

22 January 2009

Senator the Hon. Chris Evans  
Leader of the Government in the Senate  
Minister for Immigration and Citizenship  
Parliament House  
CANBERRA ACT 2600

My Dear Minister

**RE: Proposed revocation of authority of MIA in respect of MARA and the Report on the 2007-2008 Review of Statutory Self Regulation of the Migration Advice Profession.**

I write as a preliminary response to your letter dated 15 December 2008 relating to the future management of the functions of the Migration Agents Registration Authority.

We note you have under consideration proposals to:

- Allow the Deed between the Commonwealth and MIA to lapse on 31 March 2009;
- Revoke the appointment of MIA as MARA under s315 of the Migration Act;
- Become (as Minister) the MARA pursuant to s275 of the Migration Act;
- Establish a discrete office attached to the Department and headed by a specifically designated officer solely responsible for MARA activities (which office would be guided by a representative and an independent advisory board on which MIA would have a representative).

It is these matters that I wish to respond to on behalf of the MIA. To allow the Deed to lapse at the end of March 2009 would be premature and would undermine public confidence in the proper regulation of the migration advice profession and consumer protection accorded.

We propose an alternative approach which we believe will meet all the concerns you expressed in your letter and will not require any legislative change at this time

Returning Regulation to DIAC will result in the disbanding of the existing MARA secretariat. We see two serious consequences

1. The high level of expertise and systems developed over ten years will be lost and must be established within the Department bringing a significant cost to the public purse and a gross waste of the resources already paid for by the profession
- 2 Equally important is the impact on MARA employees who will lose their employment at a particularly difficult economic time.

Distinguishing governance and operations is important, as the issues raised in your letter are concerned with the governance of the MARA not its operations. The MIA as the MARA has operated economically and effectively to regulate the profession within the bounds of co-regulation and the limits of the scheme as designed. Dismantling the secretariat diminishes operational effectiveness, does not improve governance and comes at great cost in resources and human loss and expertise.

This destruction and recreation of a secretariat will also be disruptive to the profession as DIAC creates its own processes and systems. A staged transition to a new model – either a variation of the existing arrangement or a statutory body - allows the business operations of the MARA to continue as a going concern into a new model with minimum disruption.

## DIAC

The substitution of DIAC for the MIA will, in our view, be perceived as an attempt to divert attention from the real problem area of Migration advice, which is the unregistered practice for which DIAC is solely responsible.

Preliminary responses from Registered Migration Agents has already resulted in over 250 submissions to the MIA, opposing the shifting of responsibility for the MARA to the Department and only six seeing some merit in it

Nothing in the Review supports or contemplates the DIAC as a regulator. The thrust of the Review is towards an independent body if self regulation is not to continue.

The Institute believes co-regulation is preferable, with modification to the existing model as suggested in earlier submissions. If the MIA is to be completely removed from MARA involvement an independent statutory body is the only acceptable alternative. An outcome that returns regulation to the DIAC will not stand the test of time. Issues of perceived and actual conflict cost and effectiveness will inevitably arise.

## Proposed Co regulation

The MIA agrees that a fully self regulated regime may not be the best model at this time. However we urge you in examining this option not to “throw the baby out with the bath water” but rather consider an effective and renewed model of co-regulation to overcome perceived problems with the current arrangement whilst building on the expertise and structure developed by the MIA’s regulatory division over the last 10 years.

The MIA acknowledges that in order to reduce controversy and address perceptions of conflict of interest once and for all it has become essential for the Minister and MIA to take action to allocate the supervision of MARA functions to a group of decision makers outside the Board of the MIA.

This can be achieved to a certain extent without legislative change but will require amendments to MIA’s constitution. Ideally the separation of these functions will (eventually) be defined by legislative amendment *without* the need-

- to create a separate supporting administrative agency, or
- to transfer the MARA administration into DIAC or
- to create an ineffective Advisory Group.

In the meantime, under this proposal, the replacement Deed would be amended to contain special provisions requiring MIA to amend its Constitution to enable the separation of the supervision of MARA functions from the Board—as soon as the revised Deed is signed and no later than **October 2009**.

## Meeting

Given the impending expiry date of the Deed with the Commonwealth and the Department’s legal obligation under the Deed to consult with the MIA within a reasonable time before proposing change to the MARA we respectfully request a meeting with you prior to any decision being made. In the meantime there are a number of matters that you raised in your letter which we respond to below.

## Regulatory Process

MIA is disquieted by the fact that notwithstanding MIA’s 10 years’ experience and responsibility in acting as MARA through its regulatory division has not been consulted prior to this whilst;

- the Department’s External Reference Group took almost nine months to prepare and submit the Review Report in 20 May 2008;

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- the Department further allowed almost six months to elapse before it disclosed the contents of the report to the profession and then only four weeks (over Christmas 2008) have been provided to the MIA to make a response;
- there has not been any public discussion or consideration of the Report or the Minister's proposals;

and yet conclusive steps might be taken in the absence of the usual consultative process with stakeholders and the public. It is in the public interest that the usual regulatory processes be followed and the report, its proposals and the options available are publicly ventilated and that adequate time be provided for discussions submissions and public debate.

MIA contends that the proposed course of action is a breach of accepted practice, represents unreasonable behaviour on the part of the Government and ignores due process in not enabling adequate consultation with the industry and the community on the implications of the proposed action.

### **Financial Management and Accountability Act 1977**

Your letter states that the MIA is not required to comply with statutory obligations with respect to Commonwealth money. Throughout its appointment as MARA, MIA has complied with the FMAA – as it is contractually bound to do. See Attachment A.

The findings of the recently completed DIAC initiated audit by Walter Turnbull confirmed that the MIA was meeting its obligations under the Deed in relation to moneys appropriated to it to carry out the MARA function.

Several issues were identified by the auditors and were satisfactorily resolved. The main one was a difference in the interpretation as to what constitutes so called "MARA exclusive" functions. After a number of meetings and discussions between the auditors, DIAC and MIA this issue was again resolved to the satisfaction of all parties.

It must also be said that in the conduct of its activities, including the MARA function, the MIA is required to and in fact does, comply with a range of obligations under various statutes – including Trade Practices, Corporations and Taxation legislation. It has 2 independent accounting firms auditing the company each year – one firm is responsible for the audit of the MARA function, and the other firm audits the company in general. MIA has never had an adverse audit report issued by those auditors.

This does not mean that there should not be some improvements to any replacement Deed between the Commonwealth and MIA. The various Deeds assumed that the MIA would only ever have access to registration fees as its source of funding for MARA activities. Over time however MIA acting as MARA has received income from services provided in the course of fulfilling its statutory objectives. There is a need to update the Deed to conform to emerging practice. In our view there is scope in any replacement Deed for a definition of what is meant by the expression '*statutory functions*' and a clear understanding of the income and expenditure arising from those functions so as to avoid any controversy or misunderstanding in this area.

### **Conflict Of Interest (Potential or Actual)**

Some of the individual submissions made to the External Reference Group and reflected in the Review Report hint at but do not specify potential or actual conflict of interest in the MIA acting as MARA. It is important not to be *loose* with statements relating to issues such as *conflicts of interest* given the seriousness of the subject matter. We cannot in a letter of this kind include detailed submissions to all matters in the Review however some comment is warranted.

We appreciate that your letter falls short of alleging any actual conflict that has not been appropriately dealt with, and refers to "*a significant potential for, or the creation of, the*

**perception** of conflict of interest between the MIA as the industry peak body and the MIA as the regulator of the industry". The language of this statement (drawn it seems from the Review Report) still warrants a response in the interests of fairness and clarity.

First of all, MIA is determined to scotch - once and for all - any vague inference or unsubstantiated allegation that there is a fundamental conflict of interest (or the potential for a conflict of interest) in the MIA fulfilling the roles of professional organisation and industry regulator.

***From the time of its initial appointment, the Deeds of Agreement between the Commonwealth and the MIA have acknowledged that there is no fundamental conflict in the MIA fulfilling its two roles.*** For example, in clause 12.3(a) of the original Deed of Agreement signed on 23 March 1998, "*the MIA warrants that to the best of its knowledge after making diligent enquiry, at the date of signing this Agreement, no conflict of interest, other than the fact that directors are Migration Agents, exists or is likely to arise in the performance of its obligations as the MARA by itself or by its employees and that based upon reasonable enquiry it has no reason to believe that any Agent [in the context of the deed, "an individual appointed by the Migration Institute of Australia for the purposes of providing assistance or specialist advice to the Migration Agents Registration Authority in carrying out its functions under the Act"] has such a conflict*"

The MIA's objects in both roles essentially are the same: the promotion of best practice in the migration advice sector.

Of course, in practical terms there are specific circumstances where a conflict of interest may arise, and the MIA has always taken seriously its responsibility to anticipate such conflicts and ensure they are appropriately dealt with so as not to undermine the integrity of its processes.

Consumers, migration agents and the Minister are protected by specific provisions in the replacement Deeds of 2000 and 2003 which contain detailed procedures for the—

- avoidance of conflicts affecting individual directors (should they arise):
- handling of complaints (should they arise) against registered migration agents who are coincidentally also members of the MIA board.

In addition to observing these requirements, the Board has regularly considered and taken advice on identifying and dealing with conflicts of interest and operates under a protocol, reviewed from time to time to keep up to date with changing circumstances, which includes guidance on the most likely areas of potential conflict of interest.

In addition, MIA's officers and directors, must comply with the provisions of ss181, 182, and 183 the *Corporations Act* which provide civil penalty provisions and with s184 which provides criminal penalties for breaches of statutory duties. As a public company, MIA and its directors must comply with s191 and 195 of the *Corporations Act* regarding material personal interests.

### ***Perceptions of conflict of interest***

As distinct from actual or potential conflicts of interest your letter also refers to "*perception*" of conflict of interest between the MIA as the industry peak body and as the regulator of the industry.

MIA submits that if "*perceptions*" are of concern then the proposal of assigning the role of MARA to be administered by DIAC would seem to many to aggravate the issue of perceptions of conflict of interest. But this can be dealt with in a much more detailed way in a more appropriate forum if adequate time is allowed for a response to the Review Report.

For the purposes of this short letter we will briefly address the two "potential" areas identified by the Review Report (albeit absent the citation of any specific adverse instances) these being-

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- the MIA in the role of MARA being *suspected* as not treating all agents and potential agents equally (no instances are cited)
- the MIA in the role of MARA and also as an education provider supplying educational courses which are accredited for Continuing Professional Development (CPD) in some way gaining an unfair advantage to the prejudice of other course providers

The first of these issues can be addressed (if in fact it is a real issue) by various ways which might involve legislative change to introduce additional perspectives to the decision making process. Given the absence of any instances of abuse there appears no reason why this might not await legislative consideration (should it be necessary) without revoking MIA's appointment. Indeed, the Report noted (pp18-19) that there had been recommendations to broaden the representation on the PSRC, but that these had required legislative change which had not received priority. Later in this letter we suggest an alternative path to involve other decision makers in MARA functions.

As to the second of these issues it is true that in the educational sector, the MIA has an interest in having its seminars accredited - as do all education providers. It may be that MIA may be seen by some competitors (not identified) as enjoying a marketing advantage by virtue of the fact that it also administers MARA. However this is hardly an indication of unfair competition. The MIA's separation of its two roles through dedicated staff for each division ensures a level playing field. Indeed, the staff in the regulatory division overseeing CPD has tended to treat MIA seminar proposals with greater rigour than those of "external" providers.

Surely the Australian public do not desire that MIA's administration of MARA (which has been developed for 10 years and has been elevated to its present, much improved standard) should now be dissolved to meet the financial objections (and objectives) of competing education providers in the CPD field.

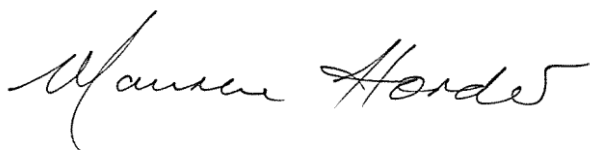
### **In conclusion**

The Board of the MIA submits that it would be appropriate to extend the Deed for two years to allow: continued operations of all of the MARA functions in an orderly and cost effective mode under a newly created interim independent governance arrangement including persons nominated by you.

- exposure of the Review Report, and the receipt of submissions thereon; and
- the Minister's consideration of the options (including either a model towards self regulation or a model involving the dissolution of the current arrangements) with a view to establish the resulting arrangements by no later than 31 March 2011.

The MIA reiterates its request for an urgent meeting with you, Minister prior to any final decision being made to enable us to make further comments on the process and issues under discussion. .

Yours sincerely



Maureen Horder  
Chief Executive Officer

## Attachment A

### Proposed New MARA structure

We propose to create a group of designated “officers” to supervise the MARA functions of MIA who would-

- be “officers” of MIA within the meaning of s9 and 189D of the Corporations Act (i.e. someone “who makes, or participates in making, [decisions](#) that affect ..... a [substantial part](#), of the business of the [corporation](#)”)
- as “officers” for the purpose of the Corporations Act, be able to accept delegation under s319A of the Migration Act (individually or as a committee appointed by the MIA Board);
- not be directors or employees;
- supervise the functions of MARA (all MIA employees in the MARA secretariat) pursuant to delegated authority of the Board;
- report on an agreed basis to the MIA Board to ensure that the MIA Board can discharge their duties as directors of MIA;
- remain as designated “officers” of the MIA for this purpose only for their appointed terms
- be appointed for a term not exceeding (say) 3 years, ideally on a rotational basis to ensure an appropriate mix of continuity and renewal;
- be required to hold qualifications prescribed in Rules created under the constitution (with appropriate exclusions for bankruptcy, conviction etc)
- be not eligible for re-appointment as officers of the MIA to exercise MARA powers (save after the expiration of 2 years since their last appointment)
- be subject to machinery provisions in respect of casual vacancies and absences etc;
- only be otherwise removable as “officers” pursuant to constitutional provisions and as agreed to in writing by the Minister;
- be constituted as committee appointed by the Board and be constituted with a minimum and maximum number of individuals;
- holding meetings and conducting proceedings, subject to quorum provisions in a manner prescribed by the constitution;
- include in the number of officers at least 1 officer recommended by each of the Law Council and DIAC and the Minister
- be able to make decisions to the same effect as though made by the Board within the scope of the MARA responsibilities under the Act under delegated power of the Board;
- not be able to carry out any other function of or for the MIA - save as the MARA
- be entitled to reimbursement and entitlements equivalent to those enjoyed by directors

**Attachment B**

All three versions of the *Deed of Agreement between the Commonwealth of Australia and the Migration Institute of Australia Limited* have each required of the MIA that, in carrying out its MARA functions, it comply with “*the relevant provisions of the Migration Act 1958, the Financial Management and Accountability Act 1997, [FMAA] the Financial Regulations and the relevant Corporations Act*”.

Whilst MIA receives monies from Consolidated Revenue its obligations under the Deed include complying with those parts of the FMAA referring to “*public money*”. These parts include:

- (a) section 19 of the Act which requires the Finance Minister to ensure that proper accounts and records are kept with respect to the receipt and expenditure of public money: and
- (b) Section 48 which requires the Chief Executives of “*Agencies*” to keep accounts and records which follow the *Finance Minister’s Orders*.