with courtesy.

In addition, the Code requires an agent to take all reasonable steps to maintain the integrity of the migration advice profession (clause 2.23).

In light of the agent's obligation to act ethically and with integrity should this requirement be dealt with in legislation or policy?

PROFESSIONAL INDEMNITY INSURANCE OBLIGATIONS

It is proposed to add new provisions in the Code, or to amend existing clause 2.3A of the Code, to expressly require that an agent must:

i. Notify his or her insurer (or insurance broker) when the Authority notifies the agent of a complaint made against him or her; and

ii. Provide written notice to the Authority that they have notified their insurer (or insurance broker) of a complaint.

Currently the Authority does not have specific power to require an agent to notify their insurer (or insurance broker) of any complaint having been made against the agent.

The current clause 2.3A requires that the agent's "professionalism must be reflected in the making of adequate arrangements to avoid financial loss to a client, including the holding of professional indemnity insurance mentioned in regulation 6B [of the *Migration Agents Regulations 1998* (the Regulations)] for the period of the migration agent's registration".

It could be argued that the existing provision compels the agent to make a claim on their Professional Indemnity insurance (as opposed to just holding the insurance) in the event of any complaint made against them. Doing so would avoid financial loss to a client. However, the provision does not expressly require the agent to notify their insurer.

The Authority's experience is that aggrieved clients in those circumstances where the agent fails or declines to notify their insurer (or insurance broker) are required to seek legal redress. This legal avenue of redress is complex and expensive, and clients who often do not have the financial means or capacity to pursue it.

The disclosure of all complaints to an insurer (or insurance broker) is reasonable from a consumer perspective and should not unduly impact on an agent's business noting that the insurer (or insurance broker) will not process the claim until the Authority's investigation has been finalised.

Do agents notify the Professional Indemnity insurer or broker of a complaint having been received by the Authority and if so at what point in time?

Would the proposed amendment be reasonable from a consumer protection perspective?

In addition the Authority is considering whether the current level of Professional Indemnity insurance held by agents is sufficient cover in the event of a legal claim for liability.

Currently an agent must not be registered unless the Authority is satisfied that the agent has Professional Indemnity insurance prescribed by the Regulations (see section 292B of the *Migration Act 1958* (the Act)). Regulation 6B prescribes that Professional Indemnity insurance must be held for at least $250,000.

Consideration is being given to proposing an increase of the minimum level of policy cover from $250,000 to $500,000. This is to ensure a safer level of cover in the event of large loss arising from a legal liability case. It is always safer to have a higher level of cover in case of any unexpected large loss.

The Authority understands that, if the value of the policy cover were increased to $500,000, in the short term insurers would generally quote an increased premium for the higher limit from 25% to 35%. In the longer term, premiums may generally reduce if the claims remain low. Professional Indemnity insurers may also adjust premiums down if an agent's claims pattern continues at the current loss ratio or improves.

If the value of the minimum level of policy cover were increased to $500,000 what would the effect be on agents' businesses?

PARTS 5 AND 7 – FEES AND CHARGES AND FINANCIAL DUTIES

Agents are subject to a number of obligations regarding fees and charges and general financial duties. These obligations are set out in Parts 5 and 7 of the Code and section 313 of the Act.

The Authority understands that agents may benefit from greater clarity and guidance in relation to these obligations, and in managing client monies.

Providing a Fee estimate

Clause 5.2 of the Code sets out a number of obligations that begin at the initial consultation and before an agreement is entered into (the Agreement for Services and Fees).

Under clause 5.2(a), the agent is required to give the client an estimate of charges in the form of fees for each hour or each service to be performed and disbursements that the agent is likely to incur as part of the services to be performed. In addition the agent is to give the client an estimate of the time likely to be taken in performing the services.

The purpose of the initial consultation requirements is to minimise misunderstandings as to costs and fees. The Code requirements give the client an opportunity to make an informed decision about whether they wish to enter into an agreement with the agent.

Under clause 5.2(b) the agent is required, upon receiving instructions from the client, to obtain written acceptance by the client of the fee estimate and the estimate of the time likely to be taken in performing the services.

The purpose of clause 5.2(b) is similarly to minimise misunderstandings as to fees and the timeframe for completion of the immigration services. In the Authority's experience many complaints stem from such misunderstandings.

Is the initial consultation process outlined in the Code sufficient to minimise client misunderstandings and give the client an opportunity to carefully consider whether to engage the agent?

What changes could be made to better achieve these outcomes?

Agreement for Services and Fees

The agent is required under clause 5.2(c), to give the client written confirmation (an Agreement for Services and Fees) of the services to be performed, the fees for the services, and the disbursements that the agent is likely to incur as part of providing the services. The agent is also obliged to give the client written notice of any material change to the estimated cost of providing a service and the total likely cost because of the change as soon as the agent becomes aware of the likelihood of a change occurring (clause 5.2(d)).

Clause 5.4 of the Code additionally requires an agent to advise his or her client in writing of the method of payment of fees and charges including departmental fees and charges.

In the Authority's experience, a significant number of complaints relate to fee disputes. Fee disputes arise for a number of reasons including insufficiently detailed Agreement for Services and Fees and misunderstandings between the parties to the Agreement.

It is possible that many fee disputes would not arise if the Agreement for Services and Fees sufficiently outlined the agent's duties. In addition, many Agreements that come before the Authority do not contain procedures for the resolution of fee disputes.

Should the Code prescribe what agent duties, client obligations and procedures must be included in the Agreement for Services and Fees?

What duties, obligations and procedures should be prescribed? For example:

- *the payment method outlined in clause 5.4;*
- *procedures relating to internal resolution of fee disputes;*
- *a requirement (by way of a clause or certification in the Agreement) that the agent has explained the content of their duties, obligations and procedures to the client before the client accepts the terms of the Agreement for Services and Fees?*

Should agents be required to send an amended Agreement for Services and Fees to clients for acceptance by the client in the event that the total costs initially agreed to increase or is separate written notification sufficient to evidence the new agreement between the agent and his or her client?

Payment for services

The Act (section 313) contains an overarching provision that, together with the provisions of the Code (clauses 5.5 and 7.2), regulates the circumstances in which agents can be paid for their services.

An agent is not entitled to be paid a fee for giving immigration assistance unless the agent gives the client a statement of services (that is, an invoice or account). The statement of services must be consistent with the Agreement for Services and Fees.

If the Agreement for Services and Fees provides for payment on completion of blocks of work, an invoice is required to be issued on completion of each block of work.

On final completion of the services set out in the Agreement for Services and Fees an agent should provide a final account to the client.

The Authority understands that these provisions are a source of misunderstanding in the profession. That is, some agents do not issue statements of service. As discussed, without issuing a statement of service and an invoice, the agent is not entitled under the Act and the Code to be paid for the immigration assistance.

Are the current provisions (and hence the process requirements) sufficiently clear to enable agents to meet their obligations to manage client funds?

How could clauses 5.5 and 7.2 be improved to encourage agent compliance?

Should the obligations set out in clauses 5.5 and 7.2 be combined into one part for better clarity?

‘No win, no fee’ Fee agreements

Clause 7.6 of the Code imposes obligations on agents providing services on the basis of ‘no win, no fee’ arrangements.

Some agents may offer services on a ‘no win, no fee’ basis. Under this model, the agent charges the client up-front, and the agent is required to retain sufficient funds in the event that the agent is required to refund the fees to the client if the visa application is unsuccessful.

While the Authority acknowledges that in many visa applications there are a number of discretionary criteria which makes it very difficult to assess the outcome of a visa application, the use of a 'no win, no fee' policy may be inconsistent with other obligations under the Code. For example:

- clause 2.6 requires the agent to be frank and candid about the prospects of success when assessing a client's request for assistance in preparing a case or making a visa application; and
- clause 2.7 requires an agent, if asked by a client for his or her opinion of the probability of a successful outcome, not hold out unsubstantiated or unjustified prospects of success.

Arguably undertaking to represent a client on a 'no win, no fee' basis whereby the fee is returned to the client if the visa application is unsuccessful, may be contrary to these Code obligations. Additionally, there can be a substantial period of time between lodgement and the department's decision which may affect the practical utility of a 'no win, no fee' arrangement.

How are 'no win, no fee' arrangements applied by agents?

Are there instances where agents operating a 'no win, no fee' fee agreement do not take upfront payment from a client?

How does visa processing times affect agents' use of 'no win, no fee' fee agreements?

Does a 'no win, no fee' fee agreement have any continued utility in the context of the provision of immigration assistance services?

Restructuring the Code relating to financial obligations

Parts 5 and 7 are separate parts in the Code as arguably they deal with different aspects of managing client monies (eg, the setting of fees and charges, and financial duties). However, the obligations clearly overlap, most notably in the payment of services.

In these circumstances, to increase compliance with the Code and improve agent understanding in relation to managing client funds it may be beneficial to combine these obligations into one part in the Code. This might be achieved by for example, renumbering the Code so that Parts 5 and 7 follow chronologically or by grouping the Code obligations in the categories discussed above.

Would compliance with the obligations in parts 5 and 7 of the Code be increased by combining the obligations in one part?

How could the obligations be best combined to improve agent understanding?