Australian Government
Department of Home Affairs

Migration Agents Instruments Review

Report to the Assistant Minister for Customs, Community Safety and Multicultural Affairs, the Hon Jason Wood MP

May 2021

CONSULTATION REPORT

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Executive summary

The Australian migration advice industry has supported Australia to become one of the most successful multicultural societies in the world, with almost 30 per cent of the population born overseas at the end of 2019. Before the global pandemic in 2020, Australia welcomed more than 239,000 overseas arrivals[1], with one person arriving to live in Australia every 30 minutes and 26 seconds[2].

The Migration Agents Instruments Review (the Review) is founded on the Australian Government's commitment to creating a world class migration advice industry. Specifically, the Department of Home Affairs (the Department) has considered how legislation can support a highly qualified and professional industry and ensure the Australian Government can effectively combat misconduct and unlawful operators.

Creating a regulatory environment that supports the industry to professionalise is not an end in itself. Rather, it reflects the critical role that registered migration agents (RMAs) play in facilitating migration to Australia, contributing to Australia's ongoing economic prosperity and the cohesiveness of our society, and our mission to protect the community and uphold the nation's security.

The Review has coincided with a particularly disruptive and distressing period for many RMAs, whose livelihood has been hurt by the global pandemic and the associated uncertainty within the immigration and travel environment.

Further, the Review is cognisant that there has been a range of relevant reviews and reforms in recent years within the regulatory environment, including the introduction in 2018 of enhanced knowledge requirements to register as an agent, and the recent removal of unrestricted legal practitioners from regulation by the Office of the Migration Agents Registration Authority (OMARA).

The options for reform provided for public feedback through this draft report have been made with this in mind and in consultation with the industry. They reflect that the vast majority of migration agents regularly provide valuable assistance and have never had a complaint against them, while recognising there are valid areas for improvement within the industry's structure and regulation, and in the combat of unethical and illegal assistance. The proposals also include measures that could support an industry rethink of how it can best pursue the development of a coherent collective professional identity.[3]

Matters for public feedback

All options for reform in this report are *proposals only* at this stage. The insights of the industry and the broader community are an essential part of finalising the report and providing informed advice to Government. **Submissions can be made using the feedback page by 5pm AEST, 25 June 2021.**

The options for reform take three forms:

- measures that address significant regulatory concerns and can be predominantly progressed through legislative amendment may be recommended for the Government's agreement
- measures that represent significant change or potential increase in industry regulation, and have an ongoing design component, may be recommended for Government's agreement to enable the Department to develop a comprehensive plan or model and clearly articulated transition timeframes in consultation with industry
- measures where the primary mechanisms for change are not directly within the Review's legislative scope and that have a significant level of complexity may be recommended for further examination and progression as appropriate by the Department.

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[1] ABS (Australian Bureau of Statistics) (2020) *Migration, Australia, 2018-19 financial year* [online document], accessed 12 January 2021
[2] ABS (2021) *Population clock* [online document], accessed 12 January 2021
[3] 'Coherent professional identity' is a term referenced in relation to the migration advice industry by Van Galen Dickie, M (2020), *The Protégé Effect*, Doctorate of Professional Studies, University of South Queensland

The report also indicates that some reform measures within the Review's scope for examination should *not* progress for a range of reasons, such as the current financial and operational environment, disproportionate nature of the reform, or availability of alternate mechanisms that address the intent of the measure.

The key issues for consideration and potential reform measures examined during the Review have been organised under three themes:

- **A qualified industry:** ensuring individuals have strong qualifications to enter and remain in the migration advice industry.
- **A professional industry:** ensuring that RMAs conduct their businesses ethically with care, skill, integrity and diligence, and maintain proper and current professional knowledge.
- **Combatting misconduct and unlawful activity:** reducing the instances of, and responding to, serious misconduct and unlawful activity by RMAs and unlawful providers of immigration assistance.

These themes are closely related, with many of the options for reform connected to other themes. Accordingly, no theme or measure has been considered in isolation in forming the Department's advice, or should be read in this report as a standalone initiative. The structure of the analysis papers, or chapters, within this report vary as needed to examine the diverse reform topics.

Review history and scope

The Review was necessitated by the impending sunsetting, or end, of four of the legislative instruments that govern the regulation of the migration advice industry in 2024. The Review's scope was expanded to include the legislative framework relating to the provision of immigration assistance (the legislative framework), including:

- Part 3 of the *Migration Act 1958* (the Act)
- *Migration Agents Registration Application Charge Act 1997*
- *Migration Agents Regulations 1998* (the Regulations) (sunsetting)
- *Migration Agents Registration Application Charge Regulations 1998* (sunsetting)
- *Migration Agents (IMMI 17/047: CPD Activities, Approval of CPD Providers and CPD Provider Standards) Instrument 2017* (CPD Instrument) (sunsetting)
- *Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018* (sunsetting).

This framework prescribes who can provide immigration assistance, disciplinary actions related to RMAs and penalties for unlawful immigration assistance, registration of migration agents, and the functions of the Migration Agents Registration Authority (the Authority).

The Review's scope also includes providing advice on a range of possible reforms that may have legislative implications, including matters relating to the Joint Standing Committee on Migration's (JSCOM) 2019 *Report of the inquiry into efficacy of current regulation of Australian migration and education agents* (JSCOM inquiry), recommendations one to four only. These reforms form the basis for the chapters within each of the themes.

Legislative implications identified throughout this report are indicative only and are subject to change when and if the proposals are progressed.

Out of scope

The *Migration Amendment (Regulation of Migration Agents) Act 2020* (Regulation Act) received Royal Assent on 22 June 2020, after the underlying bill passed the Senate on 15 June 2020. This Act removed legal practitioners with unrestricted legal practising certificates (unrestricted legal practitioners) from the regulatory scheme governing RMAs as of 22 March 2021.

Unrestricted legal practitioners are now solely regulated by relevant state and territory regulatory bodies and not the Commonwealth. While they are part of the immigration assistance market sector, they are not part of the migration advice industry (that is, they are not registered migration agents). Accordingly, legal practitioners who provide immigration assistance are not within the scope of the Review or this report, except for *restricted* legal practitioners who have chosen to remain registered with the OMARA for a transitional period.

The revised Code of Conduct for RMAs (the Code) is also expected to come into effect in 2021 following an extensive consultation and legislative drafting process. Accordingly, the Code is not within scope of the Review but will be referenced in the report where relevant to reform proposals.

The Department's submission to JSCOM advised that the Department and Australian Border Force (ABF) work well with other law enforcement agencies to target, disrupt and prosecute criminal activities. It also noted, however:

> 'there is evidence that:
>
> – lack of appropriate information sharing and evidence sharing powers and
>
> – lack of appropriate search and seize warrant executing powers, in portfolio legislation, especially the Act and the *Australian Border Force Act 2015* (ABF Act),
>
> are a significant impediment to Commonwealth investigation of fraudulent behaviour by migration agents (both registered and unregistered).'[4]

These issues are not within the Review's scope. The Review does, however, consider a range of other measures, including strengthening the definition of 'immigration assistance' in the Act, to aid in the investigation and prosecution of those who unlawfully provide immigration assistance.

Terminology

Where 'the Department' is referred to in this document, it collectively refers to Department's policy and program management functions, including the OMARA. The ABF is an operationally independent body within the Department, and is accordingly referred to separately. References specifically to the OMARA relate to the OMARA's legislated role as the Authority.

All references to migration agents relate to RMAs – those who are allowed under Australian law to provide immigration assistance, whether located offshore or onshore. Those who are not registered and are in Australia are referred to as unlawful providers of immigration assistance. Offshore (or overseas) unregistered providers of immigration assistance are referred to as such, or as offshore providers; as they are outside Australia's jurisdiction, they are not unlawful.

A glossary is provided at the conclusion of the report.

Stakeholder engagement

On 25 June 2020, the Assistant Minister for Customs, Community Safety and Multicultural Affairs, the Hon. Jason Wood MP (the Assistant Minister) announced a review of the legislative framework that governs Australia's migration advice industry (the Review).

To support the Review, the Department released a discussion paper, *Creating a World Class Migration Advice Industry* (the discussion paper), which briefly highlighted key considerations for legislative reform, and sought the views of industry and the community on the themes and reform suggestions. Fifty-five valid submissions were received, and were published on the Department's website unless the authors requested confidentiality. All stakeholder submissions referenced in this report and its chapters refer to this discussion paper consultation unless specified.

[4] Department of Home Affairs and ABF (2018:17) *Submission to JSCOM* [online document], accessed 20 November 2020

On 23 July 2020, the Assistant Minister convened an ad hoc group of experts under the auspices of a new Migration Advice Industry Advisory Group (Advisory Group) to discuss their views on the discussion paper concepts.

In August 2020, the Assistant Minister announced the establishment of the Advisory Group to provide expert advice to the Australian Government on matters relating to the migration advice industry, including potential reforms to the legislative framework governing the industry.

More than 100 membership nominations were received. The Assistant Minister subsequently appointed 26 members who represent a broad cross-section of the migration advice industry, academia, and the Administrative Appeals Tribunal (AAT).

The Advisory Group met on 19 November 2020 to discuss proposed reforms, specifically the design intent for supervised practice and a tiering system, and again on 18 February 2021 to discuss issues relating to offshore immigration assistance, and combatting misconduct and unlawful activity. Their anonymised views are reflected in relevant chapters of this report. The Advisory Group will continue to be an important consultative resource for the finalisation of the Review and other matters relating to the industry.

The industry and its regulation have also been the subject of several independent or parliamentary reviews, as outlined in the *Chronology of Australian migration advice industry regulation* at Attachment A. The recommendations of these reviews, and of relevant submissions have informed this report.

Summary of options for reform

Subject to Government authority and resourcing for implementation of the reforms and ongoing delivery resourcing, legislative changes could be made to Part 3 of the Act and other associated legislation to enable the specific measures in *Table 1*.

Table 1: Summary of potential reform options

Theme and component	Summary of reform options
Theme One: A Qualified Industry	
1.1 Qualifications	A review of migration advice industry entry qualifications to commence no sooner than 2023, supported by ongoing monitoring and evaluation. This timeframe reflects the relatively recent introduction of the current requirements and other significant events likely to impact the outcomes.
1.2 English language	Update the Occupational Competency Standards for RMAs (OCS) to include English language expectations/requirements and create an associated practice guide, detailing RMA obligations. Increase the level of English required for registration as an RMA from IELTS 7 (minimum score of IELTS 6.5 in all four components of speaking, listening, reading and writing) to 'proficient' English, which equates to IELTS 7 in all four components or the equivalent under accepted tests. Expand the number of English language test providers that the OMARA accepts for registration purposes.
1.3 Supervised practice	The introduction of a mandatory 12-month provisional licence for newly registered migration agents. Provisional licensees will operate under the supervision of a fully licensed RMA and provide immigration assistance only with applications to the Department and related matters.

Theme and component	Summary of reform options
Theme Two: A Professional Industry	
2.1 Registration requirement	Strengthen Fit and Proper Person requirements to include bankruptcy checks, spouse and associate details, and checks in departmental systems as part of the initial registration application. Amend the Act to allow the OMARA to refuse registration in circumstances relating to integrity or criminal conduct. Reduce regulatory burden by removing the 30-day publishing requirement for first time registrations. Increase the period of registration from 12 months to 36 months for agents who have not had any substantive complaints or referrals made against them for the five year period immediately before their registration application is assessed. The OMARA updates its process of character checks for registration applicants to include a coordinated identity verification process and criminal history check for all applicants at the time of initial and subsequent registration.
2.2 Publishing information on pricing arrangements	That the Department publish aggregated information on pricing arrangements on its website.
2.3 Developing a fidelity fund or other compensation mechanisms	*Do not* introduce a fidelity fund, noting the current fiscal and operational environment, industry size, and adequacy of existing consumer protections.
2.4 Introducing a tiering system	Introduce a three-tier system of registration for all RMAs that provides a graduated approach to RMAs' career progression and the provision of immigration assistance before the Minister and the AAT.
2.5 Review of Continuing Professional Development (CPD) arrangements	Use the CPD system to deliver the required training for a tiering system (should a tiering system occur). Strengthen oversight of CPD, including new quality controls for CPD activities and clarifying CPD provider standards. Increase the number of compliance audits of CPD providers and make the results publicly available.

Theme and component	Summary of reform options
Theme 3: Combatting Misconduct and Unlawful Activity	
3.1 The definition of immigration assistance	Reframe the 'clerical work' exception to require supervision, introduce a definition, rename to 'administrative assistance', and limit the number of supervisees an RMA can supervise. Address the use of business structures to avoid responsibility for misconduct, including amending the Act to apply to all businesses, and not just individuals, which provide immigration assistance. Release a factsheet explaining the distinction between general advice and legal advice on the matters under the *Australian Citizenship Act 2007*. Remove and clarify certain exemptions for provision of immigration assistance in the relevant sections of the Act. Replace the terms 'visa applicant' and 'cancellation review applicant' with 'person' in the relevant sections of the Act.
3.2 Offshore unregistered migration agents	Increase consumer awareness of the risks associated with the use of unregistered offshore and unlawful onshore providers of immigration assistance, and encourage the use of the OMARA's Register of migration agents to find and contact an RMA. *Do not* make the OMARA regulatory framework apply offshore. *Do not* allow offshore unregistered migration agents to be listed with the OMARA. *Do not* introduce categories of persons permitted to be authorised recipients. Instead, ensure departmental delegates have adequate training to identify suspicious authorised recipients, and assess the efficacy of the relevant section of the Act. *Options for further examination by the Department:*[5] Make legislative and system changes to allow the Department to accept visa applications only from the applicants, RMAs, unrestricted legal practitioners, or exempt persons. Introduce an unregistered immigration assistance Public Interest Criterion that could result in a decision to refuse to grant a visa where unregistered or unlawful immigration assistance has been received. Require visa applicants to attest in a declaration as to whether they have received immigration assistance or other relevant assistance. Develop risk profiles for individuals, occupations and industries where the risk of unregistered immigration assistance is high, and conduct audits of high risk visa applications.

[5] Primary mechanisms for change for these proposals are not directly within the Review's legislative scope and have a significant level of complexity. These proposals are instead recommended for further examination and progression as appropriate by the Department.

Theme and component	Summary of reform options
3.3 Penalties for unlawful immigration assistance providers	Increase financial penalties in section 280(1), and consider increasing financial penalties in sections 312A and 312B from 60 penalty units to 250 penalty units. Apply penalties to businesses, not just individuals. Require payment of reparation and commercial gain. Remove differentiation between fee-for-service and no fee-for-service. Introduce the ability to apply both financial infringements and/or imprisonment for related offences under sections 281(1), 281(2), 282(1), 283(1), 284(1) and 285(1) of the Act. Introduce provisions to make it a criminal offence to knowingly provide immigration assistance for the purposes of enabling serious and organised crime.
3.4 The powers of the OMARA to address RMA misconduct	Amend certain sections in Part 3 of the Act to strengthen OMARA's powers, clarify their scope and remove redundant provisions.
3.5 Improving compliance with AAT practice directions	Progress existing initiatives to improve compliance in conjunction with relevant recommendations within this report, including the provisional licence under supervision and a tiering system.
3.6 Establishing an independent regulator	*Do not* proceed with an Immigration Assistance Complaints Commissioner. Instead, strengthen relevant policies, legislation, processes and procedures to achieve the intention of the recommendation.

Industry profile

Since the Register of Migration Agents commenced in 1992[6], the immigration assistance sector has evolved alongside Australia's changing migration priorities. It has matured into an industry comparable with those of other leading Commonwealth migration destination countries, including New Zealand, Canada and the United Kingdom.

At the start of 2020, the industry was estimated to be worth $970.5million[7], totalling 6888 RMAs both in Australia and overseas, with around 38 per cent operating as sole traders. RMA registration fees in 2020 contributed 75 per cent ($10.9 million) of total licence fees collected from non-contractual licensees by the Department, including depot, warehouse, and broker licensees.

The industry is gender balanced and has an equal mix of experienced RMAs and new entrants, averaging 45 years of age. Slightly more than a third of the total RMA workforce have more than 10 years of experience and 29 per cent have been registered for three years or less. Many RMAs are migrants themselves; 4762 non-lawyer agents registered with the OMARA at the end of 2020 supported their registration application with evidence of English as a second language.

[6] The term 'registered agent' is first defined through legislation in the *Immigration Act 1948*, however the industry was not substantively regulated until 1992. *Attachment A* provides a chronology of industry regulation.
[7] IBIS World (2020) *Migration Agents in Australia – Industry Report* [online document], accessed 12 January 2021

RMAs are responsible for 58 per cent of all temporary and 17 per cent of all permanent Protection visa applications lodged in Australia. Approximately 5.6 per cent of RMAs operate full time on a non-commercial basis, providing free advice to predominantly culturally and linguistically diverse applicants through pro bono legal centres and community organisations.

Migration advice also has a significant impact on other industries, including the domestic job market and the higher education sector. RMAs assist 80 per cent of business migrants that employ local staff, and a third of international student enrolments.[8] This has positive effects for the Australian economy, supporting countless small and family-run businesses, promoting regional growth, and lifting the living standards of Australians. Critical industries, including health and aged care, are heavily reliant on RMAs to assist with procuring international experts and overseas staff.

RMAs are also qualified to assist clients at the AAT, with 49 per cent of the AAT's Migration and Refugee Division's (MRD) 63,179 active cases represented by an RMA in the third quarter of 2020. The average length of time a representative at the MRD has been registered is just over 10 years, although this does not mean new agents are not offering assistance, with a quarter of the total RMA cohort representing clients at the MRD registered for four years or less. The affirm[9] rate of 41 per cent for new RMAs is comparable to the 39 per cent affirm rate for RMAs as a group, indicating their knowledge and expertise is helpful and assists a majority of applicants.

The industry is not without its challenges, with the global pandemic deeply impacting the livelihood of RMAs, and rapid and ongoing changes to global travel affecting the industry's short term feasibility.
Recent regulatory reforms, including increased knowledge requirements to register as an RMA, removal of legal practitioners from the regulatory scheme governing migration agents, and the strengthening of evidentiary requirements for migrants seeking permanent residency in Australia, have all required the industry to evolve and adapt.

The majority of RMAs are professional and competent in what they do, and pride themselves in ethically helping people resettle in Australia. However, there remains a small cohort of RMAs involved in unethical and criminal behaviour, including migration fraud.

In the past five years, the AAT has referred 13 RMAs to the OMARA for suspected fraud or criminal behaviour. Twenty nine per cent of current agents have been the subject of a complaint at some time while being registered, although a large number of complaints are dismissed. In the 12 months to 30 June 2020, 16 RMAs and former RMAs were barred or suspended or had their registration cancelled, which was approximately nine per cent of the 447 total complaints received for this period.[10] Decision summaries for complaints finalised with a sanction (caution, suspension, cancellation, or barring) are available on the OMARA's website.

The Department continues to work with its partners in Australia, including the Australian Federal Police (AFP) and other agencies in the Home Affairs portfolio, and its overseas counterparts to address criminal behaviour in the migration advice space.

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[8] OMARA (2021:2), *Migration Agent Activity Report 1 July - 31 December 2020* [online document], Home Affairs (Department of Home Affairs), accessed 23 March 2021
[9] If a decision is affirmed at the MRD, the AAT agrees with the Department that the visa application should have been refused or the visa cancelled and the applicant is unsuccessful in their merits review.
[10] OMARA (2020:8), *Migration Agent Activity Report 1 January - 30 June 2020* [online document], Home Affairs, accessed 18 January 2021

Setting the benchmark for a world class industry

The Review is guided by the Government's vision as captured in the discussion paper, that is, of making the industry world class, to better protect consumers and ensure the integrity of the Australian migration program, while considering the regulatory impacts to the sector.

'World class' means strong consumer protections

The notion of creating a world class industry was first raised in the JSCOM report, which stated 'the Committee considers a review of the registration requirements would help ensure that Australia's registered migration agents are truly world class providers of immigration assistance'.[11]

The first practical step in implementing this vision is to clearly define what 'world class' means for the industry by creating a benchmark against international regulatory frameworks that are similar to Australia's. As observed in the 2014 Independent Review of the Office of the Migration Agents Registration Authority (the Kendall Review), these countries are Canada, New Zealand and the United Kingdom.

Analysis of recent reviews of migration advice industries in these countries and our own shows the purpose and primary consideration of a regulatory framework governing migration agents is to ensure adequate consumer protections. It follows that strong consumer protections define the benchmark for a world class migration advice industry. This assumption is foundational to the Review, and the Department has used enhanced consumer protections as a key consideration in its assessment and subsequent recommendations for all proposals.

Present state

The Department has assessed that the industry has not yet achieved 'world class' status, as there is room for improvement when it comes to protecting consumers from criminally complicit or incompetent RMAs. Feedback from stakeholders obtained through discussion paper submissions and the Advisory Group, as well as issues flagged in the JSCOM report, Kendall Review and other sources, point to a number of areas for improvement. There is evidence supporting legislative reform across the three themes of the Review: qualifications, professionalism, and misconduct and unlawful activity. This evidence is referred to throughout this report.

Some RMAs and their representative groups already assert that they are members of a profession, not an industry. Historically, the terms have been used somewhat interchangeably in reviews and speeches despite having varying connotations.

Ms Marianne van Galen Dickie contends it is an 'emerging profession' that has 'evolved in a stratified landscape. Because of this migration agents have faced reduced opportunities to develop a coherent professional identity.' Ms Dickie cites a fractured professional landscape due to a short and changing history of formal qualifications for RMAs, the dual regulation of legal practitioners (now removed as a key factor due to the recent changes), and the lack of a coherent base among the representative bodies for developing shared goals and values. Ms Dickie notes the establishment of the Advisory Group provides an opportunity to explore new ways to support the profession.[12]

The Department has used a Five Elements (5E) model (which provides that any profession should include Education, Ethics, Experience, Examination and Entity) to assess the industry to be well progressed, but requiring strengthening of all five elements to achieve the status of a profession. This applies particularly to the Experience element.

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[11] JSCOM (2019:28) *Report of the inquiry into efficacy of current regulation of Australian migration and education agents* [online document], Commonwealth of Australia, accessed 10 September 2020

[12] Van Galen Dickie, M (2020), *The Protégé Effect*, Doctorate of Professional Studies, University of South Queensland

Link between professionalisation and consumer protections

Historically, the goals of professionalisation are to:

- establish standards that enhance the quality of the workforce
- regulate workers whose jobs can affect the health, safety, or property of others
- enhance public trust and confidence
- enhance the status of an occupation
- guide the behaviour of practitioners in the field, especially when it comes to morally or ethically ambiguous activities, and others.[13]

The links between professionalisation of the industry and enhancing consumer protections are apparent. Developing the industry into a profession would enhance consumer protections, which would in turn help the industry to achieve 'world class' status.

The way forward

This draft report provides initial advice on options for reform to support the Government's vision of a world class migration advice industry through measures to professionalise the industry (Themes 1 and 2) and combat misconduct and unlawful activity in the industry (Theme 3).

The Department could also, in consultation with stakeholders, develop key performance indicators (KPIs) for the industry, to inform any future regulatory reform and monitor the industry's growth towards world class status. Once the major gaps are addressed, it may be appropriate to refer to the industry as a 'profession', which would reflect the aspirations of a number of stakeholders.

It is important to note these KPIs would simply be a mechanism for the Department to monitor the implementation and impact of reforms on the industry to support a general evaluation of progress towards a 'profession'. Beyond the regulatory framework, it is a matter for the industry and its representative bodies as to whether and how it wishes to create a (or enhance its existing) collective professional identity, and the means through which this will occur.

Overview of comparable international frameworks

Industry overview

The migration advice industry in Australia is relatively small, with about 5000 members. In Canada, there were 6744 Regulated Canadian Immigration Consultants (RCICs) as at 30 June 2020[14]. In New Zealand, there were 1232 Licensed Immigration Advisers, including 961 onshore, as at March 2021.[15] As of the 31 December 2020, the United Kingdom had 3289 regulated immigration advisers operating from 1647 regulated organisations.

Regulatory framework comparison

A detailed comparison of relevant international regulatory frameworks is at *Appendix A*. In summary, Australia, Canada, New Zealand and the United Kingdom:

- have a code of conduct for RMAs
- do not regulate legal practitioners providing immigration assistance
- have a public register of migration agents

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[13] National Research Council Of The National Academies, *Professionalizing The Nation's Cybersecurity Workforce?: Criteria For Decision-Making* (2013), The National Academies Press, Washington, D.C., accessed 18 January 2021
[14] ICCRC (Immigration Consultants of Canada Regulatory Council) (2020), *2020 Annual Report* [online document], ICCRC, accessed 23 November 2020
[15] Source withheld.

- require completion of a graduate diploma (except for the United Kingdom)
- require completion of an exam or multiple exams to register as a migration agent (except for New Zealand)
- assess the English language competency through a test or another form of assessment
- have integrity requirements, including a fit and proper person requirement
- have continuing professional development requirements.

Mechanisms that the other countries are using, and that are considered in the report:

- New Zealand and the United Kingdom have a supervised practice requirement
- New Zealand and the United Kingdom have tiering systems for migration agents. The 2017 review of the Canadian framework recommended a system of tiered licensing
- Canada's and New Zealand's legislative frameworks governing migration agents apply offshore
- The three countries have higher financial penalties and lower maximum terms of imprisonment than Australia
- Canada has a higher English language requirement
- Canada and New Zealand have separate tribunals for considering client complaints against RMAs.

Shortcomings of the Australian regulatory framework

In comparison to the countries with similar regulatory regimes, Australia has to some extent played catch-up when it comes to strengthening consumer protections. Australia introduced the Graduate Diploma of Australian Migration Law and Practice (Graduate Diploma) and an examination known as the Capstone Assessment (the Capstone) in 2018, later than similar requirements were introduced in Canada and New Zealand. These are important steps towards meeting the international benchmark when it comes to education and examination, however, it is too soon to assess how effective they have been.

Comparable countries have already introduced (or are in the process of implementation in Canada's case) tiering and/or supervised practice to guide migration agents who are new to the industry or would like to specialise in tribunal representation, both of which are not yet present in Australia's framework.

When it comes to combatting misconduct and unlawful activity, there are shortcomings in the legislation and its tactical execution that allow the issue to persist at the expense of achieving world class status in this field.

Reviews of international regulatory frameworks and industries

There are no universally accepted KPIs that would allow the comparison of migration advice industries across the globe. However, having an understanding of the recent reviews and other developments in the regulation of immigration assistance overseas, and leveraging the lessons learnt by our international counterparts, can help inform the Review.

New Zealand

In July 2014, the Review of the Regulation of Immigration Advice (the New Zealand Review) concluded a relatively high degree of regulation was justified through the *Immigration Advisers Licensing Act 2007* (the IAL Act), given the nature of any harm arising from unethical and incompetent adviser activity. Overarching government objectives were to 'support the competitive operation of industries, reduce compliance costs associated with government actions, and to support positive outcomes for consumers'.[16]

[16] Mills M, Johnston, H, (2014:59) *Review Of The Regulation Of Immigration Advice, Final Report* [online document], MartinJenkins, accessed 6 January 2021

The New Zealand Review proposed 'the following objectives to guide the future design and operation of the system:

- consumers of immigration advice express high levels of satisfaction with the quality of services they receive from licensed and exempt advisers
- consumers of immigration advice are able to easily identify licensed and exempt advisers and place a premium on their advice
- unlicensed adviser activity is effectively deterred
- the licensed adviser industry takes ownership and responsibility for the professional conduct of its members'.

The New Zealand Review noted 'the observable impacts of achieving these objectives will be:

- the licensed adviser industry and its members are held in good esteem and are able to clearly demarcate their services from any unlicensed competitors
- less unlicensed activity occurring
- less instances of harm to consumers of immigration advice, and
- maintenance of New Zealand's high reputation as being a place that is … free of corruption'.[17]

The review made 14 recommendations involving a mix of legislative, regulatory and operational changes to improve the licensing system. The changes sought to remove existing barriers to the effectiveness of the IAL Act and improve efficiency as well as clarifying legislative provisions to existing practice.[18]

Canada

Canada refers to RCICs collectively as a profession. A 2017 review of the Canadian framework did not outline the objectives of the regulatory framework. Rather, it noted issues with the existing regulatory framework, including the current lack of protection of the public in the regulatory framework, inadequate oversight within the current framework, limitations on settlement organisations that provide an alternative to immigration and citizenship consultants and paralegals, and unregulated representatives outside the regulatory framework. The importance of consumer protection is also emphasised in the report:

> 'The importance of protecting individuals who want to immigrate to Canada was a strong message throughout the course of this study. Witnesses emphasised the vulnerability of immigrants, refugees, and people with a precarious immigration status and recommended various ways to strengthen the regulatory framework governing immigration and citizenship consultants and paralegals, which would better protect the public as well as Canada's immigration system'.

The report recommended more rigorous training, education and experience standards, a system of tiered licensing, and a new regulatory body empowered to create mechanisms for investigating and dealing with complaints and disciplinary matters.[19]

The United Kingdom

In mid-2020, the Office of the Immigration Services Commissioner (OISC) published their corporate plan including a number of measures of success that would be used to map progress toward their vision and improve the effectiveness of the regulatory framework.

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[17] Mills M, Johnston, H, (2014:58) *Review Of The Regulation Of Immigration Advice*, Final Report [online document], MartinJenkins, accessed 6 January 2021
[18] Ministry of Business, Innovation & Employment (2019) Cabinet Paper, *Regulatory Systems (Economic Development) Amendment Bill (No. 3)* [online document], New Zealand Government, accessed 25 November 2020
[19] House of Commons Canada (2017:3-41) *Starting Again: Improving Government Oversight of Immigration Consultants* [online document], Report of the Standing Committee on Citizenship and Immigration, Parliament of Canada, accessed 24 November 2020

These measures are:

- views of advice seekers and supporting organisations of their knowledge and experiences of immigration advice and services
- levels and nature of advice being sought from advisers
- perceived quality of applications and appeals
- performance of registered advisers through audits and the levels/severity of complaints
- levels of prosecutions and investigations into illegal advisory activities

In addition, the OISC has KPIs that focus on the numbers of: applicants and successful applicants to enter the OISC scheme, audits completed, advisers removed from the scheme, complaints against advisers, and enforcement actions taken. A summary of these is available in the OISC's Annual Report.

The 2014 Triennial Review of the OISC noted the evidence presented was overwhelmingly in favour of regulation of immigration advice. It recognised those subject to immigration control are often among the most vulnerable in society, and that regulating the provision of advice was important to protect these vulnerable people from incompetent or corrupt advisers.

The types of behaviour that the OISC was set up to address included incomplete, inaccurate or misleading advice, unprofessional relationships with clients, deception of the client or encouraging deception by the client, and unfair charging for services and materials'. The report notes the difficulty in evaluating the OISC's contribution to preventing crime and fraud in the immigration advice sector, but highlights the OISC:

- audits identify irregular and criminal activity that can lead to advisers being removed from the Register of people authorised to provide immigration advice
- independent complaints system enables members of the public to provide information about advisers who may be behaving in a fraudulent or criminal manner, against who the OISC can then take appropriate action'.[20]

Recommendations included reviewing the approach to Continuing Professional Development (CPD) compliance, introducing a light-touch way of assessing consumer satisfaction as well as a number of recommendations regarding internal processes and governance of the OISC.

Conclusion

Consumer protections in a migration advice industry are achieved by creating a benchmark that ensures RMAs have sufficient knowledge and skills to perform the work effectively, a robust code of conduct and sanctions to encourage professional behaviour, and that there are mechanisms to address misconduct and unlawful activity. This approach aligns with the three themes of this Review: a qualified industry, a professional industry, and combatting misconduct and unlawful activity.

The Government's role in ensuring the Australian migration advice industry is world class is fulfilled by introducing, maintaining and reviewing the legislative framework governing migration agents and addressing misconduct and unlawful activity.

The legislative framework serves as assurance that consumers of migration advice are well protected. Although consumer protections are important in any industry, it is particularly crucial for the migration advice industry because, as observed by the Federation of Ethnic Communities' Councils of Australia (FECCA), 'people seeking to migrate to Australia are particularly vulnerable to exploitation while navigating a complex and technical system, making stringent regulation and accreditation crucial to ensure strong, safe and prosperous CALD [culturally and linguistically diverse] and migrant communities'.[21]

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[20] Home Office (2014:12-13) *Review of the Office of the Immigration Services Commissioner* [online document], accessed 25 November 2020

[21] FECCA (2018) Submission: *Inquiry into the efficacy of current regulation of Australian migration agents* [online document], accessed 8 January 2021

In comparing Australian migration advice industry with the three countries, it is apparent that there are many similarities to international approaches to ensuring consumer protections. However, discussion paper submissions suggest that there are areas for strengthening consumer protections in the industry.

Industry views on 'world class' status

Submissions to the public consultation in mid-2020 by Australian Migration Agents Pty Ltd, Mr Saikumar Iyer and the Migration Institute of Australia (MIA) noted a lack of a benchmark for what it means to be a world class industry.

Fifteen submissions stated there are issues the industry needs to resolve to achieve 'world class' status. Mr Christopher Peck stated that 'after 5 years in the industry … I have seen so much that is wrong with it, so much of which is anything but world class'. The Law Council of Australia (LCA) wrote 'in order to elevate the Australian migration advice industry to one that is truly world class, significant reform is needed'. Fragomen believe 'that there remains scope for further change to further lift these standards to create a world class industry'.

Several submitters flagged issues that they believe are preventing the industry from being world class, as summarised below.

Misconduct and unlawful activity

Eight submissions flagged that the issue of misconduct and unlawful activity holds the industry back from becoming world class. The submissions noted unlawful immigration assistance providers can harm the consumer as well as the reputation of the migration advice industry. A confidential submission observed there are a number of components to this problem, including 'the actions of some migration agents … unregistered practice in particular by offshore people and in the education and recruitment industries onshore'. A confidential submission stated 'improved efforts to locate and shut down illegal operators should be pushed a lot further to truly achieve a world class migration advice industry'.

Dialogue with stakeholders

The Aus Visa Specialists stated that 'to create a world class migration advice industry, it is absolutely essential for the Department to work together with us to develop and implement highly effective strategies to create a culture of trust and a positive environment for a very meaningful engagement of all stakeholders'. Shire Migration stated that 'for the migration industry to become world-class, it is important to have a dialogue among all stake-holders who contribute to the industry'.

Education and experience

Ms Nishit Padiya stated that 'ongoing comprehensive professional development is what will get us to making the Migration Advice industry world class'. Mr Michael Craddock wrote that 'in parallel professions such as accounting and taxation advisory, an advisor grows into becoming a "professional" through industry-specific qualifications (attained after their Bachelor degree) and performing client work under supervision and with the mentorship of their superiors'.

Proposed key performance indicators for achieving 'world class' status

The Department has used enhanced consumer protections as a key consideration in its assessment and subsequent recommendations for all Review proposals. The Department could potentially implement KPIs for the industry and metrics for evaluating the performance of the industry. This would allow the Department to measure the effectiveness of the legislative framework and any reforms that would be implemented as a result of this Review. The proposed KPIs are outlined in Table 2 below:

Table 2: Proposed KPIs for Australian migration advice industry

Proposed KPIs	Proposed metrics
Adequacy of legislation to meet the policy objective of ensuring strong consumer protections in the industry.	Feedback from the regulator, operational and intelligence areas to identify the areas where legislation is short of fulfilling the consumer protection objective. Feedback from the community to measure satisfaction with the performance of the industry. The feedback may be obtained through surveys of consumers of immigration assistance and other sources on an ad hoc basis.
A qualified industry	
Reduction of instances of misconduct related to unintentional mistakes by RMAs due to lack of knowledge of migration legislation and procedures.	Number of regulator's disciplinary decisions, and other measures, such as warning letters, related to incompetence per period.
Knowledge and experience requirements and examination are reflected in the OCS.	OCS are periodically reviewed to ensure they reflect the competencies required of RMAs. Adequacy of knowledge and experience requirements and examination are updated accordingly.
Improvement in the quality of cancellation review and ministerial intervention applications submitted by RMAs.	Number of referrals to the regulator from the AAT. Statistics and qualitative feedback from tribunals. Feedback from relevant departmental units.
A professional industry	
Gaps in knowledge of migration agents are identified and addressed through CPD requirements.	Availability of CPD offerings at various levels of difficulty.
Number of complaints against migration agents is useful to monitor, however, may not serve as a clear performance indicator. The increase in number of complaints may indicate increased awareness of consumers about the complaints process.	Number of valid complaints against migration agents Number of repeat complaints, indicating the RMA has not addressed the knowledge or ethics gap.
Analysis of the nature of valid complaints to capture trends and issues in the industry.	Analysis of valid complaints is conducted regularly by OMARA with recommendations proposed based on the analysis.
Unprofessional statements and misinformation in the media by migration agents are addressed by the regulator.	Number of instances of unprofessional statements and misinformation in the media.
Combating misconduct and unlawful activity	
Reduction of instances of misconduct.	Number of findings of misconduct by regulator per number of complaints lodged.
Complaints are addressed within a specified timeframe by the regulator. This may be evaluated through the target timeframe to investigate an allegation of misconduct, noting varying complexities of the investigations.	Number of complaints addressed within a specified timeframe. Presence and size of a backlog of complaints.
Allegations of unlawful activity known to the regulator are shared with the ABF.	Percentage of allegations of unlawful activity shared with the ABF

Migration Assistance: industry or profession?

Creating a world class migration advice industry submissions (2020)

The majority of submissions to the discussion paper referred to the industry as a 'profession', and some explicitly raised the issue of whether the term 'profession' is more appropriate than 'industry'. A confidential submission suggested RMAs are 'not in an industry, but a profession filled with highly-trained, specifically-skilled immigration advice providers. This is a distinction that we are passionate about and one that we believe we should strive to uphold'.

Migration Alliance (MA) stated that 'it is important that we do not define this as an "industry" but as a "profession"'. MIA rephrased the goal of the Review to '*Creating a world class migration profession*' in their submission. Newland Chase stated: 'in our view the title of the paper should be focussed on creating a world class migration advice profession, not industry, as we consider ourselves to be professionals'.

Five Elements of professionalisation

The Australian Council of Professions defines a profession as 'a disciplined group of individuals who adhere to ethical standards and who hold themselves out as, and are accepted by the public as possessing special knowledge and skills in a widely recognised body of learning derived from research, education and training at a high level, and who are prepared to apply this knowledge and exercise these skills in the interest of others'.[22]

The Professional Standards Councils have developed a 5 Elements (5E) model 'that reflects certification practices familiar to a number of professions' as outlined at *Table 3:*[23]

Table 3: 5 Es of professionalisation

Element	Description
Education	The specific technical and professional requirements to practice in a discrete professional area. Reflected in **entry-level formal qualifications or certification, and ongoing education or CPD** expectations.
Ethics	The prescribed professional and ethical standards clients can expect their professional to exhibit. This extends into **specific expectations of practice and conduct**, and a commitment to a higher duty. These standards are typically negotiated through the professional community that governs a professions' conduct, and is expected to improve consumer protection – not just reiterate statutory expectations.
Experience	The **personal capabilities and expectations of experience** required to practice as a professional in a discrete professional area.
Examination	The mechanism by which **all of the elements above are assessed and assured** to the community. This covers more than qualification or certification requirements and traditional examinations. It also extends into expectations of regular assurance, such as **compliance and professional audit expectations**.
Entity	For a profession to exist there must be a capable **entity to oversee and administer professional entry, professional standards and compliance expectations on behalf of the public**. This is often an association made up of individuals who are regulated participants in that profession.

[22] Australian Council of Professions (2020) *What is a profession?* [online document], accessed 23 November 2020
[23] Professional Standards Councils (n.d.) *What is a profession?* [online document], accessed on 23 November 2020

Professionalisation of the migration advice industry

Table 4 outlines the features of the Australian migration advice industry against the elements of professionalisation discussed above. Based on the 5E model, the RMA occupation has each element of a professionalisation at some stage of development, albeit with further measures required to align with other Australian professions. In particular, the experience element is currently not explicitly present in the framework. As such, the RMA occupation is well on track for achieving the status of profession once these factors are addressed.

The issue of unregistered persons providing immigration assistance is not present in this methodology. These persons are not considered part of the industry.

Table 4: 5 Es of professionalisation –high level evaluation of migration advice industry

Element	Presence in the migration advice industry
Education	*Entry-level formal qualifications:* The Graduate Diploma of Migration Law and Practice was introduced in 2018. More time is required to evaluate the effectiveness of this qualification (Chapter 1.1 discusses). *CPD:* Ten points per year. Areas for improvement are discussed in Chapter 2.5 of the report. In conjunction with the tiering system proposal (Chapter 2.4), the possibility of progressive education via CPD offerings is proposed. The introduction of a tiering system would ensure RMAs develop personal capabilities and obtain relevant experience and/or education before entering higher tiers and, in particular, before entering challenging discrete professional areas, such as ministerial interventions and tribunal reviews.
Ethics	*Specific expectations of practice and conduct:* The Code of Conduct for RMAs is being revised. Outcomes of the revised Code's implementation will be monitored within the context of the KPIs. The fit and proper person requirement for registration as a migration agent is considered in Chapter 2.1 of the report.
Experience	*Personal capabilities and expectations of experience required to practice as a professional in a discrete professional area:* There are currently no experience requirements for an RMA to start practice independently, with new entrants to the industry being able to undertake complex cases and represent clients at the AAT from day one of their registration as a migration agent. Chapter 1.3 of the report considers the introduction of a provisional licence with a supervision requirement for new entrants to the industry, which would assist them to obtain the minimum experience and develop personal capabilities that would prepare them for practicing independently with competence and confidence. Introduction of tiering system (discussed above under 'education') may involve additional experience requirements.
Examination	*The mechanism by which all of the elements above are assessed and assured to the community:* The Capstone is the exam that evaluates theoretical knowledge and practical capabilities of RMAs and knowledge of the Code. More time is required to evaluate the effectiveness of the mandatory entry qualifications (Chapter 1.1 of the report discusses). *Compliance and professional audit expectations:* Currently, the OMARA monitors compliance of RMAs with re-registration and CPD requirements. However, the OMARA does not conduct proactive audits of RMAs, which makes it more likely for misconduct of an RMA to not be discovered until a client lodges a complaint. This report considers various options for the OMARA to have more

Element	Presence in the migration advice industry
	opportunities to review the performance of an RMA, including through supervisors' feedback, audits of business premises, and assessing applications to change tiers, should the underlying reforms be introduced.
Entity	*Entity to oversee and administer professional entry, professional standards and compliance expectations on behalf of the public* The OMARA is the industry regulator for Australian registered migration agent services. Chapter 3.4 of the report considers whether the OMARA has sufficient powers to effectively regulate the industry.

Conclusion

The Australian migration advice industry is well progressed in its journey towards a professionalisation. The elements of the 5E model and the proposed improvements to the migration advice industry within these elements are considered in this report. Using the 5E model, the Department has assessed the industry to be advanced on Education, Ethics, Examination and Entity, but requiring strengthening of all five elements (particularly Experience) to achieve the status of a profession.

The Department could potentially keep track of any reforms of the migration advice industry and its regulation, to monitor progress towards cementing its status as a migration advice 'profession'. Once the major gaps in the 5E model were addressed, it would be appropriate to refer to the industry as a 'profession', which would reflect the aspirations of a number of stakeholders.

Theme One: A Qualified Industry

1.1. Review of mandatory qualifications

1.1.1. Executive summary

A person must currently hold an Australian legal practising certificate, or have obtained the Graduate Diploma and passed the Capstone to register as a migration agent with the OMARA.

These requirements provide a strong basis for the acquisition of and the assessment of whether a person has a body of knowledge, practical skills and values necessary for effective and ethical practice as an RMA.

The upgraded requirements to hold a Graduate Diploma and pass the Capstone were introduced in January 2018 as a result of recommendations arising out of the Kendall Review (2014). The upgraded requirements represented significant changes to the knowledge obligations for persons applying to the OMARA to register as a migration agent.

Further change to entry requirements occurred on 22 March 2021, when holders of an Australian unrestricted legal practising certificate (unrestricted legal practitioners) were removed from the regulatory scheme governing RMAs by Schedule 1 to the Regulation Act. Holders of a restricted practising certificate (restricted legal practitioners) could opt not to remain an RMA and still lawfully provide immigration assistance provided that they are doing so under the supervision of an unrestricted legal practitioner. Restricted legal practitioners who chose this option are also regulated by State and Territory bodies rather than the OMARA.

Furthermore, the OMARA's arrangement with the provider of the Capstone concluded on 31 December 2020. A new arrangement for the provision of services for the delivery and administration of the Capstone is underway.

Given the relatively recent implementation of heightened entry requirements, the upcoming transition to a new Capstone provider, and removal of unrestricted legal practitioners from the OMARA regulatory scheme, the Department suggests a significant review of the knowledge requirements to register is *not* conducted at this time. Instead, it may be beneficial to undertake a comprehensive review no sooner than 2023, underpinned by ongoing monitoring and evaluation in the interim.

The first cohort of RMAs that have been subject to the higher knowledge requirements are only in their first year of practice. It would be premature to make further changes to the entry requirements for RMAs before the impact of the higher knowledge requirements on the professional conduct of RMAs has been fully assessed. Undertaking a review in 2023 will enable analysis of a greater cohort size of RMAs, and a comparison of the scale of complaints against RMAs who were subject to the higher knowledge requirements and those that entered the industry prior to these requirements.

The submissions received in response to the discussion paper provided diverse commentary on how the existing entry requirements for RMAs could be maintained, reviewed, removed or enhanced. A key component of this feedback – the introduction of a period of supervised practice, is addressed in Chapter 1.3.

1.1.2. Strategic context

The Department regulates the migration advice industry in Australia through the OMARA. It is unlawful to give immigration assistance in Australia unless registered with the OMARA, except where an exception in section 280 of the Act applies.

Under section 289A of the Act, a new applicant for registration with the OMARA needs to complete the specified course and examination. This also applies to a former migration agent who is applying for re-registration more than three years after the end of their previous registration.

A person can meet the qualification requirements to be an RMA if they have been awarded a Graduate Diploma (or a Graduate Certificate in Australian Migration Law prior to 1 January 2018), and have passed the Capstone and apply to register as an agent within 12 months of passing the Capstone.

1.1.2.1. Graduate Diploma in Australian Migration Law and Practice

The requirement to hold a Graduate Diploma came into effect on 1 January 2018. Students study eight units (subjects) over the course of one year (full time) or longer for part time.

The Graduate Diploma is offered by the following universities:

- Australian Catholic University
- Griffith University[24]
- Murdoch University[25]
- University of Technology Sydney
- Victoria University
- Western Sydney University.

The OMARA plays no role in dictating how the Graduate Diploma is run, assessed and structured; this is a matter for each university.

1.1.2.2. Migration Agents Capstone Assessment

The Capstone was implemented as the prescribed exam for registration as a migration agent in July 2018.

The purpose of the Capstone is to assess whether a candidate possesses the range of skills, knowledge and attributes that are required in order to competently practise as an RMA. These skills, knowledge and attributes are detailed in the OCS[26].

The Capstone may be completed at any time after obtaining the Graduate Diploma, however applicants need to apply to the OMARA to register as a migration agent within 12 months of passing the Capstone. Meeting the OCS is the intended outcome of the Graduate Diploma.

The Capstone is a stand-alone assessment de-linked from the Graduate Diploma or any of the universities offering the Graduate Diploma. As such, it is an independent competency-based assessment.

The Capstone was previously offered by the College of Law Limited (the College). The OMARA's arrangement with the College for the provision of the Capstone concluded on 31 December 2020. On 18 December 2020, the Department released a Request for Proposal (RFP) for the provision of services for the delivery and administration of the Capstone. The RFP closed on 3 February 2021. It is not appropriate to provide any details of the new arrangement for the 2021 Capstone in this analysis.

The following information is provided as the most current context for the Capstone as it has functioned to 31 December 2020.

The Department entered into an agreement with the College at the end of 2017 to develop and deliver the Capstone from July 2018. The Capstone was initially delivered four times per year under the agreement, with a variation to agreement in 2020 reducing the number of intakes to three per year. The College was selected as the provider of the Capstone on the basis of a competitive tender by the OMARA for expressions of interest from providers to develop and deliver a stand-alone Capstone. The evaluation panel was independent from any of the organisations proposing to deliver the Capstone.

Candidates complete an online exam with two components:

- a 3.5 hour written component, and upon successful completion
- a 1.5 hour oral component.

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[24] Griffith University also offers a Master's program which will allow entry to the migration agent profession for those who also pass the Capstone assessment.
[25] Murdoch University ceased to accept new students into the Graduate Diploma course from the end of December 2020.
[26] OMARA (Office of the Migration Agents Registration Authority) (2016) *Occupational Competency Standards for Registered Migration Agents*, [online document], Department of Immigration and Border Protection, accessed 14 January 2021

The written assessment component consists of the following parts:

- Part A – five multiple choice questions
- Part B – four short answer questions
- Part C – two practical writing tasks.

The oral assessment tests candidates' ability to apply the law and policy to the client's circumstances and advise the client accordingly in plain English. It includes:

- preparation for an interview scenario
- participating in a discussion with an assessor about the interview scenario
- summarising the planned interview in a file note.

In order to be assessed as meeting the OCS for RMAs, candidates need to succeed in both components of the assessment within the same intake. Successful completion of the written component is a pre-requisite for enrolment in the oral component.

The fees for the Capstone are:

- written assessment component: $1650 (inclusive of GST) and is payable once the application has been accepted
- oral assessment component: $1100 (inclusive of GST) and is payable when a candidate is notified they have successfully completed the written assessment component.

The success rate for the Capstone in each assessment intake has been low. On average, 22 per cent of candidates who have been awarded a Graduate Diploma successfully passed the Capstone. Industry feedback indicates that potential factors contributing to this high failure rate include whether the exam appropriately reflects the knowledge expected of a graduate with no practice experience, the required pass mark, the amount of time allowed to complete the written assessment, and the amount of time allowed to prepare for the oral component.

1.1.3. Public consultation

The regulation of the migration advice industry has been the subject of a number of reviews. The subject of entry qualifications of practitioners was raised in the following reviews:

1.1.3.1. Review of Statutory Self-Regulation of the Migration Advice Profession (2008)

The 2007-08 Review of Statutory Self-Regulation of the Migration Advice Profession (the Hodges Review) invited stakeholders to make submissions on the industry's readiness to move from statutory self-regulation and other issues in relation to the migration advice profession, such as entry standards.

A key theme of submissions was that the introduction in 2006 of the Graduate Certificate as the requirement for entry was a positive step towards improving the professional standards of the migration advice profession. The MIA (which was the regulator at the time) acknowledged that it was committed to making further improvements in time, with a bachelor degree as the ultimate goal. The Hodges Review agreed the Graduate Certificate appeared to be a positive step, but noted concerns that it was not a sufficiently robust knowledge requirement for an increasingly complex area. The Hodges Review also noted concerns in some submissions regarding an apparently high attrition rate among new migration agents, and that more rigorous entry standards could both prevent individuals from entering the profession if they are not committed to it, and better prepare them for its challenges.

This led the Hodges Review to recommend that as soon as practicable, the Graduate Certificate be replaced with a Graduate Diploma level course as the knowledge requirement for entry. This recommendation was not implemented at that time.

1.1.3.2. Independent Review of the Office of the Migration Agents Registration Authority (2014)

The Kendall Review found entry qualifications imposed on migration agents were inadequate. Its report states:

> 'The sector services persons who may be socially and legally vulnerable. These persons deserve and require a high standard of professional service. The best way to ensure that this is offered is through the provision of strengthened educational and professional training'.[27]

At the time of the review, applicants for entry to the migration advice industry were required to either hold an Australian legal practising certificate, or have completed the Graduate Certificate.

Numerous submissions to the review questioned the professional adequacy of the current Graduate Certificate, suggesting it did not adequately prepare RMAs for practice in a legislatively and socially complex area, while some queried whether those graduating from a six month preparatory course possessed the skills needed to ensure top quality advice and assistance to persons who are often vulnerable. This led some to suggest that the current Graduate Certificate should be replaced with a 12-month Graduate Diploma and that there be greater flexibility more generally in relation to how students are taught.

Dr Kendall was of the view that a longer, more extensive program of study would address many of the concerns raised, and recommended the Graduate Certificate be replaced with a Graduate Diploma in Migration Law and Practice. In addition, the Inquiry recommended that non-lawyer migration agents be required to undertake a period of one year mandatory supervision with an already registered migration agent following completion of the Graduate Diploma.

The Inquiry further recommended that, while the OMARA should continue to determine who should be permitted to offer the Graduate Diploma and what core subject areas must be offered, the OMARA should play no role in dictating how those courses are to be run, assessed and structured.

Some submissions suggested graduates who have completed the Graduate Diploma also be required to sit a Capstone exam covering all areas of migration law and practice. The Inquiry accepted this would be a valuable addition to the entry requirements imposed on non-lawyer migration agents, stating:

> 'This option would introduce an independent and nationally consistent competency based assessment that applicants for initial registration would need to pass to satisfy the knowledge requirement for registration purposes. It would be a stand-alone assessment, de-linked from the prescribed course, designed to achieve consistency in both the examination conditions and in the marking applied to all candidates. Eligibility for sitting the assessment could be the successful completion of the Prescribed Course and completion of the minimum period of supervised practice. Attaining competency in the assessment would then be a requirement for registration purposes – the final element for a person qualifying as a fully registered migration agent.'[28]

The review recommended the OMARA tender for the development of a stand-alone Capstone Exam, de-linked from the Graduate Diploma or its service providers. The Graduate Diploma and Capstone were subsequently implemented.

1.1.3.3. Report of the inquiry into efficacy of current regulation of Australian migration agents and education agents (2019)

During its 2018-2019 inquiry, the JSCOM had particular regard to the registration and regulation of migration agents in Australia, including education, English proficiency, payment, and fee-scheduling as well as the suitability and stringency of the accreditation process and evidence of deficiencies.

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[27] Kendall, Dr C N (2014:21) *2014 Independent Review of the Office of the Migration Agents Registration Authority* [online document], Home Affairs, accessed 10 September 2020

[28] Kendall, Dr C N (2014:22) *2014 Independent Review of the Office of the Migration Agents Registration Authority* [online document], Home Affairs, accessed 10 September 2020

Submitters' comments on the current registration requirements were varied, some suggesting a further increase to a bachelor degree or higher qualification, while others said a further review was premature or supported the newly introduced requirements.

The JSCOM did not make a recommendation, instead noting the recent implementation of the Kendall Review recommendations with the introduction of the Graduate Diploma and the Capstone. The JSCOM noted it was difficult to ascertain the effectiveness of these changes in the short timeframe available, and encouraged the Department to 'consider the results of these changes in some manner'.[29]

1.1.3.4. Creating a world class migration advice industry submissions (2020)

There was diverse commentary across the 55 valid submissions to the discussion paper regarding how the existing entry requirements could be maintained, reviewed, removed or enhanced. Views on the Graduate Diploma were generally positive, albeit with some interest in reforming content to address the OCS and representation at the AAT.

Eighty per cent of submissions on the Capstone (27 out of 34 submissions) argued either the Capstone itself was not suitable in its current format or the minimum pass mark of 65 per cent was too high. Several RMA submissions sought to abolish the Capstone. The consistent sentiment was that the exam in its current form is too challenging for an applicant with no practical experience. The timing of the Capstone was also addressed by many submissions, with some recommending it occur after new agents had the chance to apply their education practically, for example:

- after 12 months of practice
- following a period of mentoring or supervised practice, or served on a provisional licence, and/or
- interspersed at intervals over the course of the first year of registration.

The pass mark could be adjusted accordingly or the exam repeated at a higher pass mark following this period.

The question of who should develop or administer the Capstone was also flagged, with proposals seeking increased oversight and involvement of the regulator, less representation from the legal profession, more involvement from RMAs, or an independent assessor.

One confidential submission provided the following view, the themes of which were repeated across a number of submissions:

> 'The Capstone remains a contentious addition to the regime. Two issues affect the efficacy and validity of the Capstone in its current form.
>
> The implementation has missed the crucial advice present in the 2014 Kendall Review; which was to implement a Capstone exam following one year of practice. The Capstone was intended to replace the Practice Ready Program which agents were required to do after one year of practice[30]. Instead it is placed as a gateway to registration. It tests those who have had no practice experience against a competency framework which is based on practice. This has resulted in a high failure rate and a contention that the Graduate Diploma is not "teaching correctly". The placement of the exam without a period of mandatory supervision has substantially misunderstood and reduced the impact of the recommendations.
>
> The Capstone is delinked from the universities that teach the Graduate Diploma and the exam is written, tested and graded by immigration specialist lawyers[31]. This has created a perception that the

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[29] Joint Standing Committee on Migration (2019:28), *Report of the inquiry into efficacy of current regulation of Australian migration and education agents,* [online document], Parliament of the Commonwealth of Australia, accessed 14 January 2021

[30] The Capstone was intended to replace the Common Assessment items relating to registration (the former prescribed exam). The introduction of the Graduate Diploma resulted in coverage of standards 8 and 9 of the OCS (practical aspect) that were not covered by the Graduate certificate and as such obviated the need for the Practice Ready Program.

[31] A panel of highly experienced and reputable RMAs marked the Capstone delivered by the College. These assessors had at least 10 years' experience in a broad range of migration advice areas and were approved by the OMARA. While some assessors were lawyers, not all were.

objection presented by the Law Council in their arguments against dual regulation has infiltrated the exam and created a bar that is too high for most graduates to jump. This then creates a perception that the OMARA is complicit in creating circumstances that purposefully restrict trade and prevent graduates entering into the profession, and in a perverse way is favouring lawyers who can practice in this area of law outside of the OMARA regulatory authority.'

Specific comments as to how the entry requirements be maintained, reviewed, removed or enhanced included:

- review of the Capstone is required, including whether the questions reflect the knowledge of someone who has undertaken the Graduate Diploma and not someone with years of experience in the migration advice industry, the required pass mark, time allowed, requirement that the written and oral components be undertaken together and transparency of exam expectations (16 submissions)
- the introduction of some level of supervised practice as the bridging element between the Graduate Diploma and the Capstone (five submissions)
- the Capstone be abolished (five submissions), or replaced by a period of one or two years of supervised practice (two submissions)
- the Capstone remain in place until an effective supervised practice framework is in place (one submission)
- the Graduate Diploma and/or Capstone be reviewed to ensure a greater focus is placed on providing effective assistance in a merits review process (two submissions)
- examinations for the Capstone should be set by RMAs to avoid any perceived conflict of interest where the entry exam is set by a (competing) profession (five submissions)
- all providers of immigration assistance must have the same minimum level of qualification and that unrestricted lawyers who wish to provide immigration assistance should be required to obtain qualifications and/or undertake examination under the same occupational competency standards that apply to RMAs (11 submissions).

1.1.4. Matter for public feedback

We welcome the public's feedback on the following option for reform:

1.1.4.1. Review knowledge requirements in 2023 for registration as a migration agent

It could be beneficial to maintain current entry qualifications pending a comprehensive review in 2023, to commence no less than five years after the introduction of the Graduate Diploma and the Capstone, to enable adequate assessment of the efficacy of the existing requirements.

The upgrade to the knowledge requirements in 2018 represents significant change for persons applying to the OMARA to register as a migration agent. The first cohort of RMAs subject to the higher knowledge requirements are in their first year of practice. As such, there is little available evidence as to whether further changes to the entry requirements for RMAs are justified.

In addition, changes already underway, such as the removal of unrestricted legal practitioners from the OMARA regulatory scheme and the selection of a new Capstone provider, may provide further insight into what else may be required.

Submissions to the discussion paper support the need for the assessment of whether a person has a body of knowledge, practical skills and values necessary for effective and ethical practice as an RMA.
As Ms Roz Germov's submission noted, 'an agent's mistakes are visited on their client even if the client had no input into the errors. Hence, the need for competent representation is vital'.

Undertaking a review of entry requirements no sooner than 2023 would provide a more reasonable cohort size and enable a comparison of the scale of complaints against RMAs who were subject to the higher knowledge requirements and those that entered the industry prior to these requirements. It would also enable consideration of those reform measures and changes which are likely to influence what knowledge requirements are appropriate for an applicant to hold in order to become an RMA.

1.2. English requirements for the migration advice industry

1.2.1. Executive summary

The Act authorises the OMARA to ensure that applicants applying for registration as a migration agent meet specific criteria including knowledge, character, insurance and English language requirements, before their registration can be approved.

However, anecdotal evidence provided by the AAT and some industry experts suggests there remains a deficiency in English language proficiency, which may hamper some RMAs' ability to effectively represent their clients on complex matters. The legislated English language proficiency requirement is inconsistent with that of comparable occupations in Australia or requirements for immigration assistance providers under comparable regulatory frameworks in Canada and New Zealand.

There is potential to update the OCS to include English language guidelines, and for the OMARA to issue a practice guide under the OCS to include English language expectations, which is comparable to the practices of like-minded jurisdictions. The level of English required for registration as an RMA could be increased to the 'Proficient English' threshold (IELTS 7 in all four components, or equivalent) used by the Department for visa applicants. Further, the English Language test provider list for RMAs could be expanded to include all other providers accepted by the Department for visa purposes.

1.2.2. Background

1.2.2.1. Current English requirement

All first time applicants for registration as a migration agent must currently demonstrate they meet the English language requirement as prescribed in legislation[32]. In addition, those applying for registration more than three years after the end of their previous registration must meet the English language requirement.[33]

The current English language requirement is an overall score of 7 for the International English Language Testing System (IELTS) Academic test or an overall score of 94 for the Internet Based Test of English as a Foreign Language (TOEFL IBT).[34] An applicant must have achieved the required overall score and minimum scores in each subtest for either the IELTS Academic test or the TOEFL IBT no more than two years before making their application to become an RMA.

- For the IELTS test, the overall score required is 7 in the Academic test, with a minimum score of 6.5 in each subtest (speaking, listening, reading and writing). An overall Band Score of 7.0 denotes a good user of the English language, but still having 'occasional inaccuracies, inappropriate usage and misunderstanding in some situations'. The current requirements mean a person who could not achieve 7.0 within each Band, would commonly experience inaccuracies, inappropriate usage and misunderstandings in their use and interpretation of English language[35].
- For the TOEFL IBT, an applicant must have a minimum overall test score of 94, with a minimum score of 20 in speaking, 20 in listening, 19 in reading and 24 in writing.

The four options to meet the OMARA English language requirement for registration as a migration agent and the associated evidence requirements are outlined at Before you apply (mara.gov.au).

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[32] Section 289A of the Act, regulation 5 of the *Migration Agents Regulations 1998*, Legislative Instrument *Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018* (IMMI18/003)
[33] From 22 March 2021, regulation 5 has extended the period of satisfying English language requirements for those applying after their registration ceases to three years, from 12 months previously.
[34] The IELTS-specific language requirement was implemented at the recommendation of the 2008 Hodges Review.
[35] IELTS (n.d.) *Understand and explain the IELTS scores* [online document], British Council, accessed 10 January 2021

They include:

- **Education Option 1 –** you have successfully completed:
  - secondary school studies to the equivalent of Australian Year 12, with a minimum of four years' study at secondary school or equivalent, and
  - a Bachelor degree or higher degree, with a minimum of three years' equivalent full-time study, where
    - your secondary school and degree studies were completed at educational institutions in Australia, Canada, Ireland, New Zealand, South Africa, the United Kingdom and/or the United States; and
    - English was the language of instruction at these educational institutions; and
    - your study was undertaken while you were living in the country where your degree was awarded and your schooling was completed.
- **Education Option 2 –** you have successfully completed:
  - secondary school studies either to the equivalent of Australian Year 10 or Year 12, and
  - at least 10 years of primary and/or secondary schooling, where
    - English was the language of instruction at your school or schools, and
    - your schooling was undertaken and completed in Australia, Canada, Ireland, New Zealand, South Africa, the United Kingdom and/or the United States, and
    - you were living in either Australia, Canada, Ireland, New Zealand, South Africa, the United Kingdom and/or the United States throughout your period of schooling.
- **IELTS (Academic) or TOEFL IBT –** you have achieved, no more than two years before making your application:
  - a minimum overall test score of 7 in the IELTS Academic module, with a minimum score of 6.5 in each subtest (speaking, listening, reading, writing), or
  - a minimum overall test score of 94 in the TOEFL IBT, with a minimum score of 20 in speaking, 20 in listening, 19 in reading, and 24 in writing.

1.2.2.2. Current prescribed qualifications and courses

The current registration requirements, including the Graduate Diploma and Capstone, are outlined under Chapter 1.1 of this report. Although universities offering the Graduate Diploma require evidence of English as part of the admissions process, these requirements differ between institutions and may not meet the threshold required for registration as an RMA by the OMARA. The OMARA therefore advises on their website that applicants undertaking an English language test may wish to consider doing so before enrolling in the Graduate Diploma to ensure they have the necessary language skills to register as a migration agent[36].

The English language test results are valid for two years for registration purposes. The OMARA advises that those who cannot achieve the required score in an acceptable English test may benefit from undertaking English language studies to improve their proficiency before committing to the significant financial outlay required for completion of the Graduate Diploma and Capstone.

Of the 4762 non-lawyer agents registered with the OMARA at the end of 2020, 1999 agents (or around 42 per cent) have satisfied English language proficiency requirements by providing IELTS or TOEFL results. It is also relevant to note that, in addition to this cohort, many agents who meet English language requirements through Education Options 1 and 2 are also not native English speakers.

In addition to the Graduate Diploma, applicants must pass the Capstone in order to register as a migration agent in Australia. During the College's provision of the Capstone, the OMARA published on its website feedback from the College, that a lack of English language proficiency may adversely impact candidates' performance in the Capstone.

[36] OMARA (n.d.) *Steps to register as a migration agent – before you apply* [online document], Home Affairs, accessed 23 March 2021

1.2.3. Stakeholder concerns with the English language level of the profession

Stakeholders have raised concerns with the level of English language proficiency of migration agents appearing before review tribunals and the documentation that they are providing.

On 23 July 2020, Assistant Minister Wood chaired a meeting of industry stakeholders on the themes outlined in the discussion paper. Key concerns raised by the participants about the industry included deficient English skills, both verbal and written. It was suggested English language should be assessed prior to acceptance into the Graduate Diploma, with an ongoing requirement to demonstrate a high standard of English throughout an agent's career.

1.2.3.1. The JSCOM inquiry report (2019)

JSCOM recommended the Australian Government, in consultation with relevant migration agent peak bodies, undertake a review of the current registration requirements for migration agents, having regard to a range of factors including English language.[37]

1.2.3.2. Creating a world class migration advice industry submissions (2020)

Of the 10 submissions that commented on the English language requirement, five stated that the current requirement is sufficient. Two submissions suggested abolishing the English language requirement, one to encourage industry participation and the other on the basis that the Capstone should set the benchmark.

Three submissions proposed introducing an increased written and oral English language requirement (prior to either the Graduate Diploma or the Capstone) of an IELTS score of 7 or 7.5 (or its equivalent under other testing arrangements).

The AAT submission noted that some Tribunal members reported having difficulty communicating in English with a small number of RMAs. It was noted that on occasion, an RMA would seek to use the interpreter the AAT had engaged for the benefit of the applicant and/or a witness. The submission suggested the OMARA be given an appropriate range of powers to impose conditions to address English language competency. To help promote and support high-quality practice, the AAT submission suggested including a broad power for the OMARA to impose conditions on registration similar to that of other occupational registration schemes, including for example Australian legal practitioners and tax agents.

The LCA noted the linguistically demanding work undertaken by RMAs, with 'potentially significant adverse consequences for clients if errors are made when interpreting, explaining and applying law and policy'. The LCA recommended a person seeking to become an RMA demonstrate to the regulator, prior to undertaking a prescribed exam for entry into the industry, that they meet the English language proficiency requirement having achieved an overall band score of at least 7.5 in the Academic Module of the IELTS.

The LCA also recommended the OCS for RMAs be revised to include detailed guidance in relation to the different types of skills, including communication skills, required for competent practice. The LCA further recommended the OMARA be empowered to suspend an RMA from practice or restrict their scope of practice where it is satisfied that the RMA does not possess the ability to deliver competent service as articulated in the OCS for RMAs. This restriction may be removed by the OMARA once it is satisfied that the person possesses the requisite skills required to resume practice.

Fragomen noted the increasing complexities of the migration legislation, policy and procedure. Fragomen's submission supported an increase in the English proficiency requirements to a score of 7 overall, and no lower than 7 in any module in IELTS Academic, which is aligned with the English requirements for other professions and with the Department's definition of Proficient English for the purposes of meeting the criteria of certain visa subclasses.

[37] JSCOM (2019:xv) *Report of the inquiry into efficacy of current regulation of Australian migration and education agents* [online document], Commonwealth of Australia, accessed 10 September 2020

The MIA and the MA did not comment directly on the current English language requirements, although the MA referred to an internal poll as part of their submission showing that 77.2 per cent of their members did not support 'increasing the English test minimum score for new RMAs to IELTS 7.5 overall'.

1.2.4. Industry comparison of English language requirements

Table 5: English Requirements for comparable occupations in Australia

Regulator	Occupation(s)	English Language Requirement (IELTS)
Australian Health Practitioner Regulation Agency (AHPRA)	- Chinese medicine practitioners - Chiropractors - Dental practitioners - Medical radiation practitioners - Occupational therapists - Optometrists - Osteopaths - Pharmacists - Physiotherapists - Podiatrists - Psychologists - Registered medical practitioners - Registered nurses and midwives	IELTS (academic module) with a minimum overall score of 7 and a minimum score of 7 in each of the four components (listening, reading, writing and speaking) in one test sitting, or a maximum of two test sittings in a six month period only if: - the applicant achieves a minimum overall score of 7 in each sitting, and in each component across the two sittings, and - no score in any component of the test is below 6.5
Australian Association of Social Workers (AASW)	Social worker	IELTS (academic module) with a minimum score of 7.0, achieved in either one or two sittings and a minimum score of 7.0 in each of the four components (listening, reading, writing and speaking) in a maximum of two sittings in a six-month period, and no component score is below 6.5.
Legal Profession Admission Board (NSW)	Lawyer	IELTS (academic module) with a minimum overall score of 7.0 in listening and reading, 8.0 in writing and 7.5 in speaking.
Victorian Institute of Teaching	Teacher	IELTS (academic module) with an overall score of 7.5 and the following required on each of the skill areas: listening 8.0, reading and writing 7.0, and speaking 8.0.

1.2.5. Regulation in other jurisdictions

1.2.5.1. United Kingdom

The OISC considers it essential for an adviser to be able to communicate clearly and accurately in English in order to be able to represent their client effectively when dealing with the Home Office, the Tribunals Service and other relevant third parties. Although there is no specified English language qualification requirement, a person who fails to show they are able to communicate clearly and accurately in English may have their application refused.[38]

[38] OISC (2018) *New Adviser Application and Competence Statement* [online document], United Kingdom, accessed 13 August 2020

Registration applications by immigration advisers require each applicant to submit a Statement of Competence (statement). This statement provides details of the applicant's training and experience, which need to correspond to the skills and aptitudes required by the Guidance on Competence.

The statement provides an indication of the applicant's written language skills. Where the statement raises concerns, the applicant is likely to be contacted by an OISC caseworker and the issue explored further through a call or face to face meeting. Where statements suggest the applicant has undertaken sufficient training or gained relevant experience, they will be invited to undertake an OISC exam at the level of authorisation sought. These assessments are carried out through online proctored exams which are held each month. Candidates are required to achieve a 65 per cent pass rate on the exam to pass. Marks are awarded within the exam for English language ability and examiners will flag assessments where applicants appear to have poor English language skills.

The OISC's Guidance on Competence contains detailed guidance on the communication and comprehension skills expected of advisers applying at the three different levels of practice. It is not until an adviser reaches Level 3 that they undertake appeal work advocacy and representation.

The required standard is the ability to:

- explain clearly to a client in plain language the progress of their case, including any appeal, the outcome of a hearing, the implications for the client and the options open to them
- draft in clear, pertinent and effective English (making use of case law and human rights legislation, where appropriate) complex applications as well as instructions to a solicitor or barrister
- make clear, cogent oral and written representations in the course of Tribunal proceedings; to identify when it is appropriate to apply for an adjournment of a hearing and argue effectively for it
- identify the salient points in an argument and respond to them effectively in the course of a hearing, where necessary; re-evaluate evidence in the light of responses or other information from the Department or a change in country conditions or new case law
- anticipate and respond effectively to the citing of precedents by the Department in the course of a hearing, where necessary; challenge existing case law, if appropriate; make effective and appropriate representations in Tribunal proceedings using applicable treaties and human rights instruments.

1.2.5.2. Canada

The Immigration Consultants of Canada Regulatory Council (the ICCRC) regulates Canadian immigration and citizenship consultants and Canadian international student advisors.

Currently, all persons seeking to become an immigration consultant in Canada must pass the Regulated Canadian Immigration Consultant Entry-to-Practice Exam after completing a prescribed entry-level qualification. In order to register for the exam, persons must provide evidence of having achieved at least the minimum required score on an approved language proficiency test no more than two years before the intended exam date and have their marks included with the application form.[39]

Since 1 July 2019, a person must demonstrate having met Canadian Language Benchmark Level 9, which is equivalent to the following minimum scores on each component of the IELTS Academic Test: Listening 8.0, Speaking 7.0, Reading 7.0, and Writing 7.0.[40]

1.2.5.3. New Zealand

In terms of English language proficiency testing, New Zealand immigration advisers must undertake an IELTS Academic test and must achieve an overall band score of at least 7 and at least the following scores on each component: Listening 6.5, Speaking 6.5, Reading 6.5 and Writing 7.0.

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[39] ICCRC (n.d.) *Become an RCIC* [online document], ICCRC, accessed 13 August 2020

[40] ICCRC (2021) *Entry-to-Practice Exam Language Ability Test Score Results* [online document] , ICCRC, accessed 7 April 2021

Under TOEFL IBT an adviser must achieve a minimum score of Writing 27, Reading 20, Listening 20, and Speaking 20 with a minimum total score of 100. Evidence of TOEFL test scores achieved in more than one sitting is acceptable if the applicant has taken the second and any subsequent TOEFL tests within 12 months of the first test. Advisers can also sit a Pearson Test of English Academic (PTE Academic) with minimum scores of Writing 65, Reading 58, Listening 58, and Speaking 58 with a minimum overall score of 65. Evidence of PTE Academic test scores achieved in more than one sitting is acceptable if the applicant has taken the second and any subsequent PTE Academic tests within 12 months of the first test. Other ways to prove English language ability, such as schooling in English, are set out on the NZIAA's website[41].

New Zealand advisers must also be able to demonstrate the ability to complete written documentation in English to a professional standard, including forms, letters, emails, client file notes, written agreements, and detailed and well-structured written submissions, arguments or presentations. They must demonstrate the ability to communicate orally in English to a professional standard including: conducting telephone and face-to-face interviews; active listening; dealing with conflict; and delivering detailed and well-structured oral presentations, submissions or arguments.

Registered advisers may have their licence limited or cancelled by the NZIAA where these competencies are not demonstrated in practice.

1.2.6. Matters for public feedback

We welcome the public's feedback on the following options for reform:

1.2.6.1. Update the OCS to include English language guidelines and create an associated practice guide that details RMA obligations.

Competency standard documents specify, in a structured format, the purpose of a particular job or role and how people should perform that job or role. Competency standards attempt to capture the various dimensions that, when taken together, account for competent performance. The OCS for RMAs lists nine standards that all agents must demonstrate competency in, in accordance with their ethical obligations under the Code. These include:

- making preliminary contact with a potential client
- agreeing on a course of action based on a detailed knowledge of relevant legislation and government policy
- preparing, reviewing and lodging applications or appeals based on a detailed knowledge of relevant legislation and government policy
- representing clients before the Department and other bodies based on a detailed knowledge of relevant legislation and government policy
- monitoring progress of cases based on a detailed knowledge of relevant legislation and government policy
- finalising matters in accordance with ethical principles and the Code
- identifying and undertaking an ongoing professional development plan
- establishing a practice in accordance with ethical principles, the Code and compliant with relevant legislation
- managing a practice in accordance with ethical principles, the Code and compliant with relevant legislation.[42]

[41] Immigration Advisers Authority (NZIAA) (n.d.), *Competency Standards* [online document], New Zealand Government, accessed 13 August 2020
[42] OMARA, *Occupational Competency Standards for Registered Migration Agents* [online document], Home Affairs, accessed 9 December 2020

The OCS is used by educators for developing curriculum, including for the Graduate Diploma, the Capstone and CPD activities. In addition to the OCS, the OMARA releases practice guides containing detailed instructions to address specific industry issues and to educate RMAs on their obligations in a range of different scenarios. These guides, released on the OMARA's website, supplement the Code that all RMAs must abide by in the course of their work.

A practice guide that specifically details the English language expectations required for all practicing agents and their responsibilities under the OCS could provide agents with clear guidance to ensure that their language skills are fit for purpose, exceed certain set standards and are maintained at that level if they wish to continue practicing.

Any practice guide on English language requirements issued under this framework could be based on the United Kingdom Guidance on Competence and New Zealand competency requirement for high quality documentation.

1.2.6.2. Increase the level of English required for registration purposes to the equivalent of 'proficient English' as defined in Regulation 1.15D of the Migration Regulations.

The English language requirement for entry to the industry could be increased to promote better language skills in applicants, protect consumers and raise industry standards. The proposed option, which would bring the English requirements in line with the Department's English assessment model for specific visa applications, is to lift the level of English required to proficient English as defined in the legislation for visa purposes.

'Proficient English' is defined in Regulation 1.15D of the *Migration Regulations 1994 (*Migration Regulations). A person has 'proficient English' if they achieve a test score specified in the Legislative Instrument: Language Tests, Score and Passports 2015 (IMMI 15/005). For visa applications lodged after 1 January 2015, the following test scores are specified:

- an IELTS test score of at least 7 in each of the four test components of listening, reading, writing and speaking; or
- an Occupational English Test (OET) test score of at least B in each of the four test components of listening, reading, writing and speaking; or
- a TOEFL iBT test score with at least the following scores in the four test components: 24 for listening, 24 for reading, 27 for writing and 23 for speaking; or
- a PTE Academic test score of at least 65 in each of the four test components of listening, reading, writing and speaking; or
- a Cambridge English: Advanced (CAE) test score of at least 185 in each of the four test components of listening, reading, writing and speaking.

Applicants for certain skilled visas are awarded more points in a points-based system if they can demonstrate they have proficient English, rather than 'competent English' (see Regulation 1.15C of the Migration Regulations).

Imposing a requirement for Academic level 7 across all components of the IELTS (or equivalent in other tests) would assist in addressing the issues raised by the AAT concerning English deficiency representation by some RMAs. It would also align the requirement with standards required of legal practitioners in Australia, and assist RMAs to most effectively advise clients, interpret case law and advocate matters at the AAT and within their practice generally.

Conversely, a limited number of stakeholders recommended abolishing the English language requirement altogether. After assessing all stakeholder feedback and the approach taken to English language regulation in comparable jurisdictions, the Department does not recommend this approach, which runs counter to the intent of previous recommendations to ensure RMAs effectively understand, apply and communicate complex migration legislation and its implications.

1.2.6.3. Expanding the number of test providers that the OMARA accepts for registration purposes

The Department currently accepts scores from five English language testing providers as evidence of English language ability for visa purposes. These providers are IELTS, OET (Occupational English Test), TOEFL iBT, PTE, and Cambridge English: Advanced. These arrangements are governed by commercial in confidence deeds of agreement. In comparison, the OMARA only accepts test results from two providers, IELTS and TOEFL IBT.

The OMARA has advised that there are very few applications that require evidence of test scores from a broad range of providers, and that they receive a limited number of inquiries regarding other test providers. The OMARA has noted that most applicants who need to meet the requirement do so through other means, such as level of education.

Expanding the number of test providers accepted for registration as an RMA to the same providers as the Department uses in the visa domain would broaden the pool of candidates who can apply to register as an RMA. This is because different English language tests are preferred in different parts of the world and although IELTS and TOEFL iBT have a significant market share, depending on the region of the world the applicant is from, they may feel comfortable with other providers due to faster turnaround times and general access to testing centres and test specific language classes.

In addition, applicants who are recent migrants, and who satisfied their permanent residence visa requirements by providing an English language test score from a provider not on the list, may later need to re-sit an English test with one of the two providers allowed by the OMARA, at an added cost, to be able to register.

1.3. Introducing a provisional licence with a supervision requirement

1.3.1. Executive summary

There is potential to introduce a mandatory 12-month provisional licence during which an RMA would be permitted to provide immigration assistance only under the supervision of an experienced RMA or a legal practitioner. The provisional licence requirement could be introduced either as a stand-alone scheme or as part of a tiering system, should one be agreed by Government.

In addition to the supervisory requirement, provisionally licensed agents would be restricted in the kinds of immigration assistance they can provide. A key component of this requirement would be that provisionally licensed RMAs would not be permitted to provide immigration assistance on matters before the AAT and representations to the Minister. A supervisory framework could support this arrangement by providing an appropriate standard of oversight and guidance, while limiting regulatory or administrative burden.

Supervised practice is not just an educational tool. It is arguably integral to the professional culture and conduct of the industry. Supervisors could also be mentors, providing foundational professional guidance and networks that will benefit the new RMA throughout their career. Supervision was overwhelmingly supported by relevant submissions to the discussion paper.

Supervised practice could serve a dual purpose: protection of consumers of immigration assistance, and protection of newly-registered migration agents. Recently registered migration agents often lack the experience in applying the theoretical knowledge obtained through the completion of the prescribed course into practice. This can lead to flaws in immigration assistance they provide, which can be detrimental to the client's migration prospects as well as the new RMA's career. The supervised practice period could be an opportunity for new RMAs to have their work reviewed by a supervisor before finalisation to prevent any mistakes resulting from inexperience.

To progress this measure, the Department could work closely with industry to develop a comprehensive plan for final agreement to implement the reform. Consideration could be given to broadly modelling Australia's approach on elements of the established supervisory frameworks administered by the NZIAA and the United Kingdom's OISC. Practical considerations, including availability of supervisors for sole traders and remotely located RMAs, could be addressed through the design of a supervised practice model.

This chapter should be read in conjunction with the Chapter 2.4 on a tiering system, and Chapter 2.5 on CPD activities. Issues relating to representation at the AAT are discussed in Chapter 3.5.

1.3.2. Overview

The concept of a period of supervised practice is not a new one, having been recommended by three successive independent and parliamentary inquiries, most recently as a result of JSCOM's inquiry.

It is a measure supported by many within the industry, including two peak bodies – MIA and LCA, and aligns with the requirements for other comparable professions. Submissions to the above inquiries and in response to the recent discussion paper, and many Advisory Group nominations (in which nominees outlined their experience and credentials), suggest supervision and/or mentoring are already commonplace in migration advice companies of all sizes and within the membership of recognised industry bodies.

The prevalence of sole traders – 40 per cent of industry – has been a consistent argument against introducing a mandatory supervision requirement. Conversely, the relative isolation and absence of supervision for new sole traders is a concerning and arguably easily mitigated risk for both consumers and RMAs. For new industry entrants intending to become sole traders, an initial stint under the guidance of an experienced supervisor could provide an invaluable introduction to the industry, to business more generally, and the potential for ongoing mentorship. Further, this would provide new RMAs with the opportunity to have any mistakes corrected by an experienced supervisor, guarding the RMA and their client from any resulting detriment.

The implications for regional RMAs have also been canvassed by stakeholders. However, the extended period of working from home experienced by millions of Australians in 2020 has demonstrated that geographic distance can be overcome by an ever-increasing range of information technology solutions, opening up supervision opportunities for those more remote or regional members of the industry.

A key consideration raised by stakeholders and previous reviews is the associated timing of the Capstone, which must currently be passed before registering as an RMA. This will not be discussed in detail in this report given the current changes underway to the provision of the Capstone.

1.3.3. JSCOM inquiry recommendations

The JSCOM inquiry report includes a chapter on supervised practice, which outlines relevant submissions made to the inquiry. It notes that two previous reviews of migration agents, the Hodges Review (2008) and the Kendall Review (2014), recommended establishing supervised practice for newly qualified RMAs.

The JSCOM report recommends all new migration agents be required to complete a period of supervised practice before being permitted to practice on their own, providing the following supporting comments:

1. 'There are numerous jobs that have a component of supervised practice across varied fields including medicine, law, construction, education, and social work to name a few'.
2. The Committee notes that both the Hodges and Kendall reviews recommended implementing a year of supervised practice for newly qualified migration agents.
3. The United Kingdom, New Zealand and Canadian migration agent systems all contain a requirement that an immigration advisor or consultant undergo a period of supervised practice prior to being granted a certificate to practice unrestricted.
4. It is widely held that effective supervision practices can facilitate the professional development of the supervisee, build and consolidate knowledge, monitor and maintain ethical standards and responsibilities, gain support at a professional and personal level and enhance the overall development of the field and its practice.
5. The Committee has formed the view that all new migration agents be required to complete a period of supervised practice before being permitted to practise on their own.
6. Supervised practice will provide much needed support to new migration agents in navigating the extensive immigration system. More experienced migration agents have the added benefit of providing improved customer service to their clients.'[43]

1.3.4. Stakeholder engagement

1.3.4.1. Creating a world class migration advice industry submissions (2020)

Supervised practice was referenced in more than half the submissions (29 submissions) on the discussion paper. It was strongly endorsed by almost 90 per cent of these submissions.

A confidential submission noted new RMAs could currently practise immediately across the broad sweep of migration law, including visa applications, advising on cancellation or compliance issues, and assisting with the review of decisions. 'Within each category is a multitude of convoluted legislation and policy the agent must navigate', they stated, suggesting the 'expectation that new migration agents could automatically practice across all areas of the migration legislation is misplaced'. The submission cited reliable evidence of unease among new agents regarding their work in the first 18 months of practice, including extensive research and repeated checking of findings, and the emotional impact of dealing with their clients.

[43] JSCOM (2019:108-112) *Report of the inquiry into efficacy of current regulation of Australian migration and education agents* [online document], Commonwealth of Australia, accessed 10 September 2020

The MIA noted the original recommendations of the Kendall Review were a trio of changes to the entry qualifications for the profession: the upgrade of the educational qualification, a period of supervised practice and the Capstone. Without supervised practice as the bridging element between training and assessment, candidates lacked 'real world' experience, which contributed to their low Capstone success rate.

Conversely, the LCA argued that, for supervised practice to be meaningful for the newly qualified RMA, as well as attractive to and commercially viable for the supervisor, the period of supervised practice should only commence after the person has successfully completed the entry level qualification and passed the entrance test.

The MA expressed concern that the requirement for supervised practice may lead to the exploitation of entry level RMAs, suggesting instead an initial restricted practising certificate and mentoring by experienced RMAs. Other submissions opposing supervised practice did so on behalf of sole traders, countered by supporters of supervised practice who argued the critical industry need outweighs the personal interest of those who choose to become sole traders.

Proposed models and duration

The proposed duration of supervised practice varied from one month up to (most commonly) one to two years. Authors suggested a variety of models, including several closely linked to a provisional licence period, during which new RMAs would gain invaluable practical experience but would not be able to be a sole trader, undertake more complex cases, or represent clients at the AAT. While there were different lengths of supervised practice proposed, many submissions did not provide clear arguments in support or against a particular length of the period.

Astute Immigration Advisory (Astute) stated, 'from experience, I believe that it takes at least two years of supervised work in a busy practice to gain a better understanding of Migration Law and have exposure to a variety of complex scenarios'. Astute also proposed an additional two years of supervised practice before representing clients at the AAT. Fragomen proposed a 24-month period of supervised practice to harmonise the requirements across RMAs and legal practitioners practising in this area of law.

Ms Germov proposed new RMAs should undertake 'at least one year of supervised practice akin to Graduate Traineeships done by law graduates, which have set learning benchmarks and outcomes'. MIA supported a period of supervised practice to be undertaken before a Capstone exam, but did not specify the preferred duration of the supervised practice.

MA suggested as an alternative to supervised practice, a 'restricted practising certificate for an appropriate period with the capacity to proceed to full registration (an unrestricted practising certificate) subject to meeting the current OCS through education appropriate to the level of registration'. Other alternatives included the addition of a practical/placement training module within the Graduate Diploma and a selective panel of mentors; and additional CPD tiers to allow for an element of practical skills.

Submissions argued supervised practice needed to be supported by a coherent framework, with highly qualified supervisors, and a suggested supervisor's tool kit to include elements such as a fair and reasonable supervision fee, a supervision agreement, record keeping of supervision arrangement, agreement of CPD between supervisor and provisional licence holder, a training log, and the flexibility to change supervisor.

The LCA further stated a person should only be granted a provisional registration certificate by the regulator if they can demonstrate they have an approved supervision arrangement in place. The MIA suggested they, as the only incorporated professional association, develop and administer a supervised work experience program.

A concern was raised about the availability of supervisors for newly registered agents. The proposed solutions included to provide CPD points to supervisors to encourage them to participate, to introduce mentoring for a fee, or to allow the provision of supervision via the internet.

1.3.4.2. Migration Advice Industry Advisory Group

On 19 November 2020, the Advisory Group met to discuss the Review, specifically the concepts of a tiering system and supervision. The members outlined a range of considerations for supervised practice, with a focus on the practical implications and feasibility of such a scheme. Members described the role of supervised practice as:

- part of an educative approach to equip an agent with the skills necessary to deal with more complex immigration cases
- providing professional support to an agent, in particular new entrants to the industry, or agents with limited experience and sole practitioners
- assisting an agent to understand their duty of care towards their clients and providing a greater level of consumer protection, particularly for the vulnerable.

While sole trading was again raised as an issue, it was also noted sole traders did not currently have access to the same level of professional support as was received by new agents employed within firms. Supervised practice could encompass a range of models, including but not limited to, an employer-employee relationship, or a less formal mentor-mentee structure, an internship or cadetship.

1.3.5. Comparison with relevant international regulatory frameworks

Australia, Canada, New Zealand and the United Kingdom have comparable regulation schemes for migration agents. In summary:

Table 6: Comparison with relevant international regulatory frameworks

Australia	Canada	New Zealand	United Kingdom
No supervision requirement	No supervision requirement. All migration advisors undertake a Practice Management Education course, modelled on the legal practice programs and the MIA's original Practice Ready Program. [44] A 2017 review recommended tiering in relation to the categories of service provided. [45]	Two years of supervision on a provisional licence to become a fully licensed advisor. Applicants must obtain a supervision agreement with a full licensed adviser before applying for the provisional licence. [46]	The normal supervisory period is up to 12 months, at which point the OISC expects the supervisee to submit a competence statement at the higher Level for which he/she has been supervised and be ready to take a competence assessment. [47]

1.3.5.1. New Zealand

The NZIAA website states the practical experience requirements are geared towards producing highly competent immigration advisers who are able to add value for their clients and employers. The purpose of supervision is to give the clients of provisional licence holders access to the same standard of full, accurate, competent and ethical advice that would be received by a full licence holder's clients. [48]

Section 19(5) of the IAL Act requires that a person who holds a provisional licence must work under the direct supervision of an immigration adviser who holds a full licence. Students may apply for a provisional immigration adviser licence once they have completed and passed Courses A and B of the Graduate

[44] MIA (2020:16) Discussion paper submission [online document], accessed 4 September 2020
[45] House of Commons (2017:33), Report of the Standing Committee on Citizenship and Immigration, *Starting Again: Improving Government Oversight of Immigration Consultants* [online document], 42nd Parliament, First Session, June 2017, accessed 4 September 2020
[46] NZIAA (n.d.) *Licensing* [online document], Ministry of Business, Innovation and Employment (MBIE), accessed 4 September 2020
[47] OISC (2017) *Guidance Note on Supervision* [online document], GOV.UK, accessed 4 September 2020
[48] NZIAA (n.d.) *Purpose of supervision* [online document], MBIE, accessed 24 November 2020

Certificate in New Zealand Immigration Advice or Courses 1-4 of the Graduate Diploma in New Zealand Immigration Advice, and must have an approved supervision arrangement.[49]

The NZIAA provides a comprehensive supervision toolkit on its website, with essential forms and templates, and guidance on responsibilities, supervision fees, and methods for finding a supervisor or provisional licence applicant. Key components of direct supervision include:

- a professional development plan, developed by the provisional licence holder and the supervisor
- monitoring of formal documentation and correspondence from the provisional licence holder to clients, Immigration New Zealand and tribunals as well as other key documents such as eligibility assessments
- regular meetings with definable goals and outcomes
- increasing independence over the two-year period of the provisional licence holder with key and formal documentation and correspondence still monitored.

Remote supervision, including supervision across time zones, may take place if a provisional licence applicant and a supervisor do not share the same geographic location.

1.3.5.2. The United Kingdom

The United Kingdom's model integrates supervised practice with a tiering system of three levels that escalate from straightforward to increasingly complex matters. This scheme is overseen by the OISC, to which written applications must be provided for authorisation.

The OISC website notes the most effective means by which authorised advisers can move to a higher advice level or increase their competencies is through training under effective supervision. [50] An authorised adviser who is working under supervision must not be given work beyond their competence, or that might prejudice a client's best interests, and must be closely supervised in relation to the higher level work.

There are two types of supervisors:

- the Principal Supervisor responsible for the work carried out by everyone who is working under supervision within a registered organisation, including those who are working remotely
- the Individual Supervisor responsible for the work of those directly assigned to be supervised by them.

Both roles can be held concurrently or separately, however all registered organisations require a Principal Supervisor. There are also rules regarding the level of a supervisor in relation to the level of the supervisee.

Key components of supervision include:

- supervision plans, including the level of work at which the supervisee will be supervised
- adequate supervision and direction of clients' matters including regular supervisee file reviews that can be readily accessed by the OISC
- regular assessments that a supervisee's training needs are being met
- a supervision log book.

1.3.5.3. Canada

In Canada, there is currently no supervised practice requirement, however the ICCRC is planning to move to provisional licensing and supervised practice in July 2022. New entrants to the industry are currently required to complete a Practice Management Education course. As observed by MIA in its discussion paper submission, this course is modelled on legal practice programs and the MIA's original Practice Ready Program. However, the Department observes that this course is not a sufficient equivalent to a period of supervised practice, as working under supervision involves completing day-to day work with supervision by a more experienced professional, rather than competing a structured educational course.

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[49] NZIAA (n.d.) Qualify [online document], MBIE, accessed 4 September 2020
[50] OISC, *Guidance Note on Supervision* [online document], GOV.UK, accessed 26 November 2020

1.3.6. Comparable legal supervised practice requirements

The Australian legal profession's supervised practice requirements provide a useful model that could inform a similar arrangement for RMAs. For example, the principles from the Western Australian Supervised Legal Practice Guidelines[51], which set out the requirements under the *Legal Profession Act 2008* (WA), include:

- A legal practitioner who does not have the 'required experience' must engage in 'restricted legal practice only'. 'Required experience' is defined as a period of 'supervised legal practice'.
- At least one person (i.e. the supervisor) must accept responsibility for the supervision of the restricted practitioner during the period of supervised legal practice.
- The period of supervised legal practice can be overseen by more than one supervisor, consecutively, provided there is continuity of direct supervision over the entire period of supervised legal practice.
- Daily contact between the supervising practitioner and the restricted practitioner for the purpose of review, guidance and instruction.
- Any legal advice or assistance provided by the restricted practitioner (verbal or written) to a client has been approved by the supervising practitioner before it is provided to the client.
- The supervising practitioner scrutinises and signs-off on correspondence and other documents prepared by the restricted practitioner.
- The WA Legal Practice Board (Board) calculates full-time employment on the basis of 37.5 hours per week. Part-time arrangements of more than 20 hours per week that have been approved by the Board are calculated as: the number of full weeks in the period, multiplied by the number of hours per week approved by the Board, divided by 37.5.
- To prevent an inadvertent breach of the Act, prior approval from the Board should be sought if it is proposed that the supervising practitioner will not be physically located at the same office as the restricted practitioner; or if any other unusual circumstances apply. The supervising practitioner should provide a signed letter detailing the proposed supervision arrangements. The arrangements should include face-to-face contact at least once every three months if the proposed supervising practitioner is based outside of Western Australia.

1.3.7. Virtual Community of Practice (VCoP) model

Ms Dickie conducted a research project that involved placing 31 newly registered migration agents – referred to as 'protégés' - in an online community (or VCoP) with two experienced agents for 18 months. The cohort chosen for the research were in their first 18 months of practice, had no current mentor or supervisor, and were either sole practitioners or worked in small firms with less than five agents with at least one active client file.

The research showed that the VCoP allowed protégés to engage in the aspects of professional practice that are essential to workplace learning, including 'the ability to work with clients, to engage with challenging problems and tasks and interact with peers. As well as the need to access timely and strategic feedback, and to learn from one's own or others' mistakes'.[52]

This finding supports the consideration of using a VCoP as an alternative or part of a supervisory arrangement for migration agents, especially for those who are unable to secure a supervisory arrangement as part of their employment (for example, sole traders). The use of a VCoP could be considered as part of the design of a supervised practice requirement, should one be introduced, or be considered as a separate industry-led initiative.

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[51] Legal Practice Board of Western Australia (2018) Supervised Legal Practice Guidelines (Legal Profession Act 2008) [online document], accessed 23 December 2020

[52] Van Galen Dickie, M (2020), The Protégé Effect, Doctorate of Professional Studies, University of South Queensland

1.3.8. Matter for public feedback

We welcome the public's feedback on the following option for reform:

1.3.8.1. The introduction of a mandatory 12-month provisional licence for newly registered migration agents. Provisional licensees would operate under the supervision of a fully licensed RMA and provide immigration assistance only with applications to the Department and related matters.

Applying for a provisional licence could be conditional on first completing the Graduate Diploma and the Capstone, and securing the supervision of an RMA with a full licence. Provisionally licensed migration agents would not be permitted to provide immigration assistance on matters before the AAT or make representations to the Minister.

Should the provisional licence be part of a tiering system, provisionally licensed migration agents would be allocated to Tier 1. The required tier or tiers for a supervisor would be considered in collaboration with industry and other stakeholders. If the tiering system proposal is *not* implemented, prerequisites for supervisors would include certain level of experience and absence of meritorious complaints. Supervision by an unrestricted legal practitioner could also be considered.

The OMARA would oversee the provisional licensing regime as well as the supervisory framework, providing clear guidance and templates to support successful supervisory arrangements, monitoring compliance, and limiting exploitation.

Close collaboration with peak industry bodies would be critical to both the development, transition to and ongoing operation of this arrangement. Subject to their agreement, peak industry bodies may also have an important role in connecting supervisors and supervisees, and other supporting arrangements. Consideration would be given to the diverse circumstances of RMAs and their employees, including part-time RMAs and not-for-profit organisations.

Theme Two: A Professional Industry

2.1. Review of registration requirements

2.1.1. Executive Summary

Registration requirements for migration agents have been scrutinised by multiple independent or external inquiries to make sure that they are fit for purpose. Most recently, JSCOM's inquiry report recommended the current registration requirements be reviewed to assess their effectiveness.

This report accordingly examines registration requirements that RMAs must satisfy and assesses their effectiveness in the current era. It outlines several options to improve the efficiency of the registration process and strengthen the powers available to the OMARA to assess and refuse registration applications, including:

- the Fit and Proper Person (FPP) requirements for registration as a migration agent be strengthened to include bankruptcy checks, spouse and associate details, and checks in the Department's systems as part of the initial registration application
- the criteria for being 'Fit and Proper' in Part 3 of the Act as a requirement assessed at time of registration and subsequent renewal of registration be enhanced, modelled on the character test in section 501(6) of the Act, and tailored to the migration advice industry
- amending Part 3 of the Act, and the Regulations where required, to:
  - allow the OMARA to refuse an applicant's registration as a registered migration agent, or to cancel an agent's registration in the event the OMARA becomes aware of an active and substantive criminal investigation into the agent's conduct
  - remove the 30 day publishing requirement
  - increase the period of registration to 36 months for agents who have not had any substantive complaints or referrals made against them for the five year period immediately before their registration application is assessed
- the OMARA update its process of character checks for applicants to include a coordinated identity verification process and criminal history check for all applicants at the time of initial and subsequent registration.

2.1.2. Background

In Australia, it is an offence for a person to provide immigration assistance unless they are registered as an RMA with the Authority, legal practitioners, or exempt under section 280 of the Act. Exempt persons include:

- a nominator, sponsor or close family member of the applicant
- an official giving assistance as part of their job
- a parliamentarian, a member of a diplomatic mission, consular post or international organisation
- a person providing free help to prepare a submission to the Minister.

The regulatory framework that the OMARA administers includes legislated functions set out in section 316 of the Act:

- considering and deciding applications for registration as a migration agent
- monitoring the conduct of RMAs in the provision of immigration assistance
- investigating complaints made in relation to the provision of immigration assistance by RMAs
- taking appropriate disciplinary action against RMAs or former RMAs
- informing the appropriate prosecuting authorities about apparent offences against Part 3 or Part 4 of the Act.

Division 3 of Part 3 of the Act lays out the criteria required for individuals to be registered as a migration agent including provisions on applying for registration, prescribed qualifications, and character requirements that need to be satisfied during the registration period.

2.1.2.1. A brief history of registration requirements

Prior to September 1992, anyone wanting to practice as a migration agent was required to inform the then Department of Immigration, Local Government and Ethnic Affairs in writing of their intention to do so. Acknowledgement by the Department constituted accreditation. Under this model, there was no regulation of the migration advice sector[53].

The Migration Agents Registration Scheme (MARS) was established in 1992 under the *Migration Amendment Act (No. 3) 1992*. That Act was intended to address complaints about unscrupulous conduct and incompetent advice being given by people purporting to be experts in migration. The MARS was administered by the Migration Agents Registration Board and the Secretary of the Department of Immigration and Multicultural Affairs.

In 2008, the Hodges Review recommended that an independent statutory body with greater powers to protect consumers be established. It was further recommended that the regulatory framework be strengthened and clarified, including raising entry requirements. As a result, the OMARA, was established in 2009 as a discrete office attached to the Department of Immigration and Citizenship. The OMARA was subsequently integrated into the Department in 2015 (consistent with Recommendation 23 of the 2014 Kendall Review).

In tandem with the evolution of the Authority, corresponding amendments to Part 3 of the Act were also made, beginning in 1998, to reflect the broadening of registration requirements for individuals entering the industry. These amendments coincided with the growth of the industry as the number of agents doubled from 2500 to over 5000 in the span of 15 years (see *Figure 1*). The changes were meant to ensure that migration advice was only provided by those who were qualified to provide it.

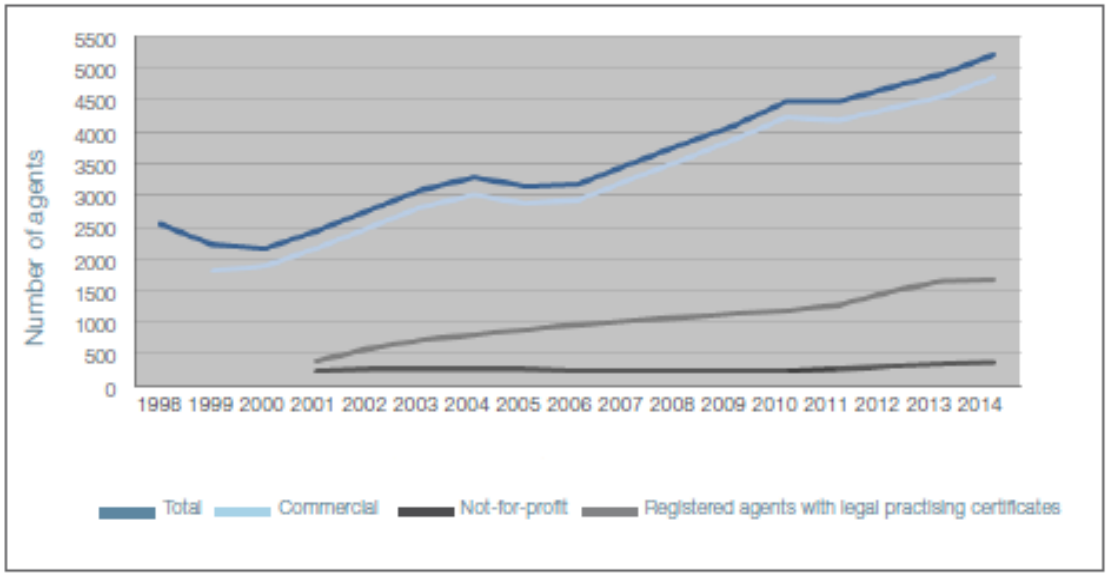

Figure 1: Increase in number of agents from 1998 to the 2015 integration of the OMARA into the Department. Source: OMARA annual report 2013-2014

2.1.2.2. The purpose of registration in the current environment

The process of registration serves as a 'filter' for individuals wanting to pursue providing migration advice as a profession. It allows the OMARA to screen applicants for their knowledge of the Act, *Migration Regulations 1994* and associated legislation, and to verify that they are a person of integrity before allowing them into the pool of experts who are certified to assist consumers.

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[53] Kendall, Dr C N (2014:10) *2014 Independent Review of the Office of the Migration Agents Registration Authority* [online document], Home Affairs, accessed 10 September 2020

This leads to greater uniformity in the advice provided as well as an expectation for the consumer that the individual they are engaging will demonstrate professional conduct. Registration requirements have been crucial to the migration advice industry and over time have been strengthened to keep pace with the consumer's growing dependence on the agent's knowledge and experience, as new visa pathways and corresponding legislation is introduced.

2.1.3. Stakeholder feedback

2.1.3.1. The Hodges Review (2008)

The Hodges Review made a number of recommendations addressing registration requirements that were in place at that time. Some of the recommendations addressed supervised practice (Chapter 1.3) and English language requirements (Chapter 1.2). The Hodges Review further recommended the OMARA be able to impose conditions on migration agents applying for repeat registration after being sanctioned; and that further guidance be provided on the definition of 'fit and proper person' in section 290.[54]

2.1.3.2. The Kendall Review (2014)

In September 2014, the Kendall Review made a number of additional recommendations regarding registration requirements for RMAs. These included a review of registration and re-registration fees for commercial and community migration advisors, and a recommendation that those with an unblemished record for a continuous period of five years be able to access a faster renewal process relying upon self-declaration for a further registration period of three years, rather than annually.

Recommendation 8 of the Kendall Review addressed the lack of power the (then independent) OMARA had to obtain information from other agencies relevant to assessing whether an applicant was fit and proper or a person of integrity. The Kendall Review recommended 'appropriate legislative measures be implemented to ensure that in determining the appropriateness of a candidate's registration, the OMARA has access to all of the evidence it requires to make such a determination'.[55]

2.1.3.3. The JSCOM Inquiry Report (2019)

Although most of the submissions to the JSCOM inquiry held the view that the registration requirements were appropriate and should not be amended, six submitters suggested additions to a number of requirements including assessment of technical and English proficiency, peer assessment, issuing of a practising certificate, regulation by legal bodies, and changing migration agent nomenclature.

Some of these recommendations from previous reviews, including implementation of supervised practice, establishing an Immigration Assistance Complaints Commissioner and publication of pricing arrangements are considered in this report, while others, including removing legal practitioners from OMARA's regulatory scheme, commenced in March 2021.

2.1.3.4. Creating a world class migration advice industry submissions (2020)

Eight submissions to the discussion paper stated the OMARA's current registration requirements were adequate and that further strengthening of these requirements would make the regime restrictive to the detriment of the industry.

Another four submissions favoured an overhaul of current standards and addition of new requirements, including granting the OMARA the power to impose conditions on RMAs where there are concerns about their competency (including English language ability) and/or integrity. One of the submitters further proposed expanding the FPP criteria to include an RMA's knowledge of migration law, association with individuals of concern and academic misconduct or plagiarism while studying to meet the knowledge requirements for registering as an RMA.

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[54] Hodges, J (2008:10-14) *2007–08 Review of Statutory Self-Regulation of the Migration Advice Profession* [online document], Commonwealth of Australia, accessed 12 January 2021

[55] Kendall, Dr C N (2014:28,83) *2014 Independent Review of the Office of the Migration Agents Registration Authority* [online document], Home Affairs, accessed 10 September 2020

2.1.4. Current Registration Requirements

2.1.4.1. Initial registration

Individuals seeking to register as migration agents for the first time, or re-register because their previous registration lapsed, must meet a number of requirements under the Act, which include:

- technical proficiency through education – hold the Graduate Diploma and pass the Capstone
- English proficiency (an overall IELTS Academic score of 7 or TOEFL result of 94)
- payment of registration fee – $1760 AUD ($160 for not-for-profit practice)
- mandatory assessment as a person of integrity and a 'fit and proper' person – this requires the applicant to undergo an AFP National Police Check (police check)
- confirmation that the person is over the age of 18
- confirmation of professional indemnity insurance
- access to a suitable professional library (either LEGENDcom or LexisNexis)
- Australian citizenship or permanent residence of Australia or a New Zealand citizen holding a special category visa
- they have not had their registration application refused in the past 12 months
- they have not had their registration cancelled in the past five years.

Once the registration application is received by the OMARA, under section 288A of the Act, all first time applicants have their details published on the OMARA's website for a 30 day 'Notice of Intention' period to satisfy the publishing requirement. During this time, anyone may provide the OMARA a written objection to the applicant's registration.

Following the 30 day period, the application assessment process commences. Initial assessment involves a review of the documents provided in support of the application. Evidence provided by applicants include an AFP check, identity documents such as passports, birth certificates, evidence of schooling and tertiary qualifications, and English language results. In the event of an objection having been received, or adverse information being found by the OMARA, the applicant is afforded an opportunity to comment before a decision is made.

2.1.4.2. Subsequent annual registration renewal

Agents applying for their subsequent registration are required to:

- pay $1595 registration fee ($105 for not-for-profit practice)
- continue to be a person of integrity and 'fit and proper'
- hold professional indemnity insurance
- have access to a suitable professional library
- complete CPD (agents must undertake 10 points worth of CPD each year with ethics or the Code as a mandatory subject).

2.1.5. Fit and Proper Person (FPP) Test

An important part of the registration process is verification by the OMARA that the applicant is a person of integrity. Paragraphs 290(1)(a) and (b) of the Act prevent the OMARA from registering an applicant if it is satisfied that the person is not a person of integrity or is not a fit and proper person to give immigration assistance. As this criteria is partly subjective, the OMARA uses a suite of different methods to evaluate whether a prospective RMA meets these requirements.

In the first instance, applicants are required to provide a police check received within the past 12 months as part of their initial registration application and answer specific questions pertaining to their background and past conduct, listed at *Appendix B*.

Section 290 of the Act prevents the OMARA from registering an applicant if it is satisfied that the person is related by employment to a person who is not a person of integrity and should not be registered because of that relationship. The application form therefore also requests information on an applicant's employment associations. The OMARA also conducts a number of other checks on new applicants and agents applying for re-registration.

On 1 January 2021, the OMARA implemented a new requirement for re-registering agents to provide a police check every five years (and on an ad hoc basis from agents of concern). This change has not been in effect long enough to accurately assess its impact on registration requirements.

2.1.5.1. Comparison with other licensing regimes

2.1.5.1.1. *Depot / Warehouse Operators and Custom Brokers*

Depots and warehouses are places licensed by the ABF. Depots are used by importers to hold goods that must be moved away from the wharf or airport but have not yet been cleared for home consumption. Warehouses are places used by importers for longer term storage of goods awaiting customs clearance, such as household items, which allows for deferring the payment of import duty and taxes.

The ABF issues licences under *the Customs Act 1901* (the Customs Act) for individuals and businesses to operate a depot or a warehouse, or operate as a customs broker. In Australia, only the owner of goods or a licensed customs broker can submit an import declaration to enter goods for home consumption in connection with the importation of those goods. Most importers of goods choose to engage a licenced customs broker to act on their behalf because of the complexity of the laws governing the importation of goods and the potential financial and other implications of lodging an incorrect entry.

Licensing

For depots and warehouses the assessment of the application includes:

- background checks to determine that all persons in positions of management or control are fit and proper
- a site visit to determine whether the premises are adequate to deal with goods subject to customs control and the viability of the business model and operating systems.

Broker applications are assessed by the National Customs Brokers Licensing Advisory Committee (NCBLAC) against a set of requirements depending on the type of application. If an application does not adequately demonstrate that the applicant meets the core criteria, NCBLAC may conduct an in person interview with the applicant. Following the assessment of an application, NCBLAC will make a recommendation to the Controller-General to either grant or refuse a licence.

Fit and Proper Person (FPP) Requirements

For depots, warehouses and brokers the Customs Act specifies the requirements for the grant of a licence including that a licence must not be granted if certain persons are not a fit and proper person or a company is not a fit and proper company. The fit and proper checks apply to individual applicants, partnerships, companies, and employees of the company in positions of management or control.

The Customs Act also prescribes the matters that shall be considered when deciding whether a person or company is fit and proper. In deciding whether a person is fit and proper the delegate shall consider the following:

- any conviction of the person of an offence against the Customs Act committed in the previous 10 years
- any conviction of the person of an offence against another law of the Commonwealth, or a law of a State or Territory that is punishable by imprisonment for one year or longer in the previous 10 years
- whether the person is an insolvent under administration (depot only)
- whether the person is an undischarged bankrupt (warehouse & broker)

- any misleading statement in relation to the application for the licence or in relation to the person
- if any false statements are made whether the person knew the statement was false
- whether the person has been refused a transport security identification card, or has had such a card suspended or cancelled in the previous 10 years.

The criteria is slightly different for companies but considers the same aspects as the FPP test for individual applicants. This list is not exhaustive, and additional relevant criteria may also be considered. Periodic annual checks of all licence holders are conducted to ensure ongoing compliance with FPP requirements.

2.1.5.1.2. *ASIC and MSIC Schemes*

An aviation or maritime security identification card (ASIC or MSIC) is required by individuals in Australia who require regular and unsupervised access to secure areas of Australia's airports, seaports, or offshore oil and gas facilities. It's important to note that an ASIC or MSIC is not an access card and does not give the holder the right to access aviation or maritime secure areas without the permission from the relevant authority or facility owner or operator.

The *Aviation Transport Security Regulations 2005* (the Aviation Regulations) and the *Maritime Transport and Offshore Facilities Security Regulations 2003* (the Maritime Regulations), made under the *Aviation Transport Security Act 2004* (the Aviation Act) and the *Maritime Transport and Offshore Facilities Security Act 2003* (the Maritime Act) respectively, establish the ASIC and MSIC schemes.

Under the ASIC and MSIC schemes a person who applies for, or renews, their identification card is required to undergo a background check. The elements that form the background check under the two schemes currently are[56]:

- an identity check
- a criminal history search, to determine whether the person has a criminal conviction for an offence listed in the Aviation or Maritime Regulations (known as 'eligibility criteria')
- a security assessment conducted by Australian Security Intelligence Organisation (ASIO)
- where the person is not an Australian citizen or permanent residence, a check of whether the person has a right to work in Australia.

Under the *AusCheck Act 2007*, AusCheck is responsible for coordinating a background check on the person applying for the card. There are currently approximately 230,000 ASIC/MSIC holders and a valid background check is required every two years.

2.1.5.2. Industry comparison

Different regulators may have their own criteria for assessing whether or not an applicant for registration with their organisation meets their FPP criteria. This assessment is based on the person's job profile and the industry they work in. For example, the Australian Securities and Investments Commission (ASIC) requires that applicants for credit licences meet its prescribed FPP criteria.

This entails that the person:

- is competent to operate a credit business as demonstrated by the person's knowledge, skills and experience
- has the attributes of good character, diligence, honesty, integrity and judgement
- is not disqualified by law from performing their role in a credit business

[56] Neilsen M, Transport Security Amendment (Serious Crime) Bill 2019, Bills Digest 64, 2019-20, Parliamentary Library, Canberra, 4 December 2019.

- either has no conflict of interest in performing their role in a credit business, or any conflict that exists will not create a material risk that the person will fail to properly perform their role. [57]

For companies, the ASIC FPP criteria also applies to partners, trustees, directors, secretaries and senior managers who will perform duties in relation to credit. To verify these details and the applicant's claims, ASIC requires a statement of personal information, national criminal history check, bankruptcy check, and educational qualifications for each person listed in the application. ASIC then performs internal checks to corroborate claims made by applicants and verify their details.

Regulators in other industries also rely on the FPP test to assess registration requests. For trade occupations for example, the Victorian Building Authority that manages registrations for building practitioners (engineers, building surveyors, building inspectors, quantity surveyors and demolishers working on domestic buildings in Victoria) requires applicants to meet specific requirements before they are allowed to submit an application for registration.[58] These include having adequate insurance, no adverse legal history, no history of insolvency and details of any physical or mental disability which may affect the practitioner in the course of their work.

The Tax Practitioners Board (TPB) has a similar requirement that applies to individual applicants and each partner and director in respect of partnership and company applicants. TPB's Explanatory Paper states that 'There is no general, universally applicable formula for determining whether a person is a fit and proper person for the purpose of registration as a tax practitioner.

A determination on whether a person is a fit and proper person requires the TPB to make a value judgment in the context of the activities in which the person is or will be engaged considering all the circumstances of a given case. Therefore, a determination on whether a person is fit and proper is not made by applying a single, standard test or rule, but rather, by balancing a range of considerations that may be seen to be relevant to fitness and propriety generally.[59]

Section 20-15 of the *Tax Agent Services Act 2009* (TASA) further specifies that:

> 'In deciding whether it is satisfied that an individual is a fit and proper person, the Board must have regard to whether the individual is of good fame, integrity and character and someone who has not in the past five years become an undischarged bankrupt or sentenced to a term of imprisonment, or been:
>
> - convicted of a serious taxation offence,
> - convicted of an offence involving fraud or dishonesty,
> - penalised for being a promoter of a tax exploitation scheme, or
> - penalised for implementing a scheme that has been promoted on the basis of conformity with a product ruling in a way that is materially different from that described in the product ruling.'

2.1.5.3. International comparison

Similar requirements also apply to legal practitioners and to providers of migration advice in comparable Commonwealth countries. In New Zealand for example, the fitness criteria, including prohibitions to hold an immigration advisers licence under certain circumstances, are contained in sections 15 to 17 of the IAL Act. Fitness to hold a licence forms part of every application (including renewal applications), since applicants must complete a fitness questionnaire and declare relevant matters to the Authority.

In the United Kingdom, the OISC sets out requirements on fitness in relation to advisers and to business owners. Declarations are made by applicant advisers, business owners and managers related to fitness at the application stage. The OISC carries out checks against the statements that include any previous

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[57] ASIC (Australian Securities & Investments Commission) (n.d.) *Fit And Proper People* [online document], Australian Government, accessed 20 January 2021
[58] Victorian Building Authority (n.d.) *Fit and proper person – external administration* [online document], Victorian State Government, accessed 20 January 2021
[59] Tax Practitioners Board (2010:9) *Explanatory Paper TPB - Fit And Proper Person* [online document], Australian Government, accessed 20 January 2021

dealings with the OISC and open source online checks. The OISC also looks at other business interests declared by advisers and owners and carries out Companies House checks or checks on registered charities where this may be appropriate. Further details may be required where there are declarations that might indicate a fitness issue of concern.

Where concerns exist (regarding the fitness of an adviser or a business owner or manager) but have insufficient grounds for refusal, the organisation may be approved but flagged as being of high risk. The organisation will then be scheduled for a premise audit within 12 months of approval.

2.1.6. Matters for public feedback

We welcome the public's feedback on the following options for reform:

2.1.6.1. There is potential to:

- **strengthen Fit and Proper Person requirements for registration as an RMA to include bankruptcy checks, spouse and associate details, and checks in the Department's systems as part of the initial registration application**
- **enhance the criteria for being 'fit and proper' in Part 3 of the Act as a requirement assessed at time of registration and subsequent renewal of registration, modelled after the character test in section 501(6), and tailored to the migration advice industry**
- **amend Part 3 of the Act to allow the OMARA to refuse an applicant's registration as an RMA, or to cancel an agent's registration in the event the OMARA becomes aware of an active and substantive criminal investigation into the agent's conduct.**

A robust FPP assessment is increasingly important to the OMARA delegates making assessments to register agents under the Act. A small number of current and former RMAs are involved in facilitating serious misconduct, including human trafficking, modern slavery (including sexual exploitation), and organised crime for financial benefit, which warrants increased scrutiny.

Assessing an applicant's fitness to practice and their integrity should involve considering information from a wide range of sources. The OMARA's current assessment process must be therefore be strengthened to include a more thorough criminal history check and identity verification process to counter the growing threat to the migration program from unethical agents.

The FPP requirement is not unique to the registration process for RMAs and is also applied by the Department in customs-related programs, such as depots, warehousing and custom brokers, all of which have fit and proper components, as defined in the Customs Act[60].

2.1.6.1.1. *Criminal investigations*

Another related FPP consideration, and a source of concern for law enforcement agencies, is the small number of RMAs under criminal investigation but who are not subjects of an immigration assistance complaint. As no conviction has been made, and the information is part of an ongoing investigation and cannot be put to the agent, the OMARA has limited legislative options to refuse their registration.

Under section 287 of the Act, the OMARA is required to publish the names and details of all agents who have successfully had their registration approved. Publishing the names of these agents on the OMARA's website may be seen by the public as an endorsement of these RMAs, which may lead to exploitation and financial loss for those who engage with such agents, by way of migration fraud or unscrupulous conduct.

[60] *Customs Act 1901* - Part VAAA, Division 1, 102BA

2.1.6.1.2. *Modelling the character test*

Section 501 of the Act applies a 'character test' to all non-citizens holding or applying for an Australian visa.[61] Under this provision, if the Minister or a delegate is not satisfied that a non-citizen passes the 'character test' they may – and in some cases must[62] – cancel or refuse to grant a visa to the person.

Subsection 501(6) specifies the circumstances in which a person does not pass the character test. These currently include where the person:

- has a 'substantial criminal record'[63]
- has been convicted of an offence committed in, or in connection with, immigration detention
- is reasonably suspected to have been a member of, or had an association with, a group or person involved in criminal conduct
- is reasonably suspected to have been involved in people smuggling, people trafficking and modern slavery offences, or crimes of serious international concern
- is not of good character, based on their past and present criminal conduct and/or general conduct
- is considered at risk of: engaging in criminal conduct in Australia; harassing, molesting, intimidating or stalking another person; vilifying a segment of or inciting discord in the Australian community; or otherwise representing a danger to the Australian community
- has been convicted of sexually based offences involving a child or
- has been assessed by ASIO as a direct or indirect risk to security.

The character test, in one form or another, has been in the Act since 1992. The *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) broadened the grounds on which a person will fail the character test and introduced mandatory cancellation provisions.[64] This expanded character test has been important in assisting law enforcement agencies to remove criminals from Australia and in the Department's view is a useful standard to base the FPP criteria required by the OMARA.

Part 3 of the Act could be revised to enhance the FPP assessment criteria for RMAs applying for repeat registration, modelled after the character test in section 501(6) of the Act and tailored to the migration advice industry. This would allow discretion to the OMARA to strike off the name of an agent, or refuse to register an agent if there is an ongoing serious criminal investigation into their conduct.

This would need to be balanced with measures to reinstate an RMA who was suspended or had their registration cancelled as a result of a criminal investigation but who is later found by a court to be innocent, including potential options for recourse available to the RMA for loss of earnings if this was to occur.

2.1.6.1.3. *Relationships of concern*

Section 290 of the Act prevents the OMARA from registering an applicant if it is satisfied that the person is related by employment to a person who is not a person of integrity and should not be registered because of that relationship. This subsection limits the OMARA's ability to refuse registration on the basis of a relationship only if the relationship of concern is one of 'employment'.

However, there are other types of relationships that could reasonably impact an RMA's fitness to be registered. For example, an RMA whose spouse had their registration cancelled on the basis of multiple convictions of immigration fraud may present an unacceptable integrity risk, particularly if they co-owned a business where the former agent could potentially continue to operate under the Migration Agents

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[61] Petrie (2019) *Migration Amendment (Strengthening the Character Test) Bill 2018* [online document], Bills Digest No. 57, 2018-19, Parliamentary Library, Canberra, accessed 5 February 2021

[62] Subsections 501(1), (2), (3A) of the Act. Additionally, under subsection 501(3) the Minister (but not a delegate) may refuse or cancel a visa without affording the person natural justice (such as notice of the intention to cancel or refuse the visa) if they 'reasonably suspect' the person does not pass the character test, and is satisfied the refusal or cancellation is in the national interest.

[63] Section 501(6) is subject to definitions at sections 501(7), (7A), (8), (9), (10), (11) and (12).

[64] Coombs (2014) *Migration Amendment (Character and General Visa Cancellation) Bill 2014* [online document] Bills Digest no. 53, 2014-15, Parliamentary Library, Canberra, accessed 5 February 2021

Registration Number (MARN) of their spouse. A spouse involved in other serious criminal conduct, including modern slavery offences, may also be a cause for concern.

Another scenario may be when an RMA continues to share office accommodation with a former RMA business partner whose registration has been cancelled for reasons of integrity, fitness or propriety, or a college or registered training organisation director. Even though they may have technically severed the business relationship and the RMA may have established a new business name, the constant proximity to a sanctioned agent or a person suspected to be associated with migration fraud may be an integrity concern, especially if the RMA continues to refer work to, or receive services from the associate.

In these situations, it would be beneficial for the OMARA to have greater powers to take action against RMA's who not only have concerning employment relationships but also any other relationships including personal and business relationships with an individual (or organisation) who is not a person of integrity.

The use of these powers would be at the OMARA's discretion on a case-by-case basis and the severity of the integrity concerns raised. This would close the existing loophole that only allows the OMARA to assess employer/employee relationships.

These powers would be developed under strict guidelines and in accordance with the *Privacy Act 1988*, to limit intrusion when requesting information of an RMA's spouse and other associates and avoid undue impact on competent and ethical agents who through no fault of their own were at one time associated with a previously sanctioned agent.

2.1.6.2. Amend Part 3 of the Act, and the Regulations, to remove the 30 day publishing requirement.

The 30 day notice requirement in section 288A of the Act was established as an integrity measure before current internet search facilities were available to the OMARA staff. The 30 day publication requirement has only resulted in four valid objections between 2015 and 2020 and has not resulted in any refusals due to insufficient evidence. Removing this requirement would result in considerable efficiency and improvement in the registration process without impacting the integrity of the registration process.

Table 7: Objections received by the OMARA

Year	Initial applications lodged	Objections lodged number / percent	Number of valid objection(s) and nature of complaint	Applications refused as result of objections
2015	1067	3 / (0.28%)	2	0
2016	1164	3 / (0.26%)	0	0
2017	1179	3 / (0.25%	1	0
2018	960	3 / (0.31%)	1	0
2019	436	3 / (0.59%)	0	0

2.1.6.3. Amend Part 3 of the Act to increase the period of registration from 12 months to 36 months for agents who have not had any substantive complaints or referrals made against them during the five year period immediately before their registration application is assessed.

Registration renewal as an annual exercise presents an added regulatory step for RMAs, which can be further streamlined. Agents complete CPD, pay a yearly fee, provide the OMARA with evidence of indemnity insurance, and receive access to a professional library on an annual basis. For the OMARA staff, the staggered renewals result in officers processing these applications year round, with dedicated staff required to assess applications, request further information, conduct checks and approve or refuse applications daily.

Recommendations four and five of the Kendall Review (2014) specifically focused on the heavy administrative burden imposed on agents having to register every year and recommended measures to ensure agents with good standing who had been registered for five years or more, to be able to utilise faster renewal processes using self-declaration with a longer reregistration period of three years. The Department supports these recommendations with the caveat that the allowance only be permitted for agents who in addition to satisfying the re-registration requirements, agree to the OMARA:

- auditing their conduct at any time during the extended registration period
- varying the conditions of their registration, imposing a shorter registration period, or otherwise sanctioning the RMA if the OMARA receives information that the agent is not a fit and proper person.

The extended registration period may also be tied in with initiatives related to the proposed provisional licence with supervision requirement, and proposed tiering system discussed elsewhere in the Review report. For example, re-registration could be conditional on an agreement to supervise a new RMA for a minimum of one year. This will reduce the administrative workload for the OMARA and RMAs equally. It will also incentivise agents to adhere to recommended FPP practices and effectively manage the reputation of their business.

The Department also recommends the fees for the extended period be prorated for the entire duration to ensure that all agents, regardless of their length of registration, pay the same amount and that the extended registration period does not imply favourable treatment towards a certain class of agents (i.e. through reduced fees), just a reduction in the administrative workload for those agents.

2.1.6.4. The OMARA update its process of character checks for applicants to include a coordinated identity verification process and criminal history check for all applicants at the time of initial and subsequent registration

Applicants for repeat registration are required to make a declaration as to whether they have been the subject of any investigations or criminal charges or convictions. From 1 January 2021, agents are also required to provide a new police check every five years upon renewal of their registration.

It is also important to verify each applicant's identity by requiring sufficient evidence of identity, as is standard practice for citizenship applications and government security assessments. Each applicant's identity should be verified in accordance with the National Identity Proofing Guidelines. Consideration should also be given to enabling applicants to use trusted digital identities, such as myGovIDs, particularly those digital identities that are biometrically verified in accordance with the Trusted Digital Identity Framework managed by the Digital Transformation Agency. This would help ensure every assessment from the point of initial registration onwards is accurately connected to the correct individual.

OMARA's current guidelines for registering applicants require identity verification through the provision of a photograph and single form of ID (passport or driver licence). The Department uses varying methods to verify the identity and character of the persons they deal with, for example, engaging AusCheck to coordinate background checks for the ASICs and MSICs. When an applicant applies for an ASIC or MSIC, their application is assessed by AusCheck, which uses information supplied by ACIC and ASIO to make a determination on whether the applicant is eligible to be issued a card.

The Department proposes that the OMARA implement similar processes to verify the identity and assess the character of applicants prior to initial registration, and to subsequently assess RMAs at each registration renewal to ensure their identity is authenticated and that they remain a person of sound character.

2.2. Publishing information on pricing arrangements

2.2.1. Executive summary

It may benefit consumers if the OMARA was to publish aggregated information on the pricing arrangements for RMAs. Specifically, the Regulations could be amended to reinstate the requirement that an individual submit, when applying for repeat registration, an approved form identifying their pricing arrangements. The approved form would collect the range of fees charged by the individual across all visa classes, as an RMA, during the 12 months immediately before the individual applies for repeat registration.

There is no statutory scale of fees for the provision of immigration assistance. Rather, the Code requires that RMAs set and charge a fee that is reasonable in the circumstances of a case.

While the fees that RMAs charge vary, these variations are usually reasonable. Factors that influence the fee can include the level of experience of the RMA, the type of visa being applied for and the complexities associated with the application. The business structure in which the RMA operates, such as whether the RMA is a sole practitioner, employed by a large practice or provides services on a retainer basis or contract basis, will also influence what fees are charged.

The OMARA's website recommends consumers seek three quotes in order to ensure they are being charged a fair price for the services they require prior to choosing an RMA. While some RMAs publish information about their fees, not all consumers will have the sufficient digital literacy or have access to the necessary digital technology to access this information. A further barrier to obtaining multiple quotes may be financial, as some RMAs require and charge for an initial consultation.

While the Code delivers a level of protection to consumers in relation to fees by requiring that an RMA provide the consumer with a written Agreement for Services and Fees (an agreement) before starting work, this alone may not be sufficient to protect consumers from unscrupulous RMAs.

The Canadian Government has recognised this risk within their industry, and is taking steps to establish a suggested fee guide as part of its mandate to regulate the profession in the public interest by protecting both the public and consultants in good standing from dishonest actors who take advantage of vulnerable people.

It is not suggested the Australian Government regulate the fees charged by an RMA. The provision of immigration assistance operates in an open market environment in which consumers are free to choose an RMA based on their own analysis of fees charged and services offered.

However, providing consumers with a single point of reference to access average migration agent fees would enable consumers to more easily undertake market research. It would also shift the regulatory focus to a more proactive approach that aims to prevent the consumer from being overcharged in the first place, rather than the consumer paying the RMA and then having to seek redress through the relevant consumer fair trading agency or tribunal if they believe they have been overcharged.

2.2.2. Strategic context

One of the aims of the Code is to establish procedures for the setting and charging of fees by RMAs. The obligations in the Code are partly underpinned by s313 of the Act, which provides that an RMA is not entitled to be paid a fee or other reward for giving immigration assistance to another person unless the RMA gives that person a particularised statement of services and related charges.

2.2.2.1. Agreement for Services and Fees

The Code requires that an RMA must provide a written estimate to their client before commencing work and before a contract or written agreement is signed. This estimate must include:

- the fee or hourly rate for each service to be performed
- each disbursement[65] that the RMA is likely to incur, including visa application charges
- the time likely to be taken in performing the services.

Many RMAs require that the consumer attend an initial consultation in order to understand the nature of the assistance sought by the consumer and to provide the consumer with an estimate. The approach varies, with consultations ranging from a 30 minute to two hour appointment on either a free basis or at a cost, which typically ranges from $150 to $500.

If the client instructs the RMA to perform the services, the RMA gives the client written confirmation, that is, an agreement.

Under the Code, an RMA is not entitled to be paid a fee or other reward for giving immigration assistance to a client unless the RMA gives the client a statement of services (for example, an itemised invoice or account), that is consistent with the services, fees and disbursements in the agreement.

How fees are set and charged

There are a number of ways that RMAs charge fees:

- charging after work is performed
- charging in advance, or
- 'no win, no fee[66]'.

The Code requires that an RMA set and charge a fee that is reasonable in the circumstances of the case. Factors that may reasonably influence the fees charged by an RMA include the:

- RMA's experience and ability
- complexity of the application
- number of applicants included in an application
- level of service required
- urgency of the case
- location (e.g. whether the RMA works in a metropolitan area or rural or regional area)
- business running costs (this is usually related to the size of the organisation).

2.2.3. Complaints about fees for the provision of immigration assistance

2.2.3.1. Complaints about fees charged by an RMA

While the OMARA can investigate complaints in relation to the provision of immigration assistance by an RMA and take disciplinary action where appropriate, the OMARA does not have jurisdiction to regulate fees charged by an RMA. If a consumer believes they have been overcharged, they can apply to a consumer tribunal to request consideration of their claims and seek an order for the RMA to refund fees.

As noted, there are a number of factors that influence the fees charged. However, a search of the Internet located three RMAs whose fees for the preparation and lodgement of a partner visa is quoted as follows:

- $1800 to $3500
- $3500 to $6600
- $4800.

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[65] Payments made by an RMA on behalf of a client for lodgement and/or processing of documents, such as a visa application charge.

[66] 'No win, no fee' typically only applies to the fees charged by the RMA for providing immigration assistance. In most cases, disbursements (payments made by an RMA on behalf of a client for lodgement and/or processing of documents) must be paid whether the visa applicant wins or loses.

Complaints lodged with the OMARA provide valuable insight into the fees charged by RMAs. Examples of other complaints in which the visa applicant was charged significant fees for the provision of immigration assistance include:

- $30,000 to prepare and lodge a protection visa application
- $40,000 to prepare and lodge two skilled worker visa applications.

In addition to those migration agencies who have chosen to publish their fees, one migration agency has also published a table of average RMA fees for common visa types. The data is compiled using publicly available RMA fees and sources data from 11 different migration agencies with the 10 per cent outliers removed.

These figures (see *Figure 2*) show a significant difference with the fees charged by RMAs in the above examples.

VISA CATEGORIES	VISA SUBCLASS	2016 - 2017 OMARA AVERAGE AGENT FEE	2019 - 2020 AVERAGE AGENT FEE ^
Skilled Migration	189 Skilled Independent visa	$2,200 - $4,750	$2,500 - $6,600
Skilled Migration	190 Skilled Nominated visa	$2,000 - $4,800	$2,500 - $7,150
Skilled Migration	491 Skilled Work Regional Visa (Provisional)	N/A	$4,125 - $6,545
Skilled Migration	186 Employer Nomination Scheme (ENS)	$2,500 - $5,500	$5,200 - $7,150
Skilled Migration	187 Regional Sponsored Migration Scheme (RSMS)	$3,300 - $6,000	N/A
Skilled Migration	482 Temporary Skill Shortage visa (TSS)	$3,300 - $5,000	$3,800 - $7,500
Family	Parent Visas	$2,000 - $4,200	$2,800 - $6,050
Family	Child Visas	$1,500 - $3,800	$2,750 - $6,000
Family	820, 309 Partner Visa (Stage 1) & 300 Prospective Marriage Visas	$500 - $4,400	$2,800 - $5,670
Family	801, 100 Partner Visa (Stage 2)		$1,500 - $4,950
Student	500 Student visa	$500 - $2,420	$500 - $2,200
Skilled Migration	485 Temporary Graduate Visa (TR visa)	$990 - $2,500	$1,000 - $3,300
Visitor	600 Visitor visa (aka Tourist visa)	$330 - $1,500	$880 - $1,650
Other	AAT Review Tribunal	$1,500 - $5,000	$4,000 - $7,700+

Figure 2: Publication of RMA fees by the OMARA[67]

2.2.3.2. Complaints about fees charged by a legal practitioner

Consumers who receive immigration assistance from a legal practitioner can dispute costs through either the relevant State or Territory legal authority or the courts, if they believe that they have been overcharged for legal services. The charging of grossly excessive legal costs may amount to unsatisfactory professional conduct or professional misconduct and may result in disciplinary action by the relevant State or Territory legal authority.

How complaints about overcharging are handled varies between States and Territories, however it typically involves mediation or a costs assessment by an independent assessor.

For example, in New South Wales, a consumer may seek the assistance of the Office of the Legal Services Commissioner (OLSC) to resolve a costs dispute if the total bill for legal costs is less than $116,635 or the total bill for legal costs equals or is more than $116,635, but the total amount in dispute is less than $11,665. Where a consumer lodges a complaint with the OLSC, the OLSC will first assist the parties in attempting to resolve the costs dispute through mediation.

[67] Skylark Migration Specialists (2020) *Average Migration Agent Fees in Australia* [online document], SMS, accessed 14 January 2021

If the dispute cannot be resolved through mediation, the OLSC has the power, in appropriate cases, to make a determination about costs, including a binding determination specifying the amount payable. Alternatively, the consumer can apply for a costs assessment.

Costs assessments are carried out by independent, court-appointed costs assessors. The costs assessor considers the bill and the client's objections to it, and decides what is a fair and reasonable amount of costs for the legal services provided. There is no court hearing because the decision is based on the written material that the law practice and the client submit.[68]

2.2.4. Publication of fee information by the OMARA

RMAs were previously required under Regulation 3XA of the Regulations to provide information to the Authority[69] setting out the average fees they charged as an RMA during the preceding 12 months when applying for repeat registration. In April 2017, Regulation 3XA was repealed and substituted with the current version of the regulation due to issues with the provision and collection of this data, including:

- the burden on RMAs in compiling and providing this information
- the quality and usefulness of the information (insufficient granularity to compare like with like services and its unverifiable nature)
- the administrative costs to the Department of collecting and presenting the information, and of verifying its accuracy
- the Government's broader deregulation agenda of reducing regulatory burden.

This change was the result of the OMARA's ongoing review and evaluation of its business practices and not the recommendation of an independent review.

The current requirement is that an individual who applies for repeat registration must, if requested to do so by the OMARA, give the OMARA a statement in writing setting out the average fees charged by the RMA, during the period specified in the request.

This request:

- must be made in writing
- may be included in a form approved under regulation 11 for use in making applications for registration
- must not specify a period that begins more than 12 months before the individual's application for repeat registration.

An example of the information that was published by the Authority is shown in *Figure 3*:

The rest of this page is intentionally left blank.

[68] OLSC (Office of the Legal Services Commissioner) (2020) *Costs Disputes Fact Sheet,* [online document], OLSC, accessed 12 January 2021

[69] The then Minister for Immigration appointed the MIA to assume the role of the Authority from March 1998 to June 2009 as a statutory, self-regulating body.

Agent fee data

This table represents the range of fees charged by registered migration agents for the period **1 July 2016 to 30 June 2017**. It gives you an idea of how much you might pay an agent to help with your visa.

Agent fee data - 1 July 2016 to 30 June 2017		
Temporary visa services	Bridging visa	$150 - $550
	Business (visitor)	$500 - $1,500
	Graduate - Skilled	$990 - $2,500
	Other temporary resident	$1000 - $2,500
	Other visitor	$500 - $1,500
	Student	$500 - $2,420
	Student Guardian	$550 - $2,000
	Temporary Graduate	$750 - $2,500
	Temporary Non-business	$1000 - $3,000
	Temporary Work Skilled (457)	$2,000 - $5,000
	Tourist	$330 - $1,500
	Working Holiday	$500 - $1,250
Permanent visa services	Australian Declaratory visa	$550 - $5,500
	Business Skills	$3,700 - $18,000
	Child Migration	$1,500 - $3,800
	Employer Nomination Scheme	$2,500 - $5,500
	General Skilled Migration	$2,000 - $4,800
	Humanitarian Offshore	$1,500 - $4,950
	Onshore Protection	$1,100 - $5,500
	Other Skilled	$2,200 - $5,000
	Parent Migration	$2,000 - $4,200
	Partner Migration	$500 - $4,400
	Regional Sponsored Migration Scheme	$3,300 - $6,000
	Returning Resident	$500 - $2,000
	Skilled Independent	$2,200 - $4,750
	Special Migration	$1,300 - $5,500
Other	New Zealand Special Category visa	$500 - $2,200
	Review Application	$1,500 - $5,000

Note: These fees are in Australian dollars and include Goods and Services Tax (GST). These fees do not include visa application charges payable to the Department of Home Affairs.

Figure 3: Publication of RMA fees by the OMARA

The OMARA subsequently replaced average fee information with the following guidance on its website:

> 'Agent fees vary and depend on:
>
> - your visa application type
> - the amount of time it will take to prepare your application. Some visa applications take longer to prepare than others
> - the level of service you need
> - if you need extra help or have complex circumstances. For example your agent might charge more if you have dependants on your application (such as children)
> - the experience and qualifications of your agent. If your agent is a lawyer or has many years of experience, their fees might be higher. If your agent's fees seem too high, discuss this with them before signing a contract.
>
> To ensure you are charged fairly, it is recommended that you talk to three different agents about their services and fees, before you choose one and sign a written contract with them.'

2.2.5. Regulatory reviews and stakeholder engagement

The subject of fees and publication of fees as a mechanism to protect consumers was raised in the following reviews of the regulation of the migration advice industry:

2.2.5.1. Hodges Review (2008)

The Hodges Review noted the Authority published a list of average fees charged by RMAs in the interests of consumer protection and to encourage competition. This list displayed fee ranges and stated the reason for the difference between the upper end and lower end of the range was due to the experience of the migration agent, the complexity of the case, the quality of service provided and other overhead costs associated with running a business.

The Hodges Review acknowledged that the provision of migration assistance operates in a market environment and that fees should not be subject to unnecessary regulation. The Hodges Review felt that consumers should be free to choose an appropriate migration agent based on their own analysis of fees charged and services offered. Its view was that the list on the Authority's website should be sufficient to satisfy the need for consumer protection regarding the level of fees charged.

2.2.5.2. Kendall Review (2014)

The Kendall Review noted an applicant for re-registration must complete an online form by updating the information provided in their previous registration form, and that they are also required to provide details regarding pricing and payment options available to clients.

The Kendall Review did not make any recommendations relating to the publication of pricing arrangements.

2.2.5.3. JSCOM inquiry report (2019)

During its 2018-2019 inquiry, the JSCOM had particular regard to the registration and regulation of migration agents in Australia. A notable change between the JSCOM inquiry and the Kendall Review was that the OMARA had ceased collecting and publishing pricing arrangements following repeal of Regulation 3XA in April 2017 and substitution with the current version of the regulation.

In its submission, the Chinese Australian Services Society Limited (CASS) suggested that clients from non-English speaking backgrounds could be open to exploitation as they 'are not familiar with Australian laws and culture, to discern if the price is reasonable for the services provided'. CASS recommended establishing a legislated fee schedule:

> '…outlining acceptable price range corresponding to different kinds of migration assistance. Service fees across agents would then become more consistent, transparent and fair.'

FECCA and the Settlement Council of Australia agreed that a lack of understanding by individuals from CALD communities could lead to exploitation.

The Humanitarian Group further advised their clients frequently reported having experiences with unethical practice by RMAs which included 'registered migration agents overcharging and charging for the preparation of visa applications that have no real chance of success, particularly Class XB humanitarian visas'. [70]

The MIA pointed out that the OMARA used to publish 'fee information on its website, collected when agents are renewing their registration'. The MIA were of the view that publishing fee information was 'a somewhat 'blunt instrument' as information collected refers to only a small proportion of the types of matters registered migration agents undertake and does not collect information on the level or complexity of matters'.

[70] JSCOM (2019:55,16), *Report of the inquiry into efficacy of current regulation of Australian migration and education agents* [online document], Parliament of the Commonwealth of Australia, accessed 14 January 2021

In their supplementary submission, the MIA did however recommend that the OMARA continue to publish RMAs average fee schedules believing that they provided strong consumer protection and:

> 'This schedule gives potential migration clients, a benchmark against which to measure quoted fees. A fee that is dramatically outside this range would serve to alert consumers to potential rorting or illegal activities.'

The MIA recommended the OMARA collect and publish refined average RMA fee data 'in consultation with commercially practising RMAs to ensure the development of an efficient and effective schedule'.[71]

The Committee recommended information on the pricing arrangements of migration agents be published, commenting that 'it is important to consult with the migration agent industry in order to gain an appropriate determination on the average service fees charged by migration agents, taking into account the visa application type, preparation time, complexity of the case and qualification and experience of the migration agent'.[72]

2.2.5.4. Creating a world class migration advice industry (2020)

Three submissions to the discussion paper were in support of publishing information on pricing arrangements, with one submission advocating for publishing to mitigate exploitation of vulnerable people who did not understand the value of advice. Ten submissions opposed the reform.

Issues raised in submissions opposing the reform included:

- The publishing of pricing arrangements is not practical as the needs and situation of every client is unique. RMAs base their fees on factors that include experience, complexity of casework, urgency, availability and history of successful cases handled (six submissions).
- RMAs may be commissioned by recruitment agencies, education networks, overseas and local businesses, to provide immigration assistance. Accordingly, pricing may be structured in subsidised form where the RMA provides services on a retainer basis or outsourcing of contract basis. Additionally, fees are often commercial-in-confidence and corporate clients are won partly on the basis of competitive and confidential pricing agreements (three submissions).
- The proposition of only RMAs (and not legal practitioners[73]) having to publish their pricing is discriminatory (one submission).
- Pricing for professional services is seldom published (four submissions).
- Consumers know their rights and know how to shop around. In this digital age, consumers have the skills and knowledge to identify and locate a migration agent who can deliver a quality service (one submission).

Issues raised in submissions supporting the reform raised the following views:

- Price guides should be made public so clients can compare and identify when they are being exploited. The information can be embedded into the agent profile maintained by the OMARA (two submissions).
- A proactive approach in relation to financial matters is more likely to be effective in allowing clients to negotiate and prevent them from being parted with their money unethically in the first place (one submission). This confidential submission stated:

> 'Many clients have no idea what a reasonable price for migration services would be, particularly accounting for exchange rates and variances in the cost of professional services between Australia and their home countries, and are accordingly unable to negotiate fees with 5 migration agents effectively or risk being charged exorbitant prices. [Name withheld] has regularly encountered clients who say that a[n] … agent has charged them tens of thousands of dollars for

[71] JSCOM (2019:56), *Report of the inquiry into efficacy of current regulation of Australian migration and education agents* [online document], Parliament of the Commonwealth of Australia, accessed 14 January 2021
[72] JSCOM (2019:59), *Report of the inquiry into efficacy of current regulation of Australian migration and education agents* [online document], Parliament of the Commonwealth of Australia, accessed 14 January 2021
[73] From 22 March 2021, Australian unrestricted legal practitioners are not regulated by the OMARA.

a relatively simple application, for which a market rate would be more like $2,000 to $5,000 AUD. [Name withheld] considers that this could be at least partly addressed by creating and circulating price guides [although these would obviously need to be carefully considered to account for the differences in skill, experience and service model of different agents].'

- The LCA stated the OMARA should publish (and annually update) average fee information on its website, with appropriate qualification and guidance addressed to the consumer, stating:

> 'Consumers should be empowered with average fee guidance when determining whether to engage the services of a RMA. However, such guidance should be reliable and appropriately qualified when published by the regulator. In recognition of the need for transparency and reliability, the regulator should take a targeted approach when determining average fee guidance based upon the type of service being offered and the breadth of experience of the RMA offering that service.
>
> With the introduction of a tiered registration system, a targeted approach could be employed whereby RMAs in each tier are required to declare to the regulator their range of fees charged for commonly provided services…The lower end of the range should reflect the fee charged for a standard matter while the upper end of the range should reflect the fee charged for a complex matter… [T]he regulator could then aggregate that data and publish details on its website with the appropriate qualification and guidance to the consumer when interpreting the published data…
>
> Finally, the argument that RMAs in small business would find the time spent compiling and providing this information to the regulator burdensome is specious given that small business owners readily quote their fees to clients as part of everyday practice.'

2.2.6. Publication of pricing arrangements, including by other countries and jurisdictions

A search of the internet shows that numerous RMAs already publish their fees. While the list of visa types differs between RMAs, RMAs publish either their standard fee or fee range for common visa types.

In addition, other industries are moving towards service transparency as a consumer protection measure. The regulators of immigration assistance in New Zealand and the United Kingdom do not require registered providers of immigration assistance to publish fees, however the Canadian regulator intends to establish a suggested fee guide for immigration services[74]. In evidence provided to the Standing Senate Committee on Social Affairs, Science and Technology on 29 May 2019, the ICCRC stated:

> We are, however, working on a fee guide. The reason we're doing so is because in very specific areas, as I just mentioned, dealing with work permits for temporary foreign workers, there's a lot of abuse where the individual doesn't really understand what they're paying for. The fee guide wouldn't just necessarily focus on the amount, but really educating the client what exactly is he signing up for … Those are things that need to be clarified. I think because globally there's a misconception about what appropriate practice for recruiters is — certainly in Canada this is not appropriate. Internationally we do not generally accept it. So I think in those areas we will be working on specific fee guides where it's a bit easier for us to define what an appropriate amount for a temporary foreign worker to pay for a work permit application is. In other areas, because it's more complicated — spousal applications, student permits, sometimes can be more complicated than others. But certainly we would be thinking about providing a range.[75]

[74] ICCRC (Immigration Consultants of Canada Regulatory Council) (2019), *2019 Annual Report,* [online document], ICCRC, accessed 12 January 2021
[75] Senate of Canada (2019) *The Standing Senate Committee on Social Affairs, Science and Technology evidence*, Senate of Canada website, accessed 12 January 2021

2.2.6.1. Medical Costs Finder

One example of the publication of fees charged by a specialist industry in Australia is the Medical Costs Finder, an online tool published by the Department of Health. Consumers can use the tool to see how much people have paid out of pocket for a medical service, and compare the costs estimated by a specialist and other health providers for a service with the typical costs for the same service. The purpose of the tool is to help consumers better understand what is typically paid and whether their likely out of pocket costs are high or low, compared with what others have paid for the same service.

The Medical Costs Finder presents in-hospital results based on data collected from private health insurers, which in turn is collected from declared hospitals following a private admitted episode of hospital treatment. Costs of out of hospital treatments, (i.e. services that do not involve a hospital admission), is from Medicare Benefits Schedule (MBS) data collected by Services Australia (Medicare). The focus of the Medical Costs Finder is medical specialists' costs, however MBS items may also be used by other health providers such as GPs, dentists or pathologists. *Figure 4* gives an example of the information that can be accessed using the Finder.

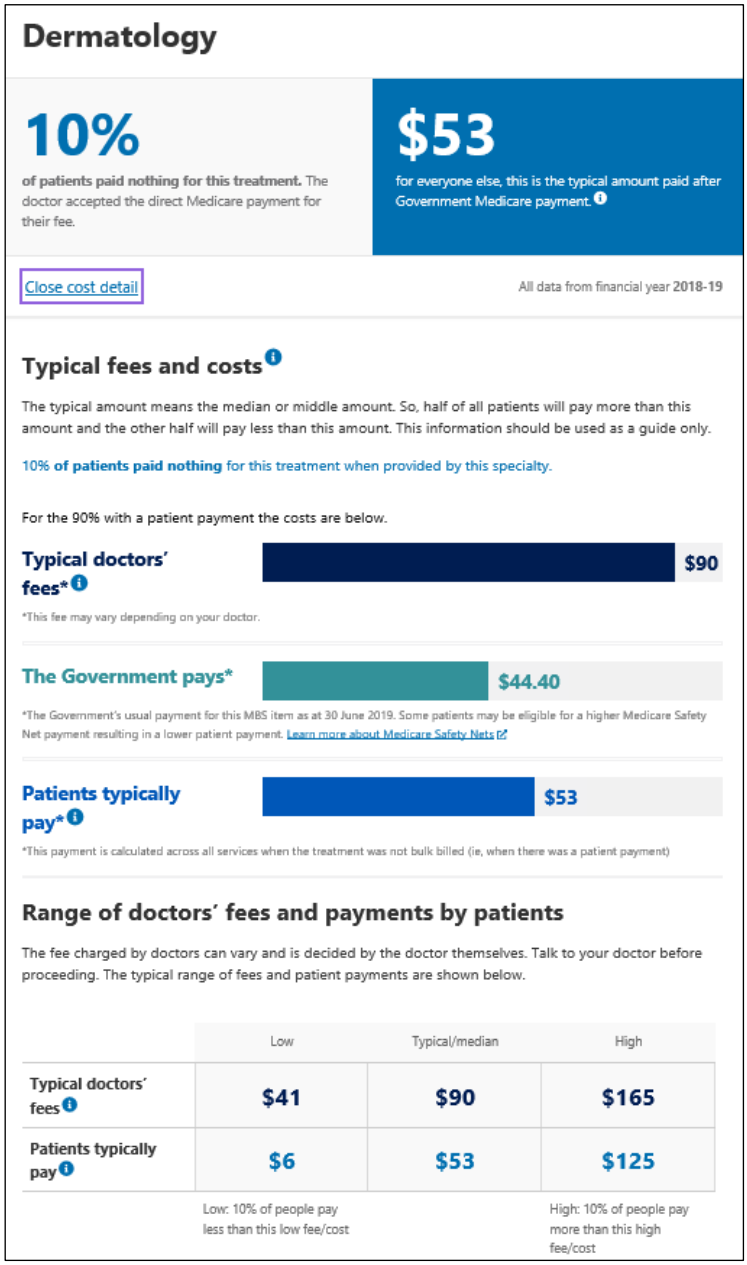

Figure 4: ***Example of cost information for 'Out of hospital for biopsy skin and Dermatology in the postcode 2600'. Source: Department of Health [online document], accessed 12 January 2021***

2.2.7. Digital literacy of culturally and linguistically diverse migrants

The Australian Digital Inclusion Index (ADII) measures three key dimensions of digital inclusion: Access, Affordability, and Digital Ability. The ADII reports that CALD migrants, defined as people born in non-main English speaking countries and who speak a language other than English at home, have a relatively high level of digital inclusion. However, the Index goes onto to state:

> 'Given Australia's long-established commitment to multiculturalism and the multifaceted nature of immigration policies that have facilitated skilled, family, humanitarian and other forms of migration, it is not surprising that the CALD migrant group is both sizeable and diverse. As such, the aggregate data for CALD migrants may obscure some of the digital inclusion outcomes for distinct groups in that population. In 2019, an ADII case study was conducted with recently-arrived CALD migrants in the regional Victorian city of Shepparton. Shepparton has recently been a key settlement location for migrants arriving from the Middle East, Central Asia and Africa under the humanitarian immigration program. This study revealed that recently-arrived CALD migrants' digital inclusion is faring less well than the broader CALD migrant community, particularly with regards to Affordability.'[76]

This view arguably supports that while digital access to pricing arrangements is not a significant barrier for CALD migrant, facilitating access to information about pricing arrangements through a single point of reference will assist improved access across all CALD migrant groups.

2.2.8. Matter for public feedback

We welcome the public's feedback on the following option for reform:

2.2.8.1. That an individual who applies for repeat registration be required to submit an approved form identifying the range of fees charged by the individual across all visa classes, for the preceding 12 months of practice, for the purpose of the OMARA publishing aggregated information on its website.

The publication of pricing arrangements would improve transparency for the public, enable them to more easily compare prices and make an educated choice. There is a recognised public interest in protecting those liable to pay legal fees from overcharging by legal practitioners. Publishing information on the pricing arrangements of RMAs would help ensure that clients of this cohort have access to consumer protections that protect them against overcharging by unscrupulous RMAs.

Numerous RMAs already publish information about their pricing arrangements on their website, which suggests the provision of this information is not overly onerous. As RMAs are already required under the Code to give the client a statement of services setting out the services performed and the fees for those services, it would require only that RMAs collate and report information that they are already in the practice of collecting.

While some RMAs have chosen to publish their pricing arrangements, this approach would not be feasible for all RMAs. For example, where the RMA provides services on a retainer or contract basis, publishing information about their pricing arrangements could provide a commercial advantage to a competitor or potential competitor.

Although the OMARA already has discretion under regulation 3XA to require an RMA applying for repeat registration to provide information about the average fees charged during the preceding 12 months, it is not possible for the OMARA to exercise this discretion in every instance. This could be viewed as fettering their discretion, which is not lawful.

The Department could work with internal and external stakeholders to address previous issues with the quality and usefulness of the data by:

- collaborating with industry regarding the methodology for collection of pricing arrangements and the qualification and guidance to be provided to the consumer

[76] ADII (Australian Digital Inclusion Index) (2020) *Measuring Australia's Digital Divide: The Australian Digital Inclusion Index 2020* [online document], ADII, accessed 14 January 2021.

- streamlining the process by which RMAs will enter their pricing arrangements into the departmental system to administer registration applications.

The onus of ensuring that the data being reported is accurate would rest with the RMAs. This approach aligns with other jurisdictions, such as the Commonwealth privacy jurisdiction. For example, the *Privacy Act 1988* requires that an entity with related obligations take reasonable steps to ensure the personal information it uses and discloses is accurate, up-to-date, complete and relevant. Guidance published by the national privacy regulator states 'where an entity collects personal information from a source known to be reliable (such as the individual concerned) it may be reasonable to take no steps to ensure the quality of personal information'.[77]

It is reasonable to expect that most RMAs would take reasonable steps to provide accurate data given that the majority of RMAs conduct their businesses diligently and competently, noting that as at 31 December 2020, 71 per cent of RMAs have never had even a minor complaint made against them[78].

[77] OAIC (Office of the Australian Information Commissioner) (2019), *Australian Privacy Principles guidelines - Chapter 10: APP 10 — Quality of personal information* [online document, OAIC, accessed 14 January 2021

[78] OMARA (2020), *Migration Agent Activity Report 1 January – 30 June 2020* [online document], OMARA, accessed 23 March 2021

2.3. Developing a fidelity fund or other mechanisms for recompense

2.3.1. Executive summary

The Department does not recommend establishing a fidelity fund due to the high cost of implementation relative to the size and risk profile of the migration advice industry.

Consumer protection mechanisms are key to ensuring confidence and trust in the migration advice industry. One of the mechanisms that protect consumers of migration assistance is the Code, which prescribes an RMA's obligations towards their clients.

Clients of an RMA have access to a complaints mechanism for alleged breaches of the Code that is administered by the OMARA. The OMARA may impose an administrative sanction if a breach of the Code is found to have occurred. While these sanctions do not include the ability for the OMARA to require that an RMA refund fees, consumers seeking a refund of money paid to an RMA may be able to seek compensation through consumer protection law.

The purpose of a fidelity fund is to provide compensation to people who have suffered financial loss due to a dishonest or fraudulent act or omission. A fidelity fund does not reimburse loss suffered as the result of negligence; this is claimed against professional indemnity insurance.

One example of an industry fidelity fund that provides valuable insight on the arrangements necessary to establish and manage such a fund is the legal profession. Legislation regulating the legal profession in all States and Territories provides for the establishment of a fidelity fund, although each jurisdiction varies in how its fidelity fund is administered. The contribution rate across States and Territories also varies, ranging from $20 to $564, and is paid when a practitioner applies to gain or renew their practising certificate.

The number of claims against the legal profession fidelity fund appears low. As one example, of the 23,477 legal practitioners in Victoria, 15 claim payments were made during 2019-20.[79] Similarly, the majority of RMAs conduct themselves professionally. In the 12 months to 30 June 2020, 16 RMAs and former RMAs were barred or suspended or had their registration cancelled.

The cost of establishing a fidelity fund would result in significant increased costs for all RMAs at a time when the migration advice industry is facing significant financial challenges due to the global pandemic. Even if no claims were made against the fidelity fund, the expense of administering such a fund is considerable. For example, the Queensland Law Society's administration expenses for its fidelity fund in the year ended 30 June 2020 were $231,000[80].

On balance, the establishment of a fidelity fund is not warranted given the size of the migration industry, the number of complaints that the OMARA receives about RMAs and the availability of existing consumer protection measures.

2.3.2. Requirement that RMAs hold professional indemnity insurance

The requirement for professional indemnity insurance arises out of s292B of the Act, with Regulation 6B of the Regulations prescribing that an RMA must hold professional indemnity insurance for at least $250,000 either as an individual or as an organisation of which the individual is a director, employee or member. Professional indemnity insurance provides cover for claims resulting from negligence or breach of duty arising from an act, error or omission in the performance of professional services.

[79] VLSBC (Victorian Legal Services Board and Commissioner) (2020:24) *Annual Report 2020* [online document], VLSBC, accessed 1 March 2021
[80] QLS (Queensland Law Society) (2020:185) *2019-20 Annual Report* [online document], QLS, accessed 19 January 2021

The requirement to hold professional indemnity insurance is also a requirement under the Code, which requires that an RMA provide evidence of current professional indemnity insurance when applying to register or re-register as a migration agent.

2.3.3. Disciplinary decisions under the Act

The regulatory functions of the OMARA include:

- considering and deciding applications for registration as an RMA
- monitoring the conduct of RMAs
- investigating complaints made in relation to the provision of immigration assistance by RMAs and where appropriate, taking disciplinary action against RMAs or former RMAs
- referring investigated complaints about legal practitioners in relation to their provision of immigration legal assistance to the relevant professional regulatory bodies for possible disciplinary action
- informing the appropriate prosecuting authorities about apparent offences against Part 3 or Part 4 of the Act.

Disciplinary action is enabled by s303 of the Act. Any disciplinary decisions based on the misconduct of an RMA can be made where the delegated officer is satisfied that the RMA is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance, or the decision maker is satisfied that the RMA has not complied with the Code.

The decisions that the OMARA can make include:

- cautioning an RMA
- suspending or cancelling an RMA's registration, or
- barring a former RMA from being an RMA for a period of not more than 5 years.

Any RMA subject to a sanction issued by the OMARA can apply to the AAT for review of that decision.

There are also a number of offences established under the Act that deal with the kinds of activities or behaviours covered by the Code. These activities include misleading statements and advertising, practising when unregistered and misrepresenting a matter. Provisions of the *Crimes Act 1914* (Crimes Act), the *Criminal Code Act 1995* (Criminal Code) and the *Competition and Consumer Act 2010*, as well as Australian consumer law, which is applied as state/territory law through various state and territory Acts, may also apply to these activities.

The OMARA's powers are administrative only. Where potential fraud or other Act offences are identified, these are referred to the ABF for further investigation and referral to the Commonwealth Department of Public Prosecutions if required.

The OMARA cannot currently impose a sanction on an RMA to provide a refund to a consumer. Clients seeking a refund of money paid to an RMA may be able to seek compensation through consumer protection law, such as the Commonwealth's *Competition and Consumer Act 2010* and of the various state-based Fair Trading Acts, applicable to all industries, or by initiating civil fraud proceedings.

Most disputes between RMAs and clients resulting in complaints to the OMARA concern:

- the lack of a service agreement
- failure to issue receipts, and/or
- failure to keep clients informed about the progress of their applications.

The majority of cases relating to fraudulent conduct by an RMA relate to the provision of bogus documents and false statements. For example, in a decision made on 2 June 2020, the OMARA barred an RMA for five years for conduct that included submitting fraudulent documentation to satisfy Expression of Interest applications for State Sponsored and Skilled Visas for his clients[81].

2.3.4. Regulatory reviews and stakeholder engagement

The subject of a fidelity fund as a mechanism to protect consumers has been raised in the following reviews of the regulation of the migration advice industry.

2.3.4.1. The Hodges Review (2008)

The Hodges Review invited stakeholders to make submissions on the industry's readiness to move from statutory self-regulation and other issues in relation to the migration advice industry, such as consumer protection. Questions raised in association by the reviewer for submissions included:

- Is there a need for a fidelity fund for registered migration agents? If so, what issues need to be considered and which model(s) would be appropriate.
- If a fidelity fund is not appropriate, how might consumers' monies be otherwise protected?[82]

Seven submissions supported and two submissions opposed the establishment of a fidelity fund. The submissions in support recommended that such a fund:

- be established by placing a levy on registrants
- be topped up by interest generated through investment of money held in the fund and through any operating surplus from the regulatory body
- exempt legal practitioners (as they already contribute to a fund) and migration agents acting solely on a not-for-profit basis from contributing to the fund
- establish limits on payments and make payments subject to funds availability.

While some submissions recommended that any fidelity fund be administered by the OMARA, the Department's submission recommended that due to potential conflicts of interest, any fund should be administered separately from the OMARA.

Submissions opposing the establishment of a fidelity fund argued the migration advice industry is different to other professions that have established such a fund, as RMAs do not hold funds in a trust account. Other arguments included that RMAs deal with a more limited range of issues than legal practitioners and those issues are not always readily capable of being quantified in terms of economic loss.

The Hodges Review subsequently recommended that a fidelity fund not be established.

2.3.4.2. Creating a world class migration advice industry (2020)

Three submissions to the discussion paper supported establishing an industry fidelity fund, with eight submissions in opposition. Views raised in the submissions were that:

- the legislative requirement that an RMA hold professional indemnity insurance for at least $250,000 provided sufficient access to restitution (eight submissions)
- there is an absence of evidence and demonstrated need for a fund (five submissions)
- compensation for clients should be the responsibility of the RMA at fault and not the profession as a whole, with a blanket requirement over the entire profession being unnecessary and unfair (three submissions)

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[81] OMARA (2020), *Sanctioned agent detail* [online document], Home Affairs, accessed 23 March 2021
[82] Hodges, J (2008:28) *2007–08 Review of Statutory Self-Regulation of the Migration Advice Profession* [online document], Commonwealth of Australia, accessed 12 January 2021

- the loss arising from an RMA's misconduct is not always financial and consequences for a client may include various statutory bars, the cancellation of their [or their family members'] visas, or imposition of exclusion periods (two submissions)
- disciplinary decisions involving the inappropriate handling of client funds often arise due to a lack of RMA training in this area rather than a calculated intent of the RMA to act inappropriately (one submission)
- RMAs, especially provisionally registered RMAs, should be required to undertake mandatory CPD to improve their ability in managing client funds (one submission)
- all clients' accounts should be held at an Australian deposit-taking institution so as to enable the OMARA to readily undertake audits of RMA client accounts (one submission)
- if a fidelity fund were to be established:
  - the amount of each RMA's contribution should change each financial year and be determined by taking into account the number of claims made in the preceding financial year, with the fee subject to approval by the Minister (one submission)
  - interest from a client account held by non-lawyer RMAs is minimal, meaning relatively little money would be available for such a fund[83] (one submission)
  - fees for the fund could come from a visa application fee surcharge and through a similar surcharge on RMA registration fees (one submission)
  - harvesting interest payments on funds held in RMA Client Accounts will not provide a worthwhile indemnity fund because of the small number of RMAs and the relatively small amounts of money held (one submission)
  - the fund could be financed through contributions from RMAs, interest on RMA client accounts and interest generated by the fund, with interest on all clients' accounts directly diverted on a monthly basis by the Australian deposit-taking institution to the fund. These funds should not be used to fund the OMARA's monitoring, investigation and disciplinary activities (one submission).

2.3.5. Powers to order a refund when a breach against an RMA is upheld

Another issue examined in earlier reviews was whether the OMARA should have powers to order a refund as a means of providing additional consumer protection for consumers of immigration assistance.

2.3.5.1. The Kendall Review (2014)

The Kendall Review noted the OMARA does not have the power to award costs or order restitution for consumer disputes. The Kendall Review stated this 'sets it apart from other sectors such as the legal profession' and advised the OMARA taking on the role of awarding costs or ordering restitution for consumer disputes would better protect consumers.[84]

2.3.5.2. JSCOM inquiry report (2019)

During its 2018-2019 inquiry, the JSCOM had particular regard to the powers of the OMARA.

Three submissions to the inquiry held the view that the OMARA's powers to take appropriate enforcement action against unscrupulous registered or unregistered agents was limited. The Asylum Seeker Resource Centre stated the OMARA's powers provided limited assistance to victims of unscrupulous agents which resulted in them being less likely to lodge a complaint:

[83] The OMARA's Client Monies Toolkit states a client account should not earn interest and if interest is earned on a client's account, then it must be apportioned to clients in proportion to the balance of their monies in the client's account.
[84] Kendall, Dr C N (2014:24) *2014 Independent Review of the Office of the Migration Agents Registration Authority* [online document], Home Affairs, accessed 10 September 2020

> ‘In our experience many clients that have experienced such difficulties or been dissatisfied with their migration agents, are not motivated to lodge complaints with the [OMARA]. This is especially when they become aware that OMARA does not have power to order a migration agent to refund fees paid by a client or to order damages for the harm done or lost opportunity caused by the misconduct.’

The Refugee Council of Australia (RCA) held the view that the OMARA does not provide redress or compensation to the affected individual or force a migration agent to refund fees. The RCA noted that while an individual ‘may be able to seek compensation through consumer protection law, this process often required legal assistance, which is not available freely or at a reduced cost’.[85]

JSCOM sought to address this issue through its recommendation to establish a statutory authority, the Immigration Assistance Complaints Commissioner that could impose sanctions or fines and/or order the payment of costs, payment of refund or compensation. The concept of an independent regulator Commissioner is examined in Chapter 3.6.

2.3.5.3. Creating a world class migration advice industry (2020)

A confidential submission received on discussion paper stated that:

> ‘A fidelity fund may well be a useful avenue for redress for clients who have been victims of poor or unethical migration advice. However, … the loss occasioned by such agent misconduct is not simply financial, but can include the loss of important legal rights and opportunities, such as by clients incurring various statutory bars, suffering the cancellation of their [or their family members’] visas, or imposition of exclusion periods. For many of [Name withheld]’s clients, these non-financial costs are quite literally a matter of life and death. Accordingly, fidelity funds may be most useful in relation to sophisticated commercial actors applying for [for instance] Skilled or Student visas; but they would fall short of a complete solution to “make good” the impacts of misconduct.’

2.3.6. Use of fidelity funds in comparable industries and professions

A fidelity fund provides compensation to persons who suffer loss because of dishonest or fraudulent behaviour. A fidelity fund does not reimburse losses suffered as the result of negligence. RMAs have professional indemnity insurance policies for this purpose.

In Australia, the legal profession and building, real estate agent and motor vehicle dealer industries have each established a fidelity fund. For example, the building industry is required to provide a fund certificate for the construction of certain kinds of residence or where certain alterations or additions to certain kinds of existing residence are valued at over $12,000.

A significant difference between these industries and the migration advice industry is the amount of money held for a client and the number of practitioners. For example, there are about 5000 RMAs, compared to more than 76,000 practising solicitors in Australia[86].

Between 1 July and 31 December 2020, out of more than 500,000 total visa applications, 165,890 applications were lodged with the assistance of RMAs (32 per cent). Prior to the COVID-19 pandemic, out of the 2.3 million total applications lodged between 1 July and 31 December 2019, 222,598 applications were lodged with the assistance of RMAs (nine per cent).

This assistance was largely sought by those applying for visa classes with greater technical requirements. The visa classes which required the most assistance in lodging an application were Temporary Skill Shortage, Business Skills and Employer Sponsored visas. The base application fee for these types of visa currently ranges from $2645 to $4045. There is limited public information available on the average range of fees charged by an RMA, however it is unlikely that the amount of money held by an RMA is comparable to industries that hold funds to manage the sale of a house, property management or deceased estate matters.

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[85] JSCOM (2019:50,53) *Report of the inquiry into efficacy of current regulation of Australian migration and education agents* [online document], Commonwealth of Australia, accessed 10 September 2020
[86] URBIS (2018) *2018 National Profile of Solicitors*, [online document], Law Society of NSW, accessed 19 January 2021

2.3.6.1. Legal profession fidelity fund

The fidelity fund established by the legal profession provides valuable insight on the arrangements required to establish and administer such a fund.

Under all State and Territory legal profession legislation, certain legal practitioners are required to contribute to a fidelity fund by way of a compulsory levy included in the practising certificate fee, as summarised in *Table 8* below. The fund exists to compensate persons who suffer financial loss due to the fraudulent behaviour of an associate of the law practice. While exceptions vary between jurisdictions, practitioners who are exempt from making a contribution to the fund typically include government legal practitioners and corporate legal practitioners. Less common exceptions include employees or volunteers of a community legal service.

This fund is typically administered by the relevant State or Territory law society. Claims for compensation arising from a dishonest default of a law practice are managed by an independent regulatory body, such as a Board, and the setting of contributions and levies subject to approval by the Attorney-General.
Legal profession legislation may provide for the law society to arrange for insurance in relation to claims, and liabilities arising out of claims, against the fidelity fund.

Table 8: Summary of fidelity funds by jurisdiction

Jurisdiction	Administered by	Number of practitioners[87]	Fund fee	Claims
Australian Capital Territory *Legal Profession Act 2006*	Administered and managed by the ACT Law Society	2356	$164	Not published
New South Wales *Legal Profession Uniform Law (NSW) No 16a of 2014*	Administered and managed by the Law Society of New South Wales Contribution fees must be approved by the Attorney-General.	32,679	$80	Not published
Northern Territory *Legal Profession Act 2006*	Administered and managed by the Funds Management Committee, a body corporate established under s 659 of the *Legal Profession Act 2006* (NT)	517	$320	Not published
Queensland *Legal Profession Act 2007*	Administered and managed by the Queensland Law Society	11,758	$22.50	67 claims paid in 2019-20, totalling $1,168,359.72 (including interest)[88]
South Australia *Legal Practitioners Act 1981*	Administered and managed by the Law Society of South Australia Payments from the fidelity fund require authorisation by the Attorney-General	3726	$164	Not published
Tasmania *Legal Profession Act 2007*	Administered and managed by the Solicitors' Trust, an independent statutory body	727	Funded from interest generated by legal practitioner trust funds	Not published

[87] URBIS (2018) *2018 National Profile of Solicitors*, [online document], Law Society of NSW, accessed 19 January 2021
[88] Queensland Law Society (2020:55) *2019-20 Annual Report*, [online document], Queensland Law Society, accessed 19 January 2021

Jurisdiction	Administered by	Number of practitioners[87]	Fund fee	Claims
Victoria *Legal Profession Act 2004*	Administered and managed by the Legal Services Board	19,460	$137 to $564	15 claims received and 6 claims paid in 2019-20, totalling $871,671.67 (including interest)[89]
Western Australia *Legal Profession Act 2008*	Administered by the Law Society of Western Australia Determinations managed by Legal Services Board	5080	$20 – payable by practitioners who have been practising for more than 2 years but less than 7 years	Not published

2.3.6.2. Costs of administering and managing a fidelity fund

The fidelity fund required under State and Territory legal profession legislation is typically funded through:

- contributions or levies paid into the fund
- interest generated from investment of the money in the fund
- interest generated from client monies held by the legal practitioner
- amounts recovered by the law society or regulatory body.

The cost of administering and managing the fidelity fund is paid out of the fund. The revenue and expenses for the fidelity fund administered and managed by the Queensland Law Society are shown in *Figure 5*.

While specifics vary between the jurisdictions, the cost of administering and managing a fidelity fund for the legal profession typically includes the:

- costs of investigating a claim
- amount of all claims, including costs and interest allowed or established against the fund
- remuneration, allowances and expenses of persons appointed to manage the fund
- all legal expenses incurred in defending claims made against the fund
- premiums for the insurance of the fund
- auditing the accounts of the fund
- engaging an external investment adviser to recommend and assist in investment decision-making, and seek to maximise investment returns whilst limiting risk to an acceptable level.

Some jurisdictions permit greater use of its fidelity fund. In some jurisdictions, this requires determination by the Attorney-General. For example, the *Legal Practitioners Act 1981* (South Australia) provides that money in the fidelity fund may be applied for purposes that include, but are not limited to:

- the costs of disciplinary proceedings under this Act
- the costs incurred by the law society in appointing a legal practitioner to appear in proceedings in which a person seeks admission as a legal practitioner
- payment of the salaries and related expenses of the Legal Commissioner and their staff
- costs of prosecutions for offences against this Act
- educational or publishing programs conducted for the benefit of legal practitioners or members of the public.

[89] (VLSBC) Victorian Legal Services Board and Commissioner (2020:24) *Annual Report 2020* [online document], VLSBC, accessed 1 March 2021

Legal Practitioners' Fidelity Guarantee Fund

Statement of Comprehensive Income for the year ended 30 June 2020

	NOTES	2020 $'000	2019 $'000
Revenue			
Practitioner levies	B1-1	308	296
Investment income	B1-2	1,119	1,282
Realised gains/(losses) on investments	B1-3	-	19
Fair value gains/(losses) on investments	B1-3	(1,344)	889
Total revenue		**83**	**2,486**
Expenses			
Administration expenses	B2-1	231	168
Notified claims (net of reversals)	C6	569	2,064
Investment fees		53	62
Management fees paid to the Queensland Law Society	B2-2	158	134
Total expenses		**1,011**	**2,428**
Operating result for the year		**(928)**	**58**
Other comprehensive income		-	-
Total comprehensive income for the year		**(928)**	**58**

Figure 5: Statement of comprehensive income for the year ended 30 June 2020 for the Legal Practitioners' Fidelity Guarantee Fund administered and managed by the Queensland Law Society[90]

Provisions in State and Territory legislative profession legislation for the administration and management of the fidelity fund address common matters such as:

- exemptions from contributing to the fund
- caps on payment for claims
- sufficiency provisions should the fund not be sufficient to satisfy the liabilities of the fund
- failure to pay contribution or levy to the fund
- refusal to grant or renew registration if an application has failed to pay a contribution to, or levy for, the fund
- investment of monies contained in the fund
- maximum amount to be contained in the fund and use of surplus funds
- publishing of an advertisement or notice about a dishonest default to seek information about the default and/or invite claims about the default
- time limit for making claims
- payment of interest on the amount payable claims from the fund
- right of appeal against decision on claim
- right of appeal against failure to determine claim
- reporting on claims made against the fund.

[90] Queensland Law Society (2020:185) *2019-20 Annual Report* [online document], Queensland Law Society, accessed 19 January 2021

2.3.7. Matter for public feedback

We welcome the public's feedback on the following advice:

2.3.7.1. Do not establish a fidelity fund for the migration advice industry

While a fidelity fund provides an additional consumer protection measure for consumers of immigration assistance, there is no evidence that such a fund is warranted given the size and risk profile of the migration advice industry, specifically:

- as at 31 December 2020, 71 per cent of RMAs have never had even a minor complaint made against them
- client monies held by an RMA is significantly less than that held by other industries that maintain a fidelity fund.

In addition to the lack of evidence to support establishing a fidelity fund, establishing such a fund would be costly both in terms of time and money, and would require significant legislative and administrative change.

These increased costs would need to be funded by the migration advice industry through increased registration fees, at a time when the migration advice industry is facing financial challenges due to the global pandemic.

Given the relatively small size of the industry, it is recommended that consumer protection improvements will be more appropriately achieved through other reform initiatives, such as:

- improved transparency by publishing information on the pricing arrangements of migration agents
- introducing a period of supervised practice for migration agents
- use of the CPD framework to deliver targeted education offerings
- continued duty in the Code that a migration agent must have professional indemnity insurance of a kind prescribed by Regulation 6B of the Regulations.

Not establishing a fidelity fund is consistent with the Government's 'fit-for-purpose' regulatory policy, and offers an alternative approach to 'hard' regulation (for example, through education/public awareness) to strengthen the professionalisation of the industry in line with the Government's preference for reducing, rather than increasing, industry red tape.

2.4. Introducing a tiering system

2.4.1. Executive summary

The introduction of a tiering system for migration agents could provide better protection for consumers and a supportive framework for professionalisation of the migration advice industry. The tiering system would support RMAs by providing a defined career pathway for new or less experienced agents. The potential model outlined below would also provide guidance for RMAs on the requirements for provision of higher quality assistance in more complex fields through targeted training and escalating practical experience. In doing so, the tiering system would increase protection and support for the most vulnerable in Australia's CALD community and for those seeking to visit or call Australia home.

The tiering system would reflect the differing levels of complexity of immigration assistance, which can include a range of tasks from filling in a visa application form to advocating on behalf of a client at a tribunal. Currently, an RMA can provide immigration assistance of any complexity without oversight on day one of their registration with the OMARA.

As noted by the AAT, 'a higher standard of knowledge, skill and experience could reasonably be expected of practitioners who intend to hold themselves out in the marketplace as capable of providing advice and assistance in the more complex or exceptional cases'[91]. Review of a visa cancellation decision or decision not to revoke a visa cancellation or a request for Ministerial intervention may be the last chance for a client to remain in Australia; incompetent immigration assistance with these matters would result in dire consequences for the client.

If this measure progressed, the Department could collaborate with industry to further develop the following tiering system model and supporting transitional and implementation arrangements. The suggested model includes three tiers, each underpinned by qualifications, supervised practice (Chapter 1.3) and/or targeted CPD (Chapter 2.5):

- a first tier for RMAs who provide immigration assistance in relation to applications to the Department and related matters. It requires a 12-month provisional licence during which an RMA would be permitted to provide immigration assistance only under supervision of an experienced RMA or a legal practitioner
- a second tier for generalist RMAs who provide immigration assistance in relation to applications to the Department and related matters without supervision
- a third tier for specialist RMAs who can provide immigration assistance on matters before tribunals and the Minister, including preparing visa refusal and cancellation review applications, Ministerial intervention requests as well as second tier matters.

Any tiering system needs to occur in alignment with the Australian Government's Deregulation Agenda, ensuring that, where regulation is required, it is 'implemented with the lightest touch – that it is designed and applied in the most efficient and timely way, with least cost on businesses and in a way that supports jobs and innovation'.[92]

Accordingly, the proposed three-tiered system would be simple in its design and governance, balancing RMAs' economic outcomes and professional development needs, and the expectations the Australian Government and consumers have for appropriate and professional representation at tribunals, and representations to the Minister.

[91] AAT (2020:5), discussion paper submission
[92] Department of the Prime Minister and Cabinet, Deregulation Taskforce [online document], Australian Government, accessed 1 October 2020

2.4.2. Relevant inquiries

The JSCOM inquiry report outlines several submissions in favour of a tiering system. The inquiry recommended a form of tiering and the introduction of a period of supervised practice prior to being granted an unrestricted practising certificate. Tiering also broadly falls within the scope of recommendation 1 of the report to undertake a review of the current registration requirements for migration agents, having regard to the effectiveness of registration requirements, technical proficiency through education and peer assessment. Other measures flowing from this recommendation are separately considered under Chapter 2.1.

The Kendall Review (2014) report does not discuss tiering, except with reference to a CPD-tiering approach unrelated to the current tiering proposal.

The Hodges Review (2008) report stated there was little support for such a system from the few submissions received, also noting disproportionate administrative overheads and compliance issues. It instead recommended a year of supervised practice. It is relevant to note that of the three quoted submissions in opposition, two did so on the basis that it was inappropriate while legal practitioners were under dual regulation (which ceased on 22 March 2021) – one of these submitters being the LCA.

The third submission, from National Legal Aid, submitted that a tiered system would probably not work, as the CPD would not be relevant to the not-for-profit sector and agents needed to be able to provide advice and representation in a wide range of complex immigration matters from the commencement of their work with clients.

2.4.3. Stakeholder views

2.4.3.1. Creating a world class migration advice industry (2020)

Almost half of submissions to the discussion paper (25 submissions) commented on a tiering approach, with 70 per cent of those submissions either supporting the measure or providing supportive commentary.[93]

The AAT noted a tiering system could offer a range of benefits for the regulation of the migration advice industry, including:

- facilitating the identification and setting of appropriate standards relevant at each tier as well as the criteria and mechanisms for progression, including testing
- enabling the tailoring of CPD syllabus content to better meet the requirements of RMAs engaged in work relevant at each tier
- enabling the creation of a defined career pathway for RMAs
- assisting consumers, many of whom could be considered vulnerable, to understand and differentiate between the knowledge, skills and experience of RMAs, and
- supporting higher quality advice and assistance in the more complex areas of work, including involvement in cases at the AAT.

Most submissions in opposition to tiering assumed the system's composition would be as proposed by the LCA during relevant inquiries and again during this public consultation. Several submissions offered other models (see *Appendix C*).

The MIA opposed tiering, stating it would impose a heavy administrative burden on the OMARA, and a severe impost and restriction on the right to practice of newly registered migration agents who have already successfully completed the Graduate Diploma, supervised practice (should it be implemented), and the Capstone. It was suggested a more streamlined outcome would be achieved through supervised work practice between the completion of the Graduate Diploma and the Capstone.

[93] The Newland Chase submission did not support, but advised 'a tiering system is an interesting idea and something that may be useful if it is similar to a chartered system'.

The MA provided results of a survey with 405 responses, in which 77 per cent of respondents opposed the LCA approach to tiering, which involved Capstone-style exams for each tier. The survey showed a slight preference for tiering based on time in the industry or attending tiered CPD activities, compared to the LCA's approach.

The LCA comprehensively outlined its three-tiered model, in which RMAs would progressively qualify to assist and represent clients with matters before the Department, matters before the AAT MRD and the Immigration Assessment Authority (IAA) and requests for Ministerial intervention. Their model was underpinned by a significant increase in regulation and industry oversight by a new independent statutory regulator.

This regulator would develop, in conjunction with the relevant review authorities and the Department's Ministerial Intervention Unit, specific competency assessments to be administered by the regulator for RMAs to transition into a higher tier. There would be no role for industry in determining which RMAs qualify to move into a higher tier. The initial tiering of legacy RMAs would occur via an expression of interest and assessment process.

2.4.3.2. Migration Advice Industry Advisory Group

On 19 November 2020, the Advisory Group met to discuss the Review, specifically, the concepts of a tiering system and supervision. Beyond the support or opposition expressed for either reform, there were disparate views within the membership regarding the role of supervised practice versus tiering, and whether the two could reasonably form part of the same framework.

One view was that supervised practice had no purpose beyond an educative practice, while tiering was part of professional development. However, it was also argued that supervised practice provided a critical introduction to the industry, in which agents learned the ethical way to work and their role as an industry member. Further, it was discussed that supervised practice is one of the benchmarks of a profession, as it is present in the medical, legal, teaching and accounting professions.

Members suggested placement of an RMA within the tiers should be based on whether the agent can demonstrate the core competencies for the immigration assistance provided at a particular tier, rather than length of time in the industry, as length of time in the industry does not necessarily demonstrate requisite expertise for the top tier.

Tiering could be aligned with areas of specialisation of agents, such as types of visa applications being lodged and an agent's success rate. However, tiering should not limit an agent's ability to deal with more complex matters if there is another more experienced agent available to provide supervision or mentoring.

With regards to duration, it was suggested applying a rigid time-frame would not necessarily reap the desired outcomes of supervised practice, since some agents work part-time and others may only pick up a few cases a year.

2.4.4. Comparison with relevant international regulatory frameworks

Australia, Canada, New Zealand and the United Kingdom have comparable regulation schemes for migration agents. New Zealand and the United Kingdom already use a form of tiering. Canada is developing a program to support agents who seek to represent clients at its AAT equivalent (see *Table 9*).

2.4.4.1. Canada

A new Specialization Program is a key component of the ICCRC's strategic goals. It is designed to progressively strengthen public confidence in RCIC's representation before tribunals, specifically the Immigration and Refugee Board of Canada (IRB).

As observed by the LCA, 'currently, all registered immigration consultants can act as a representative before the [IRB], Canada's tribunal for review of immigration and refugee decisions. However, due to concerns raised by the IRB and other witnesses at the Canadian House of Commons Standing Committee on Citizenship and Immigration Inquiry 'Starting Again: Improving Government Oversight of Immigration

Consultants' in 2017 about the quality of [RCIC's] advocacy before the IRB, the regulator commissioned a report on the feasibility of specialisations for RCICs'.[94]

The IRB Specialization Certification Program is founded on the newly developed Essential Competencies and key competency-based education and assessment principles.

The ICCRC's 2020 Annual Report states ICCRC has made good progress on the program design and further engaged in a collaborative and iterative approach to develop the Specialization Program. Offered in English and French, the program will consist of online modules, integrated experiential learning components and a final competency-based certification assessment.[95]

As observed by the LCA, 'in addition to regulating immigration consultants, the ICCRC regulates international student advisors at universities. This is an example of tiering whereby a limited licence is offered for activities related to international students' immigration needs'.[96]

Table 9: Comparison with relevant international regulatory frameworks

Australia	Canada	New Zealand	United Kingdom
No current tiering system. Entry qualifications are defined by Chapter 1.1. Sanctioned agents returning to the industry are not required to obtain entry qualifications or take /re-take associated exams.	A Specialization Program is being developed to provide additional training for those wanting to represent clients at the independent administrative Tribunal - Immigration and Refugee Board of Canada.[97] A 2017 review recommended tiering in relation to the categories of service provided. [98]	**To become a provisional licensed adviser** • Complete half of the Graduate Diploma in New Zealand Immigration Advice • Signed supervision agreement and arrangement • No fitness issues **To become a limited licensed adviser** An applicant must demonstrate, to the satisfaction of the Registrar, that he or she meets each of the competencies to the extent necessary to provide immigration advice on limited specified matters without supervision.[99] **To become a full licensed adviser** • Completed Graduate Diploma in New Zealand Immigration Advice • Two years of supervision • No fitness issues • Submit an upgrade application from provisional to full licence.	**Level 1 – Advice and Assistance advisors** are permitted to make applications that rely on the straightforward presentation of facts to meet a set of qualifying criteria; **Level 2 – Casework advisors** are authorised to handle more complex applications within the Immigration Rules as well as applications outside the Rules and applications under United Kingdom visas and immigration concessionary or discretionary policies; and **Level 3 – Advocacy and Representation advisors** are able to conduct work done following the lodging of the notice of appeal (substantive appeals work and representing clients at bail and appeal hearings) against refusal as well as the conduct of specialist casework.[100]

[94] LCA (2020:53), discussion paper submission
[95] ICCRC (2020:21), *2020 Annual Report* [online document], Canada Government, accessed 1 December 2020
[96] LCA (2020:53), discussion paper submission
[97] ICCRC (2019), *2019 Annual Report* [online document], ICCRC, accessed 24 November 2020
[98] House of Commons Canada (2017:33) *Starting Again: Improving Government Oversight of Immigration Consultants* [online document], Report of the Standing Committee on Citizenship and Immigration, Parliament of Canada, accessed 24 November 2020
[99] NZIAA (2016:1) *Immigration Advisers Competency Standards 2016* [online document], MBIE, accessed 1 December 2020
[100] GOV.UK (2017:5-19) *Guidance on Competence* [online document], OICS, accessed 10 October 2020

2.4.4.2. New Zealand

The tiering system in New Zealand is represented by three types of licences for migration advisors:

Provisional licence

All first-time New Zealand immigration advisers must hold a provisional licence for two years. This will require them to work under the direct supervision of a person holding a full immigration adviser licence.[101]

An applicant must demonstrate, to the satisfaction of the Registrar, that he or she meets each of the competencies to the extent necessary to provide immigration advice under the direct supervision of a fully licensed immigration adviser.[102]

Limited licence

Applicants can select which areas of immigration advice they would like to provide immigration advice on, up to a maximum of three areas.[103] An applicant must demonstrate, to the satisfaction of the Registrar, that he or she meets each of the competencies to the extent necessary to provide immigration advice on limited specified matters without supervision.

Full licence

An applicant must demonstrate, to the satisfaction of the Registrar, that he or she meets each of the competencies to the extent necessary to provide immigration advice on all matters without supervision.

Section 20 of the IAL Act allows the Registrar to be satisfied of an applicant's competence by means of an examination. Where an applicant holds an approved entry course or qualification, the Registrar may be satisfied, in the absence of information suggesting otherwise, that the applicant meets specific competencies for the type of licence being applied for.

2.4.4.3. United Kingdom

The OISC has divided immigration advice and services into three Levels depending on the type and complexity of the work involved. The competence requirements increase with the intricacy of the work.

The three OISC Levels of immigration advice and services are as follows:

- Level 1 – Advice and Assistance
- Level 2 – Casework
- Level 3 – Advocacy and Representation.[104]

There are three categories of work within the levels: 'Immigration', 'Asylum and Protection' and 'Judicial Review Case Management'. Only Level 3 advisors are eligible to apply for approval in the 'Judicial Review Case Management' category. While advisers do not need to be competent in all categories at their particular Level, all Level 2 and 3 advisers must have a sufficient awareness of all remedies that may be available to their client regardless of the areas of their competence at Level 2 or 3.

The three categories of work include the following:

- Immigration:
  - applications for, or for the variation of, entry clearance or leave to enter or remain in the United Kingdom
  - unlawful entry into the United Kingdom
  - nationality and citizenship under United Kingdom law

[101] NZIAA (n.d.), *Licensing* [online document], New Zealand Government, accessed 2 December 2020
[102] NZIAA (2016), *Immigration Advisers Competency Standards 2016* [online document], New Zealand Government, accessed 1 December 2020
[103] NZIAA (2020), Upgrade [online document], New Zealand Government, accessed 22 March 2021
[104] OISC (2017:5-19) *Guidance on Competence* [online document], GOV.UK, accessed 10 October 2020

- admission to, residence in and citizenship of Member States of the European Union under European Economic Area Regulations[105]

- Asylum and Protection:
  - applications for Asylum and Humanitarian Protection
- Judicial Review Case Management:
  - use of the Bar Standards Board's Licensed Access Scheme to appoint barristers who can undertake both the litigation and advocacy elements of a Judicial Review application on behalf of their clients.

The OISC has advised the tiering system allows advice seekers to select an adviser appropriate to the complexity of their case and provides some price differentiation. It also allows some organisations to provide straight forward services without the need for understanding all aspects of the immigration law.

2.4.5. Matter for public feedback

We welcome the public's feedback on the following reform option:

2.4.5.1. Implement a tiering system to provide better protection for consumers and a supportive framework for professionalisation of the migration advice industry.

A tiering system would be most effective if implemented in conjunction with other key reform recommendations, particularly the provisional licence with supervision requirement and the CPD recommendations outlined in Chapters 1.3 and 2.5.

A comprehensive plan would be developed in consultation with industry to fully articulate the tiering structure, industry requirements, and legislative and financial implications.

The implementation of an ongoing tiering system would be overseen by the industry regulator.

2.4.5.1.1. *Conditions for each tier*

Tier one: a 12-month provisional licence during which an RMA could be permitted to provide immigration assistance only under supervision of an experienced RMA or a relevant legal practitioner and in relation to applications to the Department and related matters. Applying for a provisional licence would be conditional on first obtaining the prescribed qualifications, securing the supervision of a to-be-specified higher tier RMA or an unrestricted legal practitioner, and both parties meeting the integrity requirements.

Tier two: generalist RMAs who provide immigration assistance in relation to applications to the Department and related matters. An RMA could practice at tier two on successful application to the regulator, if they have fulfilled the requirements of their provisional licence, including supervision and CPD requirements for transitioning to tier two, or are a legacy RMA assessed as suitable for the tier. An RMA could remain at tier two if they meet annual CPD requirements for tier two RMAs.

RMAs could elect to remain in tier two indefinitely, subject to maintenance of their registration and meeting annual CPD requirements, and the ongoing absence of upheld complaints or sanctions against them, or successful prosecutions for criminal activity, including in relation to immigration assistance.

Tier three: specialist RMAs who have completed prescribed CPD on providing immigration assistance with applications to tribunals and related matters. An RMA could practice at tier three on successful application to the regulator, if they:

- have completed a minimum period of practice at tier two (exceptions will apply in certain circumstances), and
- have completed tier three preparation CPD units and/or relevant experience via a supervision arrangement or a work placement, or
- are a legacy RMA assessed as suitable for tier three.

[105] As at 2017; this item may not reflect policy following the United Kingdom's departure from the EU.

An RMA could remain at tier three subject to maintenance of their registration and meeting annual CPD requirements, and the ongoing absence of upheld complaints or sanctions against them, or successful prosecutions for criminal activity, including in relation to immigration assistance.

The delineation between the tiers proposed in *Table 10* would be reflected in the OCS or a similar document.

Table 10: Proposed delineation between the tiers

Tier 1	Tier 2	Tier 3
Supervised	**Unsupervised**	**Unsupervised**
Applications to the Department and related matters • preparing, or helping to prepare, a sponsorship, nomination or visa application • advising about a sponsorship, nomination or visa application • advising in connection with visa cancellation or sponsorship compliance matter • preparing, or helping to prepare, a document in connection with any of the above, and • representing them in matters before the Department in connection with any of the above.		Tier 1 and 2 matters and: ***Applications to Tribunals and related matters*** • Review application matters to be lodged, or being considered by the AAT MRD or the IAA: • preparing, or helping to prepare, that review application • advising about that review application • preparing, or helping to prepare, a document in connection with that review application, and • representing clients in matters before the AAT MRD or the IAA. ***Ministerial intervention requests:*** • preparing, or helping to prepare, a request to the Minister to exercise his or her power under sections 351, 417 or 501J of the Act • preparing, or helping to prepare, a representation to the Minister to exercise the Minister's power under subsections 501C(4) and 501CA(4) • preparing, or helping to prepare, a request to the Minister to exercise the Minister's power under sections 195A, 197AB or 197AD of the Act, and • advising or making representations on behalf of, a person in connection with any of the above.

2.4.5.1.2. *Other models*

Introducing a provisional licence including supervised practice in itself creates a two-tier framework, but does not adequately recognise the high degree of complexity and professionalism required to make representations at the AAT MRD, the IAA, or to the Minister.

Consideration has been given to a three-tier model that further restricts:

- those in tier one (provisional licence under supervision) to assisting in only relatively straightforward visa applications, for example student, tourist and skilled visas, family and employer-sponsored migration
- those in tier two from providing advice on protection and humanitarian visas (as well as matters before the AAT, IAA, or the Minister).

Subject to the public's feedback, it is proposed not to pursue this model, to enable provisional licensees to gain critical exposure to and experience in a broad spectrum of immigration assistance with the close supervision and support of a highly experienced RMA.

2.4.5.1.3. *Components to be further considered in collaboration with industry and other stakeholders*

The following is a non-exhaustive list of elements for further consideration and consultation:

Legacy RMAs: All existing RMAs at the defined date would be nominally allocated to tier two or three, depending on their experience and absence of complaints. To be allocated to tier three, an RMA would be required to demonstrate their prior experience with AAT representations and Ministerial interventions, and absence of recent constructive complaints and investigations.

Consideration could be given to the circumstances in which the minimum period for remaining in tier two would be waived, both at the commencement of the tiering system and on an ongoing basis. The Department would also collaborate with industry in determining the transition process and timeframes for legacy RMAs, and ensuring adequate guidance and support is provided to adapt to the new approach.

Non-commercial RMAs (tiers one and two): The tiering system would be designed in a way that does not unduly impact the immigration assistance available to clients of non-commercial/non-profit organisations. Further consultation will be taken with those organisations during the design and implementation phases.

Part-time RMAs: Consideration could be given to adjusting timeframes associated with tier one and two for part-time RMAs and other specified cohorts, for example a pro-rata arrangement.

Sanctioned RMAs: Subject to further consideration, provisionally licensed RMAs who are subject to disciplinary action may need to recommence their provisional licence period, including supervision, following their period of suspension (where applicable). Suspended tier two and three RMAs would return to either tier one or two, depending on the severity of their misconduct. Should a former RMA who has been barred from being an RMA seek to return to the industry, they would re-enter at the tier one level on a provisional licence and under supervision.

Publishing/promotion of a tier allocation: Updating the Register of Migration Agents to include an RMA's assigned tier would assist consumers to select an RMA who meets their specific needs, and allow experienced RMAs to demonstrate their credentials. Consideration would be given to a requirement for RMAs to publish their assigned tier and what immigration assistance it entitled them to provide.

Additional tier three elements – CPD: The Department would fully consult on the design implications of allowing only tier three RMAs to provide CPD training, and other core elements of a revised CPD framework that provide the best outcomes under a holistic tiering framework.

Additional tier three elements – supervision: The Department would fully consult on the design implications of allowing only tier three RMAs to supervise provisional licensees. Exemptions could be available on application, for example, for small and/or regional practices, whereby supervisors could be on tier two under tailored arrangements. It would also be considered whether legal practitioners would need to demonstrate their experience in migration law to qualify as supervisors for tier one RMAs.

Arrangements for former migration agents returning to the industry: it could be considered whether an RMA who has taken a break may be placed to the same tier they occupied prior to the break. They may be required to undertake a refresher course of CPD to prepare them to practice.

Identifying RMAs practicing outside their tier: the system would include a mechanism for identifying RMAs practicing outside their tier.

2.5. Enhanced proficiency through Continuing Professional Development

2.5.1. Executive summary

A CPD framework is a key tool in ensuring that RMAs develop and maintain a sound working knowledge, and in ensuring consumer protection. JSCOM's inquiry report recommended that 'the Australian Government, in consultation with relevant migration agent peak bodies, undertake a review of the current registration requirements for migration agents, having regard to …technical proficiency through education'.[106]

There may be potential to:

- introduce quality control requirements for CPD activities, such as limiting the number of CPD points delivered in one day, requiring RMAs to prepare CPD plans, introducing minimum requirements for a refund policy and occupational competency standards for particular areas of practice, and requiring providers to:
  - link activities to the OCS framework
  - mark CPD offerings according to their complexity
  - have a certain level of experience in the subject before delivering a CPD course
- clarify the CPD provider standards, including the meaning of 'interactive' and 'workshop' and other potential ambiguities
- increase the number of compliance audits of CPD providers and make the audit results publicly available.

If a tiering system was implemented, the CPD framework could also support a defined career pathway for RMAs who are new to the industry or who would like to specialise in tribunal representation, supporting all RMAs to provide higher quality assistance in more complex fields through targeted training. The knowledge requirements would be prescribed in the OCS.

2.5.2. Overview of the CPD framework

2.5.2.1. CPD requirements for RMAs

As defined by the London School of Business and Finance, 'CPD refers to the process of training and developing professional knowledge and skills through independent, participation-based or interactive learning. This form of learning allows professionals to improve their capabilities with the help of certified learning. CPD courses for professionals should reflect their current expectations as well as future ambitions'.[107]

CPD is particularly important for RMAs because of the complexity and changeable nature of migration legislation. CPD is the only mode of ongoing compulsory education for RMAs after the completion of the knowledge requirements to enter the industry. As such, CPD is a key consumer protection that aims to prevent or reduce the instances of incompetent conduct by RMAs that may lead to adverse consequences to consumers, such as the loss of migration opportunities, time and financial resources, as well as emotional impacts.

To renew their registration, an RMA must complete CPD activities worth a combined total of at least 10 points in the 12 months before applying to re-register, except if they are a restricted legal practitioner. The OMARA recommends RMAs complete their CPD activities at least eight weeks before their registration expires.

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[106] JSCOM (2019:xv) *Report of the inquiry into efficacy of current regulation of Australian migration and education agents* [online document], Commonwealth of Australia, accessed 9 November 2020

[107] Mehta V and Campos, L (2019) *What is the Purpose of Continuing Professional Development (CPD)?* [online document], London School of Business & Finance, accessed 9 November 2020

The activities fall into two categories (A and B) and are assigned points upon completion. RMAs must accumulate at least five CPD points each year from Category A activities in order to meet the CPD requirements to re-register.

Category A activities include:

- participation in workshops on specific subject matter such as updates to visas or migration law, labour agreements, ethics and professional practice
- completing units in a course relating to Australian migration law at the Graduate Certificate, Graduate Diploma, Bachelor Honours Degree, or Masters Degree level.

Prior to the introduction of the Graduate Diploma in 2018, the Category A activities included the Practice Ready Program (PRP), which required 30 hours of tuition, a maximum of 30 participants per class, and assessment activities for all of the OCS framework.

Category B activities include participation in seminars, conferences, lectures, or undertaking a prescribed number of hours of private study (e-learning).

Category A workshops attract one point per hour, whereas category B activities attract one point per 1.5 hours. The key difference is that Category A workshops are required to be interactive.

2.5.2.2. CPD provider requirements

All CPD providers must be approved by the OMARA before they can commence delivering CPD activities. Conditions for approval are specified in Part 3C of the Regulations. The OMARA establishes the standards and conditions for providers through their CPD Provider Standards, which are set out in Schedule 2 of the CPD Instrument. The standards outline what the OMARA expects of a CPD provider. Further guidance to CPD providers is included in the CPD approval letter the OMARA sends to the CPD provider upon approval (*Appendix D* refers).

2.5.3. Issues in the CPD sector

On 1 January 2018, the role of the OMARA in CPD oversight was significantly changed and somewhat reduced due to legislative changes pursuant to Recommendation 10 of the Kendall Review to create 'a more open and competitive market-based framework for the provision of CPD'.[108]

Whereas previously OMARA delegates decided individual applications for approval of CPD activities, from that date, the OMARA's role became restricted to deciding applications from those seeking approval to deliver CPD. Additionally, the OMARA monitors approved CPD providers against the CPD provider standards.

While some stakeholders have observed that deregulation of the industry has led to the overall reduction of prices of CPD offerings, others have noted a decline in quality. Allowing the CPD delivery industry to largely self-regulate has represented a positive change, consistent with the Government's deregulation agenda. However, the migration advice industry may benefit from enhanced guidance and further quality controls within the CPD framework.

As discussed by the MIA in 2018, 'adherence to the provider standards would appear to be being exploited with impunity by some providers. This has occurred in part because Recommendation 10 [of the Kendall Review] concentrates on the monitoring compliance role served by the OMARA on the consumers of CPD provision, registered migration agents, with little attention to the compliance of CPD providers'.[109]

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[108] Kendall, Dr C N (2014:29) *2014 Independent Review of the Office of the Migration Agents Registration Authority* [online document], Home Affairs, accessed 10 September 2020

[109] MIA (2018:3-4) *Inquiry into the efficacy of regulation of Australian migration agents – Supplementary submission* [online document], MIA, accessed 10 September 2020

The OMARA, in its 2014 evidence to the Kendall Review, noted there was significant variability in the quality and relevance of activities that are submitted for consideration by the OMARA. A significant proportion of activities required revision, often substantial, to meet the minimum standard for approval as an activity. The OMARA advised the Kendall Review of the risk of decline in the quality of a considerable portion of CPD activities, if it did not have a role in assessing and approving CPD activities.[110]

In addressing this argument, the Kendall Review stated that 'while there is clearly a role for the OMARA to play in determining who can offer CPD and what core subject areas should be offered to ensure consumer protection, the Inquiry rejects any suggestion that the OMARA needs to continue micro-managing how CPD programmes are structured, taught and assessed'.[111]

2.5.4. Comparison with relevant international regulatory frameworks

Australia, Canada, New Zealand and the United Kingdom have comparable CPD schemes for migration agents. In summary:

Australia	Canada	New Zealand	United Kingdom
10 points per year – 12.5 minimum hours – mandatory Ethics or Code of Conduct points required.	16 hours per year.[112] Beginning in 2022, CPD activities will be based on identified skills/knowledge requirements	20 hours per year[113]	The number of hours is not prescribed, CPD activities are undertaken based on the identified skills/knowledge requirements.[114]

2.5.4.1. Canada

Under the ICCRC's new Quality Management Program, ICCRC has broadened the definition of CPD activities to include self-assessment and learning plans based on competency needs, growth and gaps. The annual requirement includes self-directed learning on topics identified through complaints and system trends. Review and revision of the CPD program accreditation process is in progress.

2.5.4.2. New Zealand

In New Zealand, advisers are required to undertake activities and maintain records of CPD in accordance with the requirements outlined in the CPD toolkit. The NZIAA offers several webinars each year. All advisers, whether based onshore or offshore, are required to attend one webinar provided by the NZIAA during each applicable licensing period. Advisers may also undertake CPD activities that are offered by third parties, though they must meet the criteria as set out in the toolkit. A 'frequently asked questions' section is available on the website to assist advisers understand CPD requirements.

2.5.4.3. The United Kingdom

The United Kingdom's CPD Scheme, launched in April 2017, is not prescriptive as to how much or little CPD activity is undertaken by authorised advisers, but a principle based scheme which focuses on the outcomes of learning and development. It places the responsibility on advisers and organisations to demonstrate to the OISC that they are taking action to remain fit and competent in the areas they are authorised to operate in. CPD compliance is being checked through detailed conversations with advisers at premise audits.

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[110] Kendall, Dr C N (2014:99) *2014 Independent Review of the Office of the Migration Agents Registration Authority* [online document], Home Affairs, accessed 10 September 2020
[111] JSCOM (2019:20) *Report of the inquiry into efficacy of current regulation of Australian migration and education agents* [online document], Commonwealth of Australia, accessed 10 September 2020
[112] ICCRC (n.d.) *Continuing Professional Development (CPD)* [online document], ICCRC, accessed 24 August 2020
[113] NZIAA (n.d.) *CPD hours and mandatory activities* [online document], MBIE, accessed 24 August 2020
[114] OISC (2019) *OISC Continuing Professional Development (CPD) Scheme and Guidance Booklet* [online document], GOV.UK, accessed 10 October 2020

2.5.5. CPD audit trends

The OMARA conducted several audits of CPD providers between 2018 and 2020 to ensure that providers understand and comply with the CPD provider requirements. If a provider is found to be seriously non-compliant, delegates may exercise their power under regulation 9T of the Regulations to cancel the approval.

To date, this power has not been used as non-compliance has been minor, such as reporting attendees who did not attend for the full duration of the activity (55 minutes rather than 60 minutes), or reporting attendees outside the required 14-day window. OMARA conducted seven audits in 2018-19, and only four audits in 2019-20. As at 30 June 2020 there were 22 CPD providers.

Some recent CPD trends identified by the OMARA include:

- a move online and away from traditional classroom settings to accommodate social distancing requirements under pandemic public health orders and restrictions
- a move towards workshops and away from seminars, because workshops attract more CPD points than seminars per hour (one CPD point equates to a one-hour workshop or a 1.5-hour seminar)
- a recent increase in the number of new CPD provider applicants
- the PRP is no longer being delivered due to dwindling demand.

2.5.6. Approach to addressing the issues

While it is not proposed to make any changes in the governance of the current framework, including to reinstate the role of the OMARA in deciding CPD activities, there is potential to give the industry the tools to enable it to self-regulate more effectively, and to ensure the appropriate quality of CPD offerings.

2.5.7. Matters for public feedback

We welcome the public's feedback on the following options for reform:

2.5.7.1. Use the CPD system to deliver the required training for any tiering system

Should a tiering system be introduced in any form, there would be a need for targeted education offerings that would allow an RMA to maintain their knowledge at their current tier or to move up to a higher tier. The rationale for introducing a tiering system is to ensure that RMAs have appropriate knowledge and experience to provide their services and are sufficiently prepared to take on more difficult matters.

To ensure consistency of knowledge levels of the RMAs starting to operate at a higher tier, there would need to be standard CPD courses or clear requirements for CPD that would make an RMA eligible to move to a higher tier (in addition to any other requirements being met).

No equivalent model of using CPD as a requirement for moving to a higher level has been identified in other sectors, however, some professions require an additional qualification or examination in order to achieve career progression. This proposal aims to avoid imposing additional educational requirements on RMAs while guiding their CPD choices according to their career goals.

Different tiers of CPD activities would be introduced to reflect tiering of RMAs. The OCS would prescribe the knowledge standards required for each tier. RMAs would undertake CPD units to either maintain competency in the current tier or prepare for a higher tier.

This option may not necessarily require changes to all existing CPD courses. In practice, CPD providers could continue to provide their existing courses (subject to meeting other applicable requirements), but would need to identify each course as appropriate for a particular tier. The proposal would not significantly increase the CPD burden on RMAs, rather, it would ensure RMAs are completing CPD courses appropriate to their level.

There may be a risk of inadequate CPD offerings in the market for different tiers of RMAs. The option would also increase related administrative duties of the OMARA, which would need to monitor the suitability of proposed CPD activities for each tier and monitor whether each RMA has completed suitable activities.

2.5.7.1.1. *Options for using CPD for preparing an RMA for moving to a higher tier*

Option A – repurpose the Practice Ready Program for a tiering system

The PRP is an established CPD activity for RMAs in their first year of practice who have completed the Graduate Certificate, rather than the Graduate Diploma. However, as a result of the prescribed qualification being upgraded from the Graduate Certificate to the Graduate Diploma in 2018, the PRP is no longer a knowledge requirement, and as such, is not currently used in practice.

The PRP is interactive and practical in nature, and requires participants to demonstrate that they have achieved basic competency against all of the OCS for RMAs. Successful completion of the PRP includes assessments to ensure learning outcomes have been achieved by participants, which differentiates it from other CPD activities.

The PRP course is required to:

- be practical and interactive
- include assessment tasks
- include 30 hours of tuition in addition to the time spent on assessment tasks
- have a maximum of 30 participants per class
- assess against all of standards in the OCS framework dated September 2016.

The PRP model could be used within the potential three-tier tiering system to create a course for RMAs moving from tier one to tier two, and a course for RMAs moving from tier two to tier three. The exact structure and point value of the courses would be decided in consultation with stakeholders. It is proposed that the CPD courses would be worth five points and modelled on the PRP program, meaning they would be practical and interactive and include assessment tasks. The content of the courses would help RMAs to meet the requisite OCS for moving to higher tiers. The 'practical and interactive' requirement is particularly important, as upon completing the course, RMAs are expected to be competent and confident to represent clients at tribunals independently. Some components of this course could be delivered via work experience placements.

Should a tiering system not progress, the Department would repeal the provisions prescribing the PRP in the CPD Instrument given the PRP is not currently used in practice.

Option B – prescribed requirements for moving to a higher tier

Another approach would be to allow CPD providers to develop CPD activities that would meet the requirements prescribed by the OMARA for each tier, and not require them to be modelled as a PRP. The main difference is that the PRP includes assessment tasks, which other CPD activities are not required to include. This option provides more flexibility to CPD providers to design the CPD activities and would allow the existing CPD activities to be used as activities for moving to a higher tier, provided they are linked to the relevant OCS. However, the disadvantage of this approach is not having assessment tasks that serve as assurance that the RMA has grasped the material and is able meet the minimum OCS required for moving to a higher tier. The absence of assessment may arguably impact on development outcomes and the effective monitoring of the industry's growth towards being a world class profession, particularly against the 5E criteria of Examination referred to in this report's introduction.

Option C – allowing RMAs to take any CPD activities from a higher tier as a prerequisite to moving to that tier

This approach would offer more flexibility to RMAs, however, it would be more difficult to ensure all entrants to a higher tier receive relevant training covering all basic concepts for the higher tier, which could undermine the purpose of the tiering system. Also, given the choice of any activity from a higher tier, an RMA may choose an activity that is low in cost and convenient to attend, and either does not cover the basic concepts that RMAs need to learn to move to that tier, or is too advanced for their level.

2.5.7.1.2. *Education requirement to move to a higher tier in other professions*

In the Australian legal profession, a legal practitioner has a choice to practice as a solicitor or as a barrister, the latter being a specialist advocate skilled in oral presentation and argument. Barristers are allowed to work entirely independently. To become a barrister in NSW, a legal practitioner is required to sit and pass a Bar exam with a mark of 75 per cent, complete a one month-long Bar Practice Course and complete a 12 months' reading period with one or more barristers (tutors) of not less than seven years' standing.[115]

In the Australian nursing profession, there are two levels of regulated nurses – Registered Nurses and Enrolled Nurses. Enrolled Nurses have completed a Certificate IV or a Diploma in Nursing and are registered with the Nursing and Midwifery Board. Registered Nurses are nurses who have completed a minimum three-year bachelor degree in nursing and have passed a national licensing exam to obtain a nursing license, and are registered with the Nursing and Midwifery Board. [116]

In the United Kingdom's migration advice industry, candidates for moving to a higher level within the migration profession (level 2 or 3) are required to undertake formal written competence assessments. It is noted, however, that migration advisors in the United Kingdom are not required to obtain any formal qualifications.

2.5.7.1.3. *Stakeholder views*

Fifteen out of the 17 discussion paper submissions relating to CPD argued for reform. Seven of these proposed categorising CPD activities in some way. Astute stated that 'for a majority of experienced industry professionals, CPD has been reduced to a matter of paying $500 each year with no invested interest in the content of the actual course, as it is not challenging enough. Issues of visa validity and general eligibility criteria are not that important for someone with more than five years' experience'. Astute proposed the introduction of different or additional CPD levels to address RMAs' differing levels of experience and needs.

The MA proposed 'consideration at least be given to the development of specific "tiers" of CPD that reflect the level of expertise of the RMA'. MA provided the results of a survey of its members, which included the question 'if tiering is introduced into the RMA profession, how do you think RMAs should be tiered?'.

The question was answered by 387 respondents; the most popular option was to tier RMAs based on the time in the industry (ranking score 3.0), while the second most popular option was to enable tiering by 'attending tiered CPD activities to demonstrate competence to enter higher tiers' (ranking score 2.7).

Mr Jack Li and Ms Monica Gruszka proposed introducing five specialised CPD areas, based on visa types, and ensuring RMAs take CPD units out of each visa type every year.

The LCA suggested the 'CPD framework should be revised in accordance with the proposed tiered registration system to facilitate the provision of more targeted CPD to RMAs' but stated the CPD system 'should not be designed to cater to RMAs seeking career progression to Tier 2 or 3'.

Confidential submissions proposed a similar weight or structure be given to a CPD program as for any tiered system of registration or recognition that is introduced, and advocated for increased CPD in the area of merits review, representation and advocacy.

The AAT stated that one of the benefits of a tiering system is enabling the tailoring of CPD syllabus content to better meet the requirements of RMAs engaged in work relevant at each tier. The AAT also noted that 'a higher standard of knowledge, skill and experience could reasonably be expected of practitioners who intend to hold themselves out in the marketplace as capable of providing advice and assistance in the more complex or exceptional cases'.

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[115] NSW Bar Association (2017) *Guide to becoming a barrister in New South Wales* [online document], NSW Bar Association, accessed 17 December 2020

[116] Queensland Health (n.d.) *Career Structure, Nursing* [online document], Queensland Government, accessed 17 December 2020

2.5.7.2. Introduce quality controls for CPD activities to address issues identified in CPD audits conducted by the OMARA since the introduction of the new system in 2018 and the issues raised by stakeholders

The policy intention for CPD is that it provides an essential educational opportunity to ensure RMAs develop and maintain current knowledge of their legal responsibilities, and that they engage in routine professional development.

Some stakeholders expressed the view that CPD courses are often seen by RMAs and CPD providers as a mere formality required for renewal of migration agent registration, rather than a genuine educational opportunity. Related concerns have been expressed in discussion paper submissions about the purpose and outcomes of single day intensive courses.

Quality controls could be introduced for CPD providers, CPD courses, and RMAs. While it would be the responsibility of the industry participants to meet the quality requirements, the OMARA, as the industry regulator, would play a critical role in establishing controls and ensuring compliance.

Potential quality controls include:

- a limit on the number of CPD points obtained in one session, or in one day, to prevent providers from offering a '10-point CPD day', whereby all annual CPD is delivered in one day with minimal breaks. Research shows that 'cognitive fatigue should be taken into consideration when deciding on the length of the school day and the frequency and duration of breaks throughout the day'.[117]
- OCS for each area of practice (e.g. family visas, protection visas, review applications) or for each tier, should a tiering system be introduced, and a requirement for CPD activities to be linked to these OCS.
- a compulsory CPD plan for each RMA that would require them to consider their educational needs for the year ahead, and list the relevant OCS. The RMA would be required to submit the plan to the OMARA with their registration renewal forms.
  - RMAs would further be required to reflect on the CPD course they undertook and describe how they applied it in their work. This would be particularly useful for RMAs who were previously sanctioned.
  - This approach would align with that of the United Kingdom and New Zealand, which require RMAs to prepare a CPD plan at the start of the year. In Canada, an agent is required to prepare a remedial CPD plan if they wish to be reinstated after having been suspended.
- a requirement for CPD providers to mark CPD offerings according to their complexity. To maximise the value of a CPD unit, it would be useful to mark the level it is recommended for, for example 'recommended for beginners/experienced RMAs/those who specialise in tribunal representation'. This would be especially recommended for the one-point CPD activity on Ethics and Professional Practice, or Understanding the Code of Conduct, which RMAs are required to complete every year.
- introduce the requirement for a CPD provider to have a certain level of experience in the subject they would like to deliver a CPD activity on and/or be in the higher tier, should a tiering system be introduced.
- introduce a requirement for a CPD provider to have a refund policy to enable consumers to make informed decisions.

2.5.7.3. Creating a world class migration advice industry (2020)

Mr Michael Sestak stated that a 'one day per year CPD program, which awards the necessary 10 CPD points required for renewal of migration agent registration is not sufficient'. Similarly, Mr Philip West proposed to 'not allow this to be done in a one day 10 point CPD class. I really question the learning achieved in a one-day intensive [CPD] and that this one day provides all the [CPD] learning that a fully-engaged and competent RMA needs'.

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[117] Sievertsen HH, Gino F and Piovesan M (2016), *Cognitive fatigue influences students' performance on standardized tests* [online document], Proceedings of the National Academy of Sciences of the United States of America, accessed 16 December 2020

The MIA recommends 'CPD activities policy and guidelines be urgently developed by the OMARA setting out the minimum requirements for each CPD category and each CPD format, to provide benchmark standards across CPD offerings'.

A confidential submitter stated some CPD providers were low quality, and that 'CPD providers should go through serious screening and should have significant practical experience'.

Astute stated 'the competency standards at the moment are somewhat non-existent. The [OCS] framework is not a feature of every day practice and I have never attended a CPD program which clearly advertised what skills and knowledge would be addressed in accordance with that framework'.

2.5.7.4. Clarify the CPD provider standards, including the meaning of 'interactive' and 'workshop' and other potential ambiguities

Some stakeholders have flagged that CPD provider standards lack clarity, for example, the meaning of 'interactive' and 'workshop' are not defined. This lack of clarity has potentially contributed to the lowering of the CPD standards in the industry.

2.5.7.4.1. *Stakeholder views*

MIA was the only stakeholder that provided a relevant submission response to the discussion paper. MIA stated the changes to the 'CPD legislation' (most likely the CPD Instrument) have rendered parts of the CPD Provider Standards ambiguous and imprecise, and have allowed the standard of CPD provision to fall. This is most clearly demonstrated by the difference between Category A and Category B activities.

MIA advises that 'without any definition of what constitutes 'interactive' elements of Category A activities in the legislative instrument of regulations, neither providers, RMAs or the OMARA have any current benchmark by which to determine whether an activity meets or does not meet this requirement. As such, there is no effective method for either consumers or the OMARA to differentiate Category A workshop content from that of Category B seminars'.

MIA also noted that 'with higher points for the shorter time attended, strong demand has been created for the shorter Category A activities. By way of illustration, a search of the OMARA website on 17 July 2020 provided 460 advertised Category A CPD workshops from that date for the ensuing six months. Only 10 Category B CPD seminars were listed for the same period'.

2.5.7.5. Increase the number of CPD provider compliance audits conducted by the OMARA and make the audit results publicly available, ensuring that the publication is compliant with the *Privacy Act 1988* and the ABF Act

Some stakeholders have advised that the OMARA ceasing its role as an approver of CPD activities has resulted in a lack of compliance by some CPD providers with the relevant standards. The Department and ABF's joint submission to JSCOM noted 'new CPD arrangements commenced on 1 January 2018. As a part of developing a Compliance Strategy, plans are underway to review these arrangements progressively over the next two years by undertaking audits of the CPD providers' operations. There will be data available on complaints and monitoring outcomes to measure the impact of this measure from the beginning of 2020'.[118]

The audits were conducted by the OMARA, but the information has not been published, which led some industry representatives to believe the CPD framework has not been properly monitored by the OMARA.

The information obtained from an audit of a CPD provider (particularly if it was adverse information) may be characterised as information, the disclosure of which would, or could reasonably be expected to, cause competitive detriment to a person. As such, the information would be Immigration and Border Protection information for the purposes of the ABF Act and could only lawfully be disclosed if the disclosure met an exception in Part 6 of that Act. Pursuant to the legislative limitations on the disclosure of information, consideration would be given to how the audit results may be published.

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[118] JSCOM (2019:5) *Report of the inquiry into efficacy of current regulation of Australian migration and education agents* [online document], Commonwealth of Australia, accessed 10 September 2020

This option could benefit the industry and consumers through increased oversight of the CPD providers by the OMARA, and higher compliance with CPD provider standards. Publishing audit results of CPD providers would increase transparency about the quality of CPD providers, and encourage them to comply with CPD provider standards to prevent reputational risks.

2.5.7.5.1. *Stakeholder views*

In its submission to the JSCOM Inquiry, the MIA recommended the OMARA be provided with sufficient resources to protect consumers by enabling regular and sufficient compliance monitoring of CPD providers and CPD course offerings. A confidential submission to the discussion paper also suggested that ‘resources be provided to the OMARA to conduct an audit of existing CPD providers’.

Theme Three: Combatting misconduct and unlawful activity

3.1. Immigration assistance: definition and scope

3.1.1. Executive summary

There is potential for a range of amendments to Part 3 of the Act to clarify the definition and scope of immigration assistance (the definition). This chapter also outlines options for addressing the areas of Part 3 of the Act that can be taken advantage of by dishonest persons, and which are not included in the other chapters of the report.

The definition is one of the central concepts in the migration advice framework. It outlines the scope of work that only RMAs, exempt persons and Australian legal practitioners, can perform lawfully.

The following categories of reform have been examined, and options identified:

3.1.1.1. Potential for unlawful immigration assistance to be disguised as clerical work

Part 3 of the Act could be amended to provide:

- that clerical work in relation to a visa application can only be provided under the supervision of an RMA or a legal practitioner
- a definition of the term 'clerical work'
- rename 'clerical work' to 'administrative assistance' or a similar modern term
- a limit on the number of clerical workers that an RMA can supervise.

The Department does not recommend amending the Act to place the evidential burden on the defendant, rather than the prosecution, to prove that the defendant was not providing immigration assistance and merely provided clerical work.

3.1.1.2. Address the use of business structures to avoid responsibility for misconduct

Consideration could be given to placing a limit on the business models an RMA can enter into to ensure there is always at least one RMA legally and ethically responsible for each matter; being a sole practitioner, a partner or a supervising/principal practitioner.

3.1.1.3. Clarify the law

Potential measures to clarify the law include:

- a new factsheet to help RMAs distinguish between general assistance with the *Australian Citizenship Act 2007* (Citizenship Act) and legal advice on the Citizenship Act
- making changes and clarifications to current exemptions within the Act and Regulations, including removing exemptions that involve risks to vulnerable visa applicants, clarifying the terminology and removing redundant provisions
- replacing the terms 'visa applicant' and 'cancellation review applicant' with 'person' to ensure the terminology covers the full breadth of immigration assistance.

The Department does not recommend removing references to 'court' from the definition, given RMAs may still have a legitimate supporting role in preparing for court proceedings.

The definition of immigration assistance could also be simplified as part of implementation of other reforms that may result in the redrafting of Part 3 of the Act.

3.1.2. Matters for public feedback: Addressing the potential for unlawful immigration assistance to be disguised as clerical work

We welcome the public's feedback on the following options for reform:

3.1.2.1. Reframe the 'clerical work' exception to require supervision and replace 'clerical work' with 'administrative assistance'

The definition is contained in section 276 of the Act. Subsection 276(3) states that 'a person does not give immigration assistance if he or she merely does clerical work to prepare (or help prepare) an application or other document'. However, the term 'clerical work' is not defined in the Act. The ambiguity of the meaning of 'clerical work' may allow unlawful providers of immigration assistance to disguise their activity under the banner of 'clerical work'.

In its submission to the JSCOM inquiry, the MIA reported 'wide spread unregistered practice associated with the education agency industry', further elaborating:

> 'Rogue education agents operate in a segment of the market where the legislative interpretation of what constitutes the difference between immigration and clerical assistance is either largely misunderstood or blatantly ignored. MIA members report that education agents prepare and lodge student visa applications, and then later employment and permanent residence visas once these students have completed their studies. These education agencies appear to do this with impunity.[119]

Their discussion paper submission reiterated these concerns, stating that education agents 'consistently and deliberately cross from clerical assistance to the students with their visa applications to providing immigration assistance'. Mr Philip West described in his discussion paper submission how he believes education agents get away with this conduct: 'The student signs Form 956A – which only provides the [Education] Agency with authority to receive communication from the Department. But, they see this as the same as a Form 956. They complete the on-line forms, but say this is just "clerical" support.'

It may be beneficial to amend the Act to provide that clerical work in relation to a visa application can only be provided under the supervision of an RMA or a legal practitioner. There is also potential to introduce a definition of the term 'clerical work' in the Act or the Regulations, rename 'clerical work' to 'administrative assistance' or a similar modern term, and introduce a limit on the number of clerical workers and RMA can supervise.

3.1.2.1.1. *Make the clerical work exception apply only to persons that are supervised by an RMA or a legal practitioner (with exceptions)*

Clerical work 'to prepare (or help prepare) an application or other document' is often closely related to immigration assistance. While simply helping a person to fill in an application form or passing on information about an application without comment or explanation are examples of clerical work, advising a person what visa they should apply for and providing advice in relation to their application would constitute immigration assistance. As flagged by stakeholders, this fine line is often crossed by those who are not permitted by law to provide immigration assistance.

Due to the close connection between clerical work and immigration assistance, it would be useful to specify that a person can provide clerical work only under the supervision of an RMA or a legal practitioner providing immigration assistance in connection with legal practice.

This option is not intended to disrupt the work of genuine providers of clerical assistance, such as Service Delivery Partners (SDPs) who assist visa applicants offshore to fill in paper applications or set up ImmiAccounts – this would be reflected in the design of any subsequent legislative amendments. Instead, it aims to address potential misuse of the clerical work exception by those who try to disguise unlawful onshore or unregistered offshore immigration assistance.

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[119] JSCOM (2019:51) *Report of the inquiry into efficacy of current regulation of Australian migration and education agents* [online document], Commonwealth of Australia, accessed 10 September 2020

If this option was implemented, unlawful and offshore providers of immigration assistance would not be able to use the clerical work exception, unless they are employed and supervised by an RMA or a legal practitioner, in which case the RMA or legal practitioner would have to lodge the visa application from their own ImmiAccount. The risks associated with the work performed by a clerical worker would be borne by the supervising RMA or legal practitioner.

3.1.2.1.2. *Introduce a definition of 'clerical work', including listing particular acts*

The proposal is to amend Part 3 of the Act to clarify what 'clerical work' means, or to introduce a definition that includes a list of specific acts that constitute 'clerical work' and could be based on the following definitions:

- the *Migration Agents Instructions* in the *Procedures Advice Manual*, clarifies subsection 276(3) of the Act and includes examples of clerical work as 'typing, photocopying or collating documents'[120]
- definitions contained in the *Clerks – Private Sector Award 2020* provide that 'clerical work includes recording, typing, calculating, invoicing, billing, charging, checking, receiving and answering calls, cash handling, operating a telephone switchboard, attending a reception desk and administrative duties of a clerical nature'[121]
- in New Zealand, section 7 of the *Immigration Advisers Licensing Act 2007* (NZ) provides that 'immigration advice' does not include 'carrying out clerical work, translation or interpreting services, or settlement services.' Section 5 provides the definition of 'clerical work', which lists specific acts that constitute 'clerical work', making it more precise:

  'Clerical work means the provision of services in relation to an immigration matter, or to matters concerning sponsors, employers, and education providers, in which the main tasks involve all or any combination of the following:

  a. the recording, organising, storing, or retrieving of information
  b. computing or data entry
  c. recording information on any form, application, request, or claim on behalf and under the direction of another person'.

3.1.2.1.3. *Replace the term 'clerical work' with 'administrative assistance'*

The term 'clerical work' can be perceived as old-fashioned. The new term would make it clear that the old 'clerical work' exception no longer exists, and there is a new 'administrative support exception', which is different in scope. Also, the word 'assistance' emphasises the fact that the work is performed to assist another person, and cannot be performed without their instruction.

3.1.2.1.4. *Limit the number of clerical workers that an RMA can supervise*

To avoid an unintended outcome of an RMA claiming to supervise a large number of administrative assistants, a limit on the number of clerical workers (or administrative assistants) that an RMA can supervise could be introduced.

Case study 1: RMAs supervising a large number of unregistered agents

An RMA employs between 12 and 20 staff who are not RMAs, but who all seem to provide immigration assistance. The staff's work includes meeting clients, advising what visas they would be eligible for, telling clients what documents to provide, lodging applications and getting the RMA's sign off on the agreement for services and fees. The agent maintains that he checks everything and holds daily meetings with his staff, however it is unrealistic for one RMA to properly supervise this number of staff members.

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[120] Migration Agents Instructions, *Working with the Migration Advice Industry*, reissued 01 July 2019, available on LEGENDcom and LexisNexis

[121] Fair Work Ombudsman, *Clerks—Private Sector Award 2020, clause 2* [online document], Australian Government, accessed 25 September 2020

3.1.3. Matters for public feedback: Address the use of business structures to avoid responsibility for misconduct

We welcome the public's feedback on the following options for reform:

3.1.3.1. Address the use of business structures to avoid responsibility for misconduct

The framework governing RMAs in Part 3 of the Act applies only to individuals, which means the OMARA's disciplinary powers cannot be exercised against businesses. Currently, the OMARA cannot sanction businesses for breach of the Code. Certain business structures can be used to avoid providing records to the OMARA and evade disciplinary actions for misconduct. Even though different business structures are referred to generally in section 278 of the Act, which concerns relation by employment, the definition of 'related by employment' is used in the Act in the context of disciplining RMAs who are related by employment to an individual who is not a person of integrity.

Amending the Act to apply to all businesses, and not just individuals providing immigration assistance, would increase consumer protections for clients who were given incorrect advice, by holding the correct person accountable for the conduct. It would also remove the potential for misuse of business structures with the purpose of perpetrating misconduct and unlawful activity and preventing the OMARA's access to records.

For RMAs who run businesses that already adhere to the requirements of the Code, the increase in regulatory burden would be minimal. For RMAs who struggle with their obligations, the increase in the regulatory burden (or their exit from the industry) would strengthen the integrity of the industry. The approach to regulation could be modelled from the Australian legal profession or the United Kingdom migration profession.

3.1.3.1.1. *Review recommendations and stakeholder views*

Both the Kendall and Hodges reviews supported this change. The Kendall Review (2014) recommended 'in order to ensure that the clients of all businesses are protected, the relevant legislation, practices and policies that govern migration agents should apply to all business structures.[122] The Hodges Review (2008) recommended 'amendments be made to ensure that provisions apply to all businesses (not just individuals) that are involved in the provision of immigration assistance'. [123]

EY stated in their submission to the Kendall Review:

> 'The current legislative scheme places an unrealistic burden on employee agents and curtails the ability of the OMARA to properly protect members of the community who use the services of businesses run by persons who are not registered agents'.

EY also noted 'the legislation should be amended to acknowledge different business structures and employment arrangements that operate in the commercial provision of migration assistance'.[124]

In their discussion paper submission, LCA recommended 'the scope of the regulatory scheme be broadened such that organisations offering immigration assistance to consumers must also be registered', noting its concern that the use of business structures effectively disabled the OMARA from investigating allegations of misconduct. LCA provided the following examples:

- 'Eddie Kang'[125] scenario
  - A scenario summarised by the LCA in their discussion paper submission: 'an Australian company is incorporated without any of the company directors being an RMA. That business advertises migration

[122] Kendall, Dr C N (2014:29) *2014 Independent Review of the Office of the Migration Agents Registration Authority* [online document], Home Affairs, accessed 10 September 2020
[123] Hodges, J (2008:13) *2007–08 Review of Statutory Self-Regulation of the Migration Advice Profession* [online document], Commonwealth of Australia, accessed 12 January 2021
[124] Kendall, Dr C N (2014:79) *2014 Independent Review of the Office of the Migration Agents Registration Authority* [online document], Home Affairs, accessed 10 September 2020
[125] For more detail about the Eddie Kang case, refer to Cannane S and Karagic D, *Serial conman Eddie Kang up to old tricks ripping off vulnerable students* [online document], ABC, accessed 25 November 2020, and other related media articles.

services and contracts with end-user clients to provide those services. The company then subcontracts that work to an RMA'.

  - Issue: the OMARA is potentially unable to access any records in relation to the matter.

- Migration Agent Registration Number (MARN) farming
  - A scenario summarised by the LCA: 'a business based entirely outside of Australia advertises its ability to provide migration services, contracts with a client outside of Australia and distributes the work to a subcontracted RMA'.
  - Issue: the OMARA is potentially unable to access any records in relation to the matter.
- RMA subcontracting
  - A scenario summarised by the LCA: 'an existing migration agency with RMAs subcontracts work to an external RMA with the visa applications being lodged under the ImmiAccount of the subcontracted RMA'.
  - Issue: a contest can arise as to which RMA holds an obligation to provide records to the OMARA.

As discussed by the LCA in their submission, 'in these and similar situations, in the event of a complaint being made to the OMARA, the RMA who performed the work will commonly have had:

- limited, if any, contact with the client;
- no control over or access to client records such as the client file; and
- no control over or access to accounting records including receipts, clients' account and the like.

As such, the RMA is often not in a position to provide any relevant information and/or records to the OMARA apart from their recollection of events.'

3.1.3.1.2. *Potential mechanism for making the change*

Step 1: Limit types of business structures an RMA can enter into. Example: Australian legal profession model

Limiting the business models an RMA can enter into would ensure that there is always at least one RMA legally and ethically responsible for all aspects of the immigration assistance business, being a sole practitioner, a partner, a supervising/principal legal practitioner, and/or the company director.
The Department recommends using the Australian legal services model as an example to follow in the immigration assistance space.

Legal services in Australia can only be provided through the following structures:

- a sole practitioner operating in their own name
- in the case of a law firm – a partner in a legal partnership
- in the case of a community legal service – the supervising legal practitioner
- in the case of an incorporated or unincorporated legal practice – a legal practitioner who holds an Australian practising certificate authorising the holder to engage in legal practice as a principal of a law practice, and is:
  - if the law practice is a company within the meaning of the *Corporations Act 2001* – a validly appointed director of the company, or
  - if the law practice is a partnership – a partner in the partnership, or
  - if the law practice is neither – in a relationship with the law practice that is of a kind approved by the Legal Services Council under section 40 of the Legal Profession Uniform Law or specified in the Uniform Rules for the purposes of this definition.

As discussed by the LCA, the benefit of these restrictions on the type of business structures is that 'the legal body investigating complaints against an Australian legal practitioner will always have access to records and files relating to the matter under investigation, including financial and file records'.

Step 2: Extend the powers of the OMARA to regulate businesses. Example: the United Kingdom migration industry model

In the United Kingdom, registered advisers are only able to provide advice under organisations that have also been registered with the OISC. For organisations (sole traders, partnerships, companies and charities) seeking to be registered, the OISC assesses the fitness and competence of its owners and managers as part of the initial registration application process and monitors compliance on an ongoing basis.

Registered organisations are required to apply annually for a continuation of their registration which includes detailing all registered advisers attached to their organisation. Once organisations have gained registration, an ongoing assessment of their fitness and competence is carried out through a programme of premises audits, compliance with CPD requirements and the investigation of any complaints received against registered organisations.[126]

The businesses would need to be bound by the Code, which would be amended to ensure the provisions apply to the business structures. Alternatively, it may be possible to amend the Act to give the OMARA a new power to regulate businesses, and introduce new Code provisions. If the model described above was introduced, it should also be made illegal for a business to advertise immigration assistance services, unless it is structured as one of the prescribed models.

3.1.4. Matters for public feedback: Clarify the law

We welcome the public's feedback on the following options for reform:

3.1.4.1. Prepare a factsheet explaining the distinction between general advice and legal advice on the matters under the Citizenship Act

Some stakeholders in the legal profession have raised an issue about whether or not RMAs should be allowed to provide assistance with matters under the Citizenship Act. Advice on matters under the Citizenship Act does not fall within the definition of immigration assistance, therefore, the OMARA does not have powers to sanction RMAs for providing such assistance. While there would be restrictions – at state level – for example on the provision of legal advice or representation at court proceedings by an unqualified person, there does not appear to be any impediment to RMAs providing general (non-legal professional) assistance in relation to the Citizenship Act.

The factsheet could state that any person is allowed to assist another person with completing a citizenship application, and caution RMAs from providing legal advice in relation to the Citizenship Act, unless they are a restricted legal practitioner.

3.1.4.1.1. *Stakeholder views*

The LCA's submission to JSCOM suggests legal advice on citizenship law should only be provided by legal practitioners. They argue RMAs are unfamiliar with many issues pertaining to citizenship, such as how and when visas cease, character concerns and Ministerial discretions, which may result in incorrect advice from an RMA.[127]

Newland Chase advised JSCOM that migration agents should be allowed to provide citizenship advice, stating RMAs 'regularly come into contact with enquiries in relation to citizenship. This is particularly evident when working on permanent visa applications where a client's ultimate goal is Australian citizenship'. They noted the Graduate Diploma encompasses the Citizenship Act. Converse to LCA's advice, Newland Chase stated visa cease dates, character issues and Ministerial directions are key components of RMAs' daily responsibilities.[128]

Four discussion paper submissions touched on citizenship law. Aus Visa Specialists, a small RMA business, submitted that 'for many years RMAs have successfully fulfilled a low cost but key role in representing clients

[126] OISC (2016) *Guidance on Fitness (Owners)* [online document]', GOV.UK, accessed 11 September 2020
[127] LCA (2018:14-15) *Submission to JSCOM* [online document], Parliament of Australia, accessed 12 September 2020
[128] Newland Chase and Acacia Immigration Australia (2018:4-5) *Submission to JSCOM* [online document], Parliament of Australia, accessed 12 September 2020

across a broad spectrum of Australian immigration and citizenship law'. The other three submissions were from the legal profession, each noting the migration agent regulatory scheme does not encompass Australian citizenship law. Ms Germov submitted that 'non-legally qualified migration agents do not have the academic training to competently advise and represent clients in this jurisdiction'. The LCA submission reiterated their views from the JSCOM submission.

3.1.4.2. Do *not* remove references to 'court' in the definition of 'immigration assistance'

The Hodges Review recommended 'the definition of immigration assistance be amended to remove references to court related work and to ensure that the definition does not lead to the practising of law by migration agents who are not qualified to do so'.[129]

RMAs may infer from references to 'court' in the definition that RMAs may be able to act on behalf of clients in court proceedings in relation to visa decisions – which is not the preferred interpretation. Even though the issue has not yet arisen in court proceedings, clarifying the definition would prevent this from potentially happening in the future. Further, there is a risk that an RMA decides to represent a client in court in reliance on the incorrect interpretation of the provision, and is subsequently sanctioned by the court.

A potential solution would be to amend Part 3 of the Act to confirm the preferred interpretation that RMAs (except those who are restricted legal practitioners) are not permitted by law to act on behalf of clients in court proceedings in relation to visa decisions.

The Department does not recommend this approach, as RMAs may still have a legitimate supporting role in preparing for court proceedings, including collating documents, interviewing or advising clients. An RMA could potentially assist in the review of and advice on the visa decision, or provide referrals to accredited migration legal practitioners. An RMA may also provide assistance to a client that chooses to lodge their court application as a self-represented litigant (or obtain legal representation or legal aid assistance).

Further, removing references to 'court' from the definition of immigration assistance would remove the OMARA's direct capacity to consider any complaints or potential disciplinary action in relation to an RMA restricted legal practitioner's performance or behaviour in relation to court proceedings.

The proposed amendments would also remove the OMARA's direct capacity to consider any complaints or potential disciplinary action in relation to an RMA restricted legal practitioner's performance or behaviour in relation to court proceedings.

3.1.4.3. Make changes and clarifications to the exemptions for provision of immigration assistance

There are a number of exemptions in the Act and the Regulations that have the effect of allowing certain classes of persons to provide immigration assistance, even though they are not qualified to do so, not being an RMA or a legal practitioner (*Appendix E* refers).

Exempt persons are not required to have the requisite knowledge and experience, as such, there is a risk to consumers that immigration assistance provided by exempt persons may be detrimental for the consumer. Even though some exemptions appear to be necessary, such as assistance by close family members, the presence of the other exemptions may not always be justified.

Changes and clarifications to exemptions for provision of immigration assistance could address the issues summarised below:

- the exemption for a sponsor or nominator for a visa applicant leads to a conflict of interest between an employer sponsor's roles as a future employer and as an immigration assistance provider for the potential employee
- the exemption for members of parliament or their staff does not have a clear rationale

[129] Hodges, J (2008:60) *2007–08 Review of Statutory Self-Regulation of the Migration Advice Profession* [online document], Commonwealth of Australia, accessed 12 September 2020

- the exemption for employers allowed by regulation 3C raises concerns in respect of potential exploitation of employees who may not be familiar with Australia's employment and migration laws. Obtaining advice from an independent person such as an RMA would assist in limiting the potential for exploitation.

Redundant provisions could also be removed from the Regulations. The legislation should also be clearer that exempt persons cannot hold themselves out to be registered with the OMARA, either explicitly or by implication.

3.1.4.3.1. *Stakeholder views*

In their JSCOM submission, the MA advised they were concerned about the current level of exemptions that permit, among others, HR managers to provide immigration assistance to employees that can give rise to a conflict of interest as well as concerns about the quality of that advice.

RMAs are insured and are qualified to provide independent and expert advice. However, Members of Parliament and their staff, and officers of the Department and the AAT, may not have the required expertise.

The MA advised in their JSCOM submission that these categories should not be providing immigration assistance. MA noted: 'That advice should be provided by RMAs who, through MA, are happy to provide pro bono advice to Members of Parliament and their staff to constituents'.[130]

3.1.4.4. Replace the terms 'visa applicant' and 'cancellation review applicant' with 'person'

Term 'visa applicant' is not broad enough, as not all clients of RMAs are visa applicants. For example, the current definition of 'visa applicant' does not apply to a visa holder facing possible cancellation. Similarly, as no decision has been made on the cancellation, the person is not a cancellation review applicant.

To address this issue, the Department recommends to replace the terms 'visa applicant' and 'cancellation review applicant' with 'person' in Part 3 of the Act. This would better capture the breadth of immigration assistance and ensure it extends to clients in general, including prospective applicants. This relatively minor change will significantly contribute to overall clarity of the relevant provisions and would allow to simplify the definition, as discussed below.

This change would be consistent with the Hodges Review recommendation to ensure the definition applies to immigration assistance provided to all clients, not just visa applicants or cancellation review applicants,'[131] and the definition in New Zealand legislation, which refers to 'person' rather than 'visa applicant'.

[130] Migration Alliance (2018:11) *Submission to JSCOM* [online document], Parliament of Australia, accessed 12 September 2020

[131] Hodges, J (2008:11) *2007–08 Review of Statutory Self-Regulation of the Migration Advice Profession* [online document], Commonwealth of Australia, accessed 12 September 2020

3.2. Measures to address unlawful and offshore immigration assistance

3.2.1. Executive summary

Providing unregistered immigration assistance is illegal in Australia (unless an exempt person or a legal practitioner). The Australian Government has no jurisdiction over unregistered immigration assistance conducted offshore, as Part 3 of the Act does not have extraterritorial effect.

As such, there are two categories of unregistered providers of immigration assistance – unlawful providers (those located in Australia) and unregistered offshore providers (that cannot be called 'unlawful' due to being outside of Australian jurisdiction). There is a small cohort of RMAs who are located offshore; this group is outside the scope of this chapter.

The offshore unregistered immigration assistance industry plays a critical role in supporting Australia's key export industries (students and tourism) and migration program, particularly at a time when migration needs to support Australia's post-pandemic economic recovery. However, offshore unregistered immigration assistance poses a risk to consumers as there is no assurance that unregistered providers perform their services ethically, competently and in adherence with all relevant legislation. While it is likely that many offshore providers offer good service, Advisory Group members have informed the Department of their own efforts to assist people who have been hurt by the incompetent or malicious actions of an offshore provider.

The issue of unlawful and offshore immigration assistance needs to be addressed to protect visa applicants, who are a critical part of Australian economy. There is no intention to penalise genuine visa applicants that fall victim to unscrupulous conduct.

It would be beneficial to increase awareness among consumers of the risks associated with the use of unregistered offshore and unlawful onshore providers of immigration assistance. The best protection for those seeking immigration assistance is to use a registered migration agent; not doing so comes at the individual's own risk. Consumers should also be proactively encouraged by Department officials and other official, community and industry sources to use the OMARA's *Register of migration agents* to find and contact an RMA directly.

The Department does *not* recommend making the OMARA regulatory framework apply offshore. This would involve amending Part 3 of the Act to apply extraterritorially and removing the citizenship/residence requirement for registering as a migration agent. The Australian Government could not apply and enforce the law without the consent of the country where the person of interest is located.

The Department further does *not* recommend allowing and encouraging offshore unregistered migration agents to be listed with the Department and abide by the Code. It is also not recommended to introduce categories of persons permitted to be authorised recipients.

The following measures could be further examined and progressed as appropriate by the Department, however the primary mechanisms for change are not directly within the Review's legislative scope:

- legislative and systems changes to allow the Department accept visa applications only from RMAs, legal practitioners, exempt persons, or visa applicants themselves
- introducing an unregistered immigration assistance Public Interest Criterion (PIC) providing that wilfully receiving unregistered immigration assistance by a visa applicant would warrant a decision not to grant a visa. This would help achieve a policy intent of deterring a visa applicant from accepting such assistance
- requiring visa applicants to attest in a declaration (or a statutory declaration where appropriate) as to whether or not they have received immigration assistance or other relevant assistance
- developing risk profiles for individuals, occupations and industries where the risk of unregistered immigration assistance practice is high, and conducting audits of high-risk visa applications.

Education agents are referenced in this chapter as one of the occupations known to provide unregistered immigration assistance, along with others. The regulation of education agents is not within the scope of this Review or the Home Affairs portfolio. However, the recommendations in this chapter apply to any individual who provides unregistered offshore or unlawful onshore immigration assistance.

3.2.1.1. Overview of the problem

Australian immigration assistance can be provided for a fee only by RMAs and legal practitioners. Exempt persons listed in section 280 of the Act are permitted to provide immigration assistance, but cannot charge a fee. Part 3 of the Act contains the regulatory framework for providing immigration assistance by RMAs, including:

- registration with the OMARA to provide immigration assistance
- a range of mandatory qualifications, skills and CPD requirements
- adherence to the Code of Conduct.

The OMARA has a range of disciplinary powers against RMAs in breach of their obligations under the Code. There are also separate penalties for unlawful conduct by RMAs and unregistered providers of immigration assistance onshore. The regulatory framework promotes a professional and well-informed immigration assistance sector and provides a nationally consistent consumer protection mechanism.

A person can only register with the OMARA if they are an Australian citizen, Australian permanent resident or New Zealand citizen with a special category visa. As such, most offshore unregistered providers of immigration assistance (referred to in this paper as 'offshore agents') are unable to register with the OMARA. Hence, they do not have an incentive to meet the educational and other requirements that RMAs are required to meet by law, and they are not subject to the OMARA's disciplinary powers. Further, offshore agents are not subject to the same penalties as unlawful providers onshore because Part 3 of the Act does not have extraterritorial effect. As a result, there are no consumer protections in place for visa applicants seeking assistance from offshore providers.

3.2.1.2. Risks of unregistered/unlawful immigration assistance

The risks of unregistered/unlawful immigration assistance can be summarised as incompetence and lack of integrity. Most unregistered/unlawful providers of immigration assistance have not completed qualifications in Australian migration law, do not maintain their knowledge through undertaking CPD and have not demonstrated their integrity to the Australian Government through undertaking a police check. As such, there is no assurance that they will provide competent and ethical immigration assistance. This can have catastrophic impacts for their clients and the client's migration journey.

The below case study provides an example of unlawful conduct by an unlawful provider.

Case study 2: unregistered immigration assistance enables migration fraud and illegal labour hire activities

An online entity uses social media to advertise services in a foreign language and while presenting as a legitimate migration agency. Various services advertised include:

- assisting persons who are 'blacklisted' (banned from entering Australia for three years due to a visa overstay etc.) to return to Australia under a new identity. This is facilitated by providing them with new identity documents, including birth certificates, identity cards and passports.
- visa applications, including subclass 866 permanent Protection visa applications
- student visas without the need to attend classes
- contrived marriages
- coaching to pass ABF questioning at the border
- work in Australia, and money transfers.

3.2.1.3. Importance and risks of offshore assistance

People seeking immigration assistance outside of Australia will frequently engage an unregistered agent in their own country, which leaves them unprotected by Australian law. Conversely, the volume of prospective visitors and migrants using unregistered immigration assistance means that offshore agents are likely to be making a significant contribution to Australia's Migration Program and critical education and tourism export industries.

While many of the thousands of offshore agents provide good service, the Australian Government cannot assure consumers that it is the case, advise which offshore agents can be trusted, or readily take action against offshore agents who mistreat their clients.

The absence of regulation that applies to the services of RMAs enables offshore agents to conduct activities offshore that would be unlawful if done in Australia by an unregistered person with impunity.

Case study 3: sanctioned former RMA continues to operate outside Australia

An RMA represented businesses with applications to sponsor staff for visas. Some of these businesses were alleged to be involved in a scheme involving payments for sponsorship. Several complaints were made to the OMARA by clients who were unsuccessful in obtaining visas. The visa applicants had paid significant fees to the agent for the promise of permanent residence.

The OMARA sent the RMA a notice informing him that the OMARA was considering disciplinary action. The agent then withdrew his registration as a migration agent. He left Australia shortly afterwards and did not return. The OMARA barred the former agent from being registered with OMARA for up to five years.

While there was significant evidence available of the former agent advertising his immigration assistance business on social media, the former agent is outside Australia and outside of the ABF's jurisdiction.

3.2.1.4. Prevalence of offshore agents and unlawful providers

As discussed in the Department and ABF's joint submission to the JSCOM inquiry, while the prevalence of unregistered offshore agents and unlawful onshore providers is recognised, it is notoriously difficult to provide accurate evidence and quantifiable figures regarding the extent and effect of their activity. This is due to the (often-complicit) nature of the witnesses.[132]

In the 2020 financial year, out of 39,419 allegations received by Border Watch, only 555 concerned unregistered migration agents (1.4 per cent). Between 1 July 2017 and 30 June 2020, out of 127,074 allegations received by Border Watch, 1397 concerned unregistered migration agents (1.1 per cent). There is anecdotal evidence of unregistered offshore migration agents lodging a large number of visas, as illustrated by the case study below.

Case Study 4: mass lodgements by an unregistered offshore migration agent

An online entity linked to one foreign national has been used for more than 140 permanent Protection visa lodgements, and over 480 client views or actions.

Noting the difficulty of identifying unregistered offshore agents, it is important that visibility of the unregulated offshore sector is retained, so as not to complicate investigations by the ABF. Any reform proposals that limit the ability for offshore agent to submit applications will carry this risk, whereby unregistered providers of immigration assistance submit applications using their client's ImmiAccount.

[132] Department of Home Affairs and ABF (2018:17) *Submission to JSCOM* [online document], accessed 21 January 2021

The statistics below (*Tables 11* and *12*) show that the majority of Temporary and Permanent (non-humanitarian) visa applications are lodged by the applicant. However, the small percentage of visa applications that are lodged by, or had involvement of, unregistered offshore agents, education agents and travel agents still represent over 100,000 lodgements per year.

This does not take into account visa applications lodged by unlawful onshore providers or unregistered offshore agents on behalf of the visa applicant while staying behind the scenes (these applications are part of the 'visa applicant' column). There is currently no mechanism to prevent unlawful providers or offshore agents from lodging visa applications on behalf of another person.

Table 11: Temporary and Permanent (non-humanitarian) visa applications lodgements – percentage of visa applications

	RMA	Offshore unregistered agent	Education agent	Travel agent overseas	Error - incorrect RMA number	Visa applicant
2017-18	8%	<5%	<5%	<5%	<5%	90%
2018-19	8%	<5%	<5%	<5%	<5%	89%
2019-20	11%	<5%	<5%	<5%	<5%	87%
2020-21 to 30/09/2020	27%	<5%	<5%	<5%	<5%	73%

Table 12: Temporary and Permanent (non-humanitarian) visa applications lodgements – numbers of visa applications

	RMA	Offshore unregistered agent	Education agent	Travel agent overseas	Error - incorrect RMA number	Visa applicant
2017-18	369,021	3479	2405	134,078	3607	4,368,655
2018-19	410,119	1784	1873	151,784	3456	4,446,611
2019-20	422,621	959	1357	103,580	3285	3,456,191
2020-21 to 30/09/2020	88,149	107	<5%	50	290	238,629

Note: Where a case involved more than one migration agent type, applicants were counted once against each migration agent type total, for both tables.

3.2.2. Matters for public feedback: Legislative changes to address unregistered immigration assistance

We welcome the public's feedback on the following advice:

3.2.2.1. Do *not* make the OMARA regulatory framework apply offshore

There is potential to enhance consumer protections by amending Part 3 of the Act to apply offshore, and requiring all offshore agents who are not currently registered with the OMARA to do so within a specified transition period. Offshore applicants for registration as migration agents would have to meet the same entry requirements as any other applicant, including qualifications, examination, English language proficiency and a 'fit and proper person test'. Offshore RMAs would have to complete CPD and comply with the Code.

The legislation could encourage consumers to make informed decisions and engage the migration agents who are registered with the OMARA, and providing the opportunity for anyone to register as an RMA will give a competitive advantage to those offshore agents who decide to register over offshore agents who decide to remain unregistered.

Increasing the number of consistently qualified RMAs offshore would lead to increased consumer protections for at least some visa applicants, and could improve awareness about the registration requirement, as the new RMAs would advertise their registration.

However, there are obstacles at international law in applying the legislation offshore. If Part 3 of the Act was given extraterritorial reach, Australia would need to seek and receive the consent of the State where it wishes to enforce the measure (i.e. where the person of interest is located). The ABF would be unable to investigate and sanction unlawful providers of immigration assistance offshore, unless that consent was obtained.

3.2.2.1.1. *Enabling offshore agents to fulfil their OMARA registration requirements*

In addition to making legislative changes, it would be important to support offshore agents to fulfil their OMARA registration requirements, while remaining offshore. Without these measures, the legislation would not be applicable in practice.

Options for enabling offshore agents to fulfil their OMARA registration requirements include engagement with tertiary education providers to encourage online delivery of the Graduate Diploma, considering recognition of overseas qualifications, and of police clearances and equivalents in other countries, and ensure offshore agents are able to access CPD offerings through encouraging CPD providers to run online courses and accrediting offshore CPD providers.

3.2.2.1.2. *Comparable overseas frameworks*

Individuals providing Canadian immigration/citizenship services abroad are subject to Canadian law even if they reside outside of Canada.[133] Despite this legislation, the ICCRC's website mentions 'growing problems with unauthorized practitioners who take advantage of prospective immigrants overseas'. ICCRC states that the new College of Immigration and Citizenship Consultants, which will replace the existing ICCRC as a new independent regulator for both immigration and education agents, will 'have the enhanced status necessary to engage directly with foreign government agencies. Bill C-97 also includes additional funding for enforcement and public education that will go a long way towards clamping down on unauthorized practitioners who are operating abroad illegally'.[134] New federal legislation will enable the regulator to seek injunctions to stop unauthorised practitioners from operating domestically, with public awareness and educational activities to be the key mechanism for diminishing the impact of unlawful services outside of Canada's borders.

Under the New Zealand's legislation, anyone providing immigration advice anywhere in the world must be licensed, unless exempt. Persons who provide advice in relation to student visas offshore are exempt from licensing.

Unlawful activity offshore is addressed in several ways – including education and local media campaigns, social media campaigns, phone calls and warning letters to individuals not complying with New Zealand's legislation.[135] The 2014 Review of the Regulation of Immigration Advice provided that 'Section 8 of the [IAL Act] extends the offence provisions to advice provided offshore. Retaining this provision may act as a mild deterrent to some offshore operators, but is very difficult to enforce. Generally we consider that it is undesirable to retain a provision in legislation that cannot be enforced'.[136]

The United Kingdom's OISC does not have powers related to the provision of immigration advice and services provided outside the United Kingdom. Organisations that have never been regulated by the OISC, been refused entry to OISC scheme or removed from the scheme, can establish offices abroad and continue to provide immigration advice and services regarding applications for leave to enter or remain in the United Kingdom, to persons based outside the United Kingdom. If the advice and services are however provided to persons based in the United Kingdom (advice provided remotely) then this does fall within OISC jurisdiction.

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[133] ICCRC (n.d.) *National Regulatory Body* [online document], ICCRC, accessed 24 August 2020
[134] ICCRC (n.d.) *Council to College Info* [online document], ICCRC, accessed 24 August 2020
[135] NZIAA (n.d.) *Who can give advice?* [online document], MBIE, accessed 24 August 2020
[136] Mills M, Johnston, H, (2014:50) *Review Of The Regulation Of Immigration Advice, Final Report* [online document], MartinJenkins, accessed 6 January 2021

3.2.2.1.3. *Why this proposal is not recommended*

The Department does not recommend implementing this proposal due to legal and practical difficulties of its implementation. The consent of the countries where offshore providers are located may be difficult or impossible to obtain.

Further, there is a risk that some countries provide their consent and others do not, which would result in a patchwork of regulation. Even if consent of the relevant States is obtained, application of sanctions for alleged criminal behaviour would be difficult to progress, due to the difficulty of seeking outcomes prescribed under Australian law in a foreign court system operating within their own legal system. Seeking to prosecute a foreign national in an Australian court would be equally challenging due to the need to undertake extradition proceedings or in some manner compel their attendance. Jurisdictional challenges have been borne out in the experiences of Canada and New Zealand.

The scenario where a person located offshore is able to register with the OMARA, but the ABF does not have powers to investigate and sanction them, would allow such agents to appear legitimate, while there is a risk they are conducting unlawful activity.

The issue of accessibility and affordability of educational offerings to people interested in providing immigration assistance offshore may be more or less pertinent in different countries, which could result in inconsistent regulation of offshore agents, based on their location. The relative cost of initial and ongoing registration, as well as CPD requirements, may act as a disincentive for offshore agents to register with the OMARA. Despite the possible competitive advantage of gaining legitimacy while offshore, the costs of the OMARA registration may translate to increased prices, which may result in consumers opting to engage unregistered agents offering a more affordable service.

The citizenship/residency requirement for registering with the OMARA is an integrity requirement, and its removal increases integrity risks. Temporary residents do not have significant ties to Australia, and there is a risk that a temporary visa holder may be used by criminal networks as a 'puppet agent'.

Finally, this proposal would only solve part of the problem, as offshore agents can stay behind the scenes by lodging applications on behalf of the applicant to make it appear that the applicant lodged the application themselves.

3.2.2.2. Do *not* allow and encourage offshore unregistered migration agents to be listed with the OMARA (accreditation of offshore agents)

Another potential option for addressing this issue of unregistered immigration assistance offshore could be to introduce accreditation of offshore agents, whereby they would be listed with the Department and abide by the Code. Offshore agents would not have to register with the OMARA, so they would not have to complete the registration requirements. They would only be required to declare their assistance to the Department and provide a police clearance.

This proposal would provide a source of intelligence about the unregistered offshore agents, and the opportunity to build a relationship with those offshore agents who are willing to do the right thing. It would also provide limited consumer protections by encouraging offshore agents to abide by the Code as a best practice document, since it is not enforceable offshore.

However, supporting offshore unregistered immigration assistance may increase the Department's liability if the advice of an offshore agent damages an applicant's migration prospects. It could also create unfair competition to onshore RMAs due to lower prices offered by offshore agents, who are not subject to expenses associated with the OMARA registration. Lower registration requirements for offshore agents could be an incentive for Australian migration agents to run their business overseas to cut costs.

Further, some clients may find it difficult to distinguish between 'listed' and 'registered' agents (particularly if any nuances between the two words are not reflected in translation), which may lead to further confusion and uncertainty. For these reasons, the Department does not recommend implementation of this proposal.

3.2.2.3. Do *not* introduce categories of persons permitted to be authorised recipients

Most unregistered providers of immigration assistance avoid detection by not using their names on applications, and lodging the application as the visa applicant. Some unregistered providers only identify themselves as an authorised recipient.

Consideration has been given to amending Part 3 of the Act ('Authorised recipient') to allow only certain categories of persons to be authorised recipients. The proposal would limit the opportunities for unregistered migration agents to receive documents on behalf of the visa applicant. However, it would also result in fewer options for the Department to correctly notify a client of a decision and more difficulty in dealing with subsequent non-compliance and removal of non-citizens.

Removing the authorised recipient option would be unlikely to prevent abuse by unscrupulous actors. It would, however, inconvenience legitimate users. The Act already allows the Department to cease providing information to an authorised recipient if they are suspected of providing unregistered immigration assistance.

The Department does *not* recommend amending the authorised recipient provisions, due to its low effectiveness in addressing the issues and the unintended consequences on the Department's ability to notify applicants about visa decisions.

As an alternative, the Department recommends assessing the effectiveness of the relevant section of the Act and revising it, if needed. It is also recommended to ensure that delegates have adequate training to identify if authorised recipients are legitimate and identify suspicious authorised recipients that may be giving immigration assistance.

3.2.2.3.1. *Stakeholder views*

LCA's discussion paper submission stated 'many unregistered operators avoid detection by not using their names on applications, but their client's name. ... These unregistered persons are difficult to track because they often operate through oral contracts, accept payment in cash and do not give their names.'

3.2.3. Matter for public feedback: Improving awareness of the risks associated with unregistered offshore providers of immigration assistance

We welcome the public's feedback on the following reform option:

3.2.3.1. OMARA and ABF work with the offshore network to improve awareness of Australian legislative framework governing migration agents

Strategies could be developed for improving awareness of Australian migration law overseas among consumers and offshore agents and the risks of engaging unregistered and unemployed providers of immigration assistance. The Department's offshore representatives would play a critical role in this process.

Promoting the *Register of Migration Agents* offshore (and similar registers for the legal profession), and informing potential migrants that only people listed on these registers and exempt persons are allowed to provide immigration assistance in Australia, may create positive behavioural change by visa applicants.

The timing and messaging of an awareness campaign would depend on a range of circumstances but would not necessarily be reliant on the progression of other elements of the Review.

Potential measures include:

- undertaking education and awareness campaigns targeted for cultural diasporas in Australia and offshore, with a focus on countries that generate high volumes of visa applications.
- developing a communication strategy to inform consumers in Australia and offshore about the risks of using an unregistered provider and how to access the Register of Migration Agents. The communication strategy is to be targeted to vulnerable consumers of immigration assistance, and involve communication products in foreign languages.

- for visa applications that require an interview with the Department, the Department's representative could ask the applicant of any immigration assistance the applicant has received and inform them of the risks of unregistered immigration assistance.

3.2.3.1.1. *Overview of comparable international frameworks*

Canada's regulator of immigration consultants, ICCRC, has effectively used social media to increase awareness of the dangers of using unregistered immigration consultants. ICCRC has its own YouTube page, that includes videos titled 'ICCRC's Fraud Prevention Campaign', 'Is your immigration consultant registered with ICCRC?', 'We were victims of fraud', 'Protect Your Canadian Dream' and others.[137] These videos are released in English, French, Mandarin, and Punjabi.

The ICCRC is developing a new website that will host multiples languages beyond English and French. The ICCRC also has a smart phone application called 'ICCRC CRCIC', which includes a link to the Register of Immigration Consultants, tips to prevent fraud, questions to ask an immigration consultant and other information targeted to visa applicants. The application includes information only in English and French. Additionally, the ICCRC's official website includes a separate 'Fraud' tab and has a warning message about the requirement to register with ICCRC to be an immigration consultant.[138]

Overseas offices of the Department of Immigration, Refugees and Citizenship Canada (the IRCC) offices in Canada and overseas also conduct outreach via social media, in-person, online sessions and print media in local languages.

3.2.3.1.2. *Stakeholder views*

The LCA's discussion paper submission recommended the Department 'work in consultation and collaboration with overseas posts and other stakeholders to develop education campaigns in foreign markets with a prevalence of unregistered operators who target immigrants to Australia, and with local media for a range of multicultural audiences to educate on registered practice, the immigration process, and to counter misleading and inaccurate information'.

The LCA also recommended 'that the Department provide to all potential newcomers at the beginning of their application process the rules governing representation by Australian legal practitioners and RMAs in the languages most used by prospective immigrants and that this information be on the Department's website and as part of its application forms'. Aguilus Solutions also suggested 'genuine support from the Australian government agency is required to increase awareness about the migration advice industry in our wider community'.

3.2.4. Proposals recommended for further examination by the Department

There is potential to introduce other legislative and system changes to target unlawful onshore and unregistered offshore immigration assistance. However, these measures' primary mechanisms for change are not directly within the Review's legislative scope and that have a significant level of complexity beyond the remit of migration advice industry regulation. Separate to this Review, they could be further examined and progressed as appropriate by the Department.

Public feedback on these potential measures is welcome, noting the above caveats.

3.2.4.1. Consider introducing a requirement for a valid visa application to be lodged by an RMA, a legal practitioner, an exempt person or the applicant

Further consideration may be given to creating laws with domestic consequences, with the practical effect of requiring persons providing immigration assistance overseas to register as migration agents, and to comply with the requirements for RMAs in Part 3 of the Act. This could include laws making it a requirement for a

[137] ICCRC, (2021) *ICCRC-CRCIC* [online video], YouTube, accessed 2 March 2021
[138] ICCRC-CRCIC (2021), *The Immigration Consultants of Canada Regulatory Council* [online document], accessed 2 March 2021

valid visa application that, if the application is submitted by a person providing immigration assistance, the person is an RMA, a legal practitioner, or an exempt person.

Implementation of this proposal would involve a relatively low resource output, as it does not require agreements with foreign States and attempting to apply and enforce Australian laws overseas.

The key risk associated with this proposal is that some unregistered migration agents will not disclose their involvement in the lodgement and will instead lodge the visa application as if the applicant themselves did it.

3.2.4.1.1. *Stakeholder views*

In their JSCOM submission, the MA pointed out that migration agent membership organisations had called 'upon the Government to adopt a system similar to the New Zealand and Canadian authorities with respect to their dealings offshore with Migration Agents'.[139]

3.2.4.1.2. *Comparable overseas frameworks*

Section 9 of the New Zealand's *Immigration Advisers Licensing Act 2007* (NZ) provides:

> *No acceptance of immigration applications or requests from unlicensed immigration advisers*
>
> (1) No immigration application or request put forward on behalf of another person by an unlicensed immigration adviser may be accepted, unless the adviser is exempt from the requirement to be licensed under section 11.
>
> (2) The chief executive of the department of State that has, with the authority of the Prime Minister, assumed responsibility for the administration of the Immigration Act 2009 must, so far as practicable, ensure that immigration forms and information brochures prepared or provided by that department advise that, in accordance with subsection (1), immigration applications or requests provided or prepared on behalf of another person by persons who are neither licensed immigration advisers nor exempt from the requirement to be licensed will not be accepted.
>
> (3) Where an immigration application or request on behalf of another person is not accepted by reason of contravening subsection (1), the relevant person or body must notify that person in writing of that fact, and advise the person as to how the application or request may be relodged or advanced in an acceptable manner.

3.2.4.2. Consider enabling ImmiAccount to allow visa applications to be lodged only by visa applicants, RMAs, legal practitioners (from March 2021) or exempt persons

This measure could be a practical step for implementing the proposed visa validity restriction discussed above.

Case Study 5: use of technical means have been made to obscure the source of the lodgements

A single entity in Brisbane, Queensland has lodged over 1200 valid permanent Protection visa applications, with evidence of boiler-plate or similarly worded repeated asylum claims. Significant efforts via technical means have been made to obscure the source of the lodgements.

To enable this restriction, ImmiAccount may be set up to prevent anyone from creating an ImmiAccount profile, unless they are a visa applicant, an RMA, a legal practitioner or an exempt person. This measure would only work in tandem with the legislative change to make a visa application invalid if prepared by someone other than an RMA, legal practitioner, exempt person or the visa applicant themselves. Blocking visa applications from being lodged by restricting access to ImmiAccount would need to be supported by a legislative amendment.

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[139] JSCOM (2019:59) *Report of the inquiry into efficacy of current regulation of Australian migration and education agents* [online document], Commonwealth of Australia, accessed 12 January 2021

It is noted that ImmiAccounts may have purposes other than creating visa applications. This proposed changes would impact users attempting to use other online services. Any amendments should be designed to not unnecessarily disturb users' access to these services.

Consideration could also be given to other ImmiAccount changes that may further strengthen this proposal, including:

- allowing an RMA to create no more than one ImmiAccount profile at any point in time, and require them to lodge visa applications for all their clients from that account
- making it an offence for an RMA to allow another person to access their ImmiAccount, except a person providing clerical/administrative support to the RMA
- introducing an offence for creating an ImmiAccount on behalf of another person, unless an exempt person.

3.2.4.2.1. *Stakeholder views*

Eleven discussion paper submissions proposed the Department should stop accepting visa applications from unregistered migration agents. MA argued 'access to the Immi account should… be restricted to RMAs and Solicitors as appropriate. The convenient fiction that Education Agents do not provide "immigration assistance" needs to be addressed and the wholly self-evident conflict of interest eliminated. Overseas "agents" should not have access to the Immi account and only authorised persons in line with the New Zealand and Canadian models need to be urgently implemented in order to protect vulnerable consumers.'

MIA observed that 'an ImmiAccount may be created by an individual online to lodge their own application and business ImmiAccounts that allow the management of multiple applications may be obtained on application to [the Department]. MIA understands that unregistered operators can obtain access to these types of ImmiAccounts. It would be a simple matter to only permit RMAs and legal practitioners to operate this type of ImmiAccount in an effort to deter unregistered practice.'

LCA noted 'the practice of providing immigration assistance when not an RMA is generally undetected, as education agents generally do not directly charge a fee for these services, or do not act as authorised recipients, and the applications are completed as though the student had completed the application themselves, by generating new emails and ImmiAccount logins'. While the LCA's quote refers to education agents, this kind of unregistered conduct can be perpetrated by any unregistered offshore or unlawful onshore provider of immigration assistance.

Newland Chase suggested, 'as an example of how technology may be used to reduce fraudulent use of legitimate RMA details, IMMI Account could be amended such that RMAs can enter their MARN but no email address in the application. The e-mail address used for each RMA would be centrally stored with Home Affairs (via OMARA registration). Any correspondence for that matter would then go only to the email that is registered with OMARA. This would eliminate third party actors using an RMA's details without their knowledge or consent. Other similar technology-based measures could be taken to prevent unlawful practices more broadly'.

3.2.4.3. Consider introducing an unregistered immigration assistance Public Interest Criterion (PIC)

There are currently no consequences for visa applicants for wilfully accepting unregistered immigration assistance. Further consideration may be given to introducing a PIC enabling refusal of a visa if the visa applicant knowingly received unregistered or unlawful immigration assistance. This would achieve a policy intent of deterring a visa applicant from accepting such assistance.

PICs are time of decision criteria that apply to nearly all visa subclasses. PICs are set out in Part 1 of Schedule 4 of the Regulations. An example of the existing PIC is the PIC 4020 – the Integrity PIC, which is a mechanism under which a visa may be refused if false or misleading information was provided in relation to the visa application. The majority of visa application forms include a section to capture details of any assistance provided with the application, as well as content in the information section about immigration

assistance. If an applicant's form includes a 'no' response to the 'assistance' question, and it is subsequently determined that assistance has been provided, this may be a ground for a visa refusal under PIC 4020.

The additional PIC would be a separate ground for refusing a visa, and it would apply to visa applications where an applicant declares that they received immigration assistance from an unregistered agent (i.e. where PIC 4020 would not apply, as no false information was provided).

There is a risk that applicants may not be aware of the requirement that their migration agent should be registered to provide immigration assistance. As such, the proposed PIC could potentially only target complicit visa applicants who knowingly accepted unregistered immigration assistance. The PIC could also be referred to in public messaging, to inform visa applicants that accepting unregistered immigration assistance may, in some cases, result in refusal of a visa application.

3.2.4.4. Consider requiring a visa applicant to declare assistance they have received

It may be beneficial to examine measures to encourage an applicant to declare unregistered immigration assistance and other relevant assistance. The majority of visa application forms already collect information about assistance received by the applicant, but for visa application forms that do not collect this information, the gap could potentially be filled by introducing the declaration requirement.

An applicant could be required to provide a declaration listing any assistance they have received or are receiving in relation to the application, in particular, from the industries that are known to provide unregistered immigration assistance, as determined by the Department's own assessment of risk. The MIA's discussion paper submission suggests the industries may include 'education agents, recruitment companies, travel agents, investment advisers, property developers, interpreters and translators, charity and community volunteers'[140]. If the applicant indicates that they have received assistance from any of these industries, this information can prompt the application to be audited.

The majority of visa application forms (paper and online) include a section to collect information about any assistance provided with a visa application, for example, form 47BU (application for Business Skills (permanent) visa). The form also includes information about immigration assistance and migration agent registration requirements in Australia. The Department should consider amending visa application forms that do not include the question about the assistance received by the visa applicant.

If undisclosed immigration assistance is detected, there could be scope to consider potential implications for the visa decision as a result of the false or misleading information provided by the applicant.

3.2.4.4.1. *Issues with the use of statutory declarations*

Additionally, the use of statutory declarations could be considered as part of some visa applications. The strength of a statutory declaration is that lying on a statutory declaration may result in a penalty. However, it may be difficult for an applicant located offshore to fulfil the witness requirements for a statutory declaration. It may be more practical to require only onshore applicant to provide a statutory declaration listing the assistance received with the application.

As with any self-declaration, there is a risk of an applicant not declaring the assistance they have received. This risk is partially mitigated by a potential for a significant penalty for lying on a statutory declaration. The proposed penalty as a deterrent would only apply in cases where the applicant intentionally made a false statement in a statutory declaration. In the relatively common case where an agent has an applicant sign blank forms, it may be difficult to prove the elements of the offence.

Further design issues to be considered as part of the proposal include, for example, whether the requirement to provide the statutory declaration should be made a visa validity requirement at the time of application or after the visa has been lodged.

[140] The above proposal for risk profiles for various industries would verify the MIA's list of industries that are likely to provide unregistered immigration assistance.

3.2.4.4.2. *Stakeholder views*

The LCA's discussion paper response proposed that everyone who submits an application without a representative may be required to make a declaration:

- stating that they have completed the application themselves without any paid advice or assistance from a third party
- confirming their understanding of misrepresentation on the statement and of the potential penalty for being untruthful.

The LCA also noted that 'where the applicant has received assistance from a third party who is neither an RMA nor an Australian legal practitioner, the form should require the applicant to fully disclose details of all persons who may have contributed to the preparation of the application including all persons paid to provide advice or services related to it, including translators, the Visa Application Centre, a notary, recruiter etc. Unregistered operators often hide behind these types of agencies'.

LCA's response to the discussion paper further suggests: 'if the Department suspects that an application has been prepared by someone other than the applicant, who has been paid for their services and who is neither an Australian legal practitioner nor an RMA, the Department should continue to process the application, and engage the regulator to advise the applicant of the Department's suspicion, and inform the applicant how to find a properly authorised representative.

'If the applicant responds to this approach by the regulator, the Department should then also allow the applicant the opportunity to review the information provided by the unregistered operator. If in good faith, the applicant or someone on the applicant's behalf has submitted an application which contains any error or misrepresentation not authorised or previously known to the applicant, the applicant should be permitted to correct the errors or misrepresentations made by the unregistered operator'.

3.2.4.5. Consider developing risk profiles and conducting audits of high-risk visa applications

With the high number of visa applications received by the Department each year, there needs to be a targeted approach to identifying and auditing visa applications that are likely to have been prepared with the use of unregistered or unlawful immigration assistance. To address this, consideration could be given to developing risk profiles for individuals, and for occupations and industries where the risk of unregistered practice is high, as per MIA's proposal below.

3.2.4.5.1. *Stakeholder views*

The MIA's JSCOM submission advised the Department should develop a risk profile 'for individuals, occupation and industries where the risk of unregistered practice is high, in a similar way to the risk profiling maintained for visa applications and sponsoring businesses, and regularly audit applications received from these sources' to reduce instances of unregistered practice.

MIA's members had reported instances of unregistered practice in the following industries: 'education agents, recruitment companies, travel agents, investment advisers, property developers, interpreters and translators, charity and community volunteers.'[141]

3.2.4.6. Recommended: Consider expanding the use of service Delivery Partners (SDPs) and assisted online lodgement services offshore.

SDPs are commercial organisations that provide visa support services on behalf of the Department. The services provided by SDPs include pre and post visa lodgement enquiries, distribution of visa information to clients, collection of visa applications and biometrics, and banking of visa application charges.

[141] JSCOM (2019:82,37) *Report of the inquiry into efficacy of current regulation of Australian migration and education agents* [online document], Commonwealth of Australia, accessed 12 January 2021

SDPs are also able to provide extended client service hours to the Department's services and have additional services available to clients. These services incur additional costs and include courier services, passport photos, photocopying, premium lounge, and translation services. As SDPs are commercial companies, they charge clients a fee for this service in addition to the scheduled fee charged by the Department for all visa and citizenship applications.

SDP staff are trained by departmental officers, and must observe the Australian Privacy Principles in Schedule 1 of the Privacy Act and the Australian Public Service Code of Conduct. SDP staff have no involvement in the decision-making process or the outcomes of visa applications.

SDPs could play a significant role in providing technical support to visa applicants, without providing immigration assistance. SDPs may also have a role in referring potential visa applicants to the Register, if they believe they require immigration assistance.

3.2.4.7. For further examination: concessions for visa applicants for using services of RMAs and legal practitioners

During the Advisory Group meeting of 19 February 2021, members proposed introducing concessions for visa applicants who use RMAs and legal practitioners, such as reduced visa lodgement fees or priority in visa processing for those. The rationale of this suggestion is to encourage visa applicants to use services of RMAs and legal practitioners, rather than unlawful and offshore providers. The risk with this approach is that persons who cannot afford services of an RMA or a legal practitioner would not benefit from this proposal, and may be negatively affected by it due to potentially being placed lower in the queue. A detailed examination would be required, external to this Review, before this proposal can be recommended for progression.

3.3. Penalties for unlawful immigration assistance providers

3.3.1. Executive Summary

This chapter considers whether the current penalties addressing unlawful immigration assistance in Part 3 of the Act are adequate. In doing so, a range of views on the adequacy of penalties, put forward during the Review public consultation period, and the JSCOM inquiry report have been taken into account. Penalties in comparable industries and other Commonwealth countries are also examined.

There are several measures that could improve the adequacy of penalties for unlawful immigration assistance under Australian legislation:

- increase financial penalties in subsection 280(1) of the Act from 60 penalty units to 250 penalty units
- apply penalties to businesses, not just individuals
- introduce payment of reparation and commercial gain
- remove differentiation between fee-for-service and no fee-for-service in relation to penalties
- introduce the ability to apply both financial infringements (penalty units[142]) and/or imprisonment for offences, under sections 281(1), 281(2), 282(1), 283(1), 284(1) and 285(1) of the Act
- introduce provisions to make it a criminal offence to knowingly provide immigration assistance for the purposes of enabling serious and organised crime.

In addition to the recommendations explicitly relating to unlawful immigration assistance, further consideration should be given to improving the adequacy of penalties by increasing financial penalties for RMAs in sections 312A and 312B of the Act, from 60 penalty units to 250 penalty units. These penalties are important because they allow the ABF to prosecute RMAs who fail to disclose their assistance, thereby avoiding scrutiny.

The Department has further considered but does not recommend expanding Australian criminal offences and/or civil penalties for visa applicants and sponsors using unlawful immigration assistance.

3.3.2. Strategic context

A criminal offence is the ultimate sanction for breaching the law, with far-reaching consequences for those convicted of criminal offences. As such, Ministers and agencies should consider the range of options available for imposing liability under legislation, and choose the most appropriate penalty or sanction. The purpose of the penalty or sanction is to either deter or punish an offender.

There are a range of penalties available to the courts in addressing illegal immigration assistance as set out in the Act, including financial penalties and imprisonment[143]. These differ in severity to the disciplinary actions against RMAs available to the OMARA under the Act.

Persons providing immigration assistance unlawfully are not RMAs and for that reason are outside the remit of the OMARA. Potential fraud-related or other Act offences are referred to the ABF and any action taken is subject to their priorities. Initiatives the ABF may be undertaking in addressing unlawful conduct are not addressed in this paper.

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[142] An appropriate number of penalty units relative to each offence would need to be considered should this proposal be supported. For example, a higher number of penalty units might be appropriately applied to s 281(1), 281(2) and 282(1) than for s 283-285.

[143] There is also an option of dealing with the provision of immigration assistance by a person who is not an RMA (or otherwise exempt) by infringement notice (rather than prosecution through the courts). However, the focus of this paper is on the adequacy of penalties as they appear in Division 2 and Division 5 (Section 312 A and 312B) of Part 3 of the Act.

Any changes in the current penalties regime relating to the provision of unlawful immigration assistance under the Act need to be carefully considered, as the consequences (including reputational) can be very serious for the offender.

Criminal offences should only be used where the relevant conduct involves, or has the potential to cause, considerable harm to society or individuals, the environment or Australia's national interests, including security interests. The ramifications of the provision of unlawful immigration assistance to consumers is a case in point.

An individual who is not properly qualified and registered to provide immigration assistance, yet provides immigration assistance, can lead to significant financial loss and negative immigration outcomes on the part of the client, which can in turn significantly affect their quality of life, livelihood and that of their family.

Penalties alone are not a sufficient deterrent to criminal behaviour. Consideration also needs to be given to the likelihood of known cases of unlawful immigration assistance being successfully prosecuted. There are many challenges associated with prosecution, such as convincing often vulnerable witnesses (who may hold visas for which there could be grounds for cancellation) to come forward with key information. Several Commonwealth agencies are involved in the investigation and prosecution of unlawful immigration assistance. There are also legal provisions around information sharing, the existence of which necessitate balancing the right to privacy and the need for secrecy with the benefits gained from sharing law enforcement information in certain circumstances.

Finally, it can take many years and significant resources to build up and prosecute a case, within a criminal justice system with finite resources. This means some cases may never reach prosecution, or may be settled with lesser, or more expedient, penalties or good behaviour bonds. Therefore, penalties need to be reviewed holistically.

3.3.3. Existing penalties for unlawful immigration assistance

Currently, RMAs and unlawful providers of immigration assistance can be sanctioned under a range of legislation, including the Criminal Code, relevant state and territory legislation, and the Act. Of these, only Part 3 of the Act is within scope of this Review.

The Act provides certain powers to officers, including officers of the Department, to enable them to investigate certain offences in certain circumstances. The OMARA does not investigate non-registered immigration assistance; this is usually carried out by the ABF. Some powers required by the ABF to more adequately deal with matters of unlawful immigration assistance by non-registered migration agents are not provided for in the Act. Instead, assistance must be sought from the AFP to execute search warrants and/or arrest alleged offenders in respect of offences under Part 3 of the Act.

Sections 280, 281 and 282 under Part 3 of the Act specify the restrictions on giving immigration assistance and the charging of fees. False representation and restrictions on advertising are covered in sections 283 to 285 of the Act. Sections 312A and 312 B cover the requirement for an RMA to notify the Department that immigration assistance is being given; and to notify the review authority that immigration assistance is being given in respect of a review application. Failure to do so can attract a financial penalty of up to $13,320 (60 penalty units).

A summary of penalties in Part 3 of the Act is provided in *Table 13*. Penalties for unlawfully giving immigration assistance and misrepresentation could, depending on the offence, carry a maximum penalty of 60 penalty units (the equivalent of $13,320 in financial penalties) or imprisonment for two or 10 years. Individuals who are exempt from requiring to register to provide immigration assistance, such as close family members, unrestricted legal practitioners, and parliamentarians, are listed in section 280 of the Act.

Penalties related to the requirement for RMAs to declare their involvement in, or provision of, immigration assistance (in sections 312A and 312B) are important because they allow the ABF to prosecute RMAs who fail to disclose their assistance (and avoid scrutiny, including in association with unmeritorious visa applications).

Case Study 6: failure to notify the Department when providing immigration assistance

RMAs are required to notify the Department when providing immigration assistance to a visa applicant in accordance with s312A of the Act.

- An RMA failed to declare involvement in more than 500 visa permission requests across a range of visa applications.
- Analysis of a registered migration agency indicated two RMAs have not declared their assistance as migration agents in almost 300 visa applications.

The regulatory framework is currently geared to hold individual registered or unregistered migration agents to account; consequently, disciplinary decisions only relate to the relevant migration agent and not to the business or directors who employ them.[144] The maximum penalty for providing unlawful immigration assistance when a fee is charged is 10 years imprisonment, which is a greater penalty than that for the offence of engaging in legal practice by unqualified entities.

Offences under Part 3 of the Act are difficult to prove, and require significant resources to investigate and prosecute. Intimidation and threats from RMAs or other persons acting unlawfully, along with tenuous visa status, can deter witnesses from testifying against unlawful providers of immigration assistance.

Table 13: Summary of penalties in Part 3 of the Act

Section	Offence	Penalty
280(1)	Provision of immigration assistance by a person who is not an RMA	60 penalty units, or $13,320
281(1)	Asking for or receiving any fee or reward for the provision of immigration assistance by a person who is not an RMA	10 years imprisonment
281(2)	Asking for or receiving any fee or reward for the provision of immigration assistance by another person who is not an RMA	10 years imprisonment
282(1)	Asking for or receiving any fee or reward for making immigration representations by a person who is not an RMA	10 years imprisonment
283(1)	Representing oneself to be an RMA when one is not (false representation)	2 years imprisonment
284(1)	Advertising that one is a registered migration agent when one is not (restriction on self-advertising)	2 years imprisonment
285(1)	Advertising that one can give immigration assistance when one is not registered	2 years imprisonment
312A	Failing to notify the Department that immigration assistance is being given (by an RMA)	60 penalty units, or $13,320
312B	Failing to notify the review authority that immigration assistance is being given in respect of a review application (by an RMA)	60 penalty units, or $13,320

[144] Department of Home Affairs and ABF (2018) *Submission to JSCOM* [online document], accessed 12 January 2021

3.3.4. Stakeholder views

Views in discussion paper responses were almost evenly divided on whether penalties should be raised. Of the six submissions that commented on penalties, the MA and two other submissions suggested existing penalties were sufficient while the MIA and LCA proposed to increase the penalties for unlawful immigration assistance.

Proposals included quicker action from the regulator in response to complaints and addressing misleading advertising. A confidential contributor suggested that demerit points could be applied to different categories of visas, with points being regained by either: re-sitting the Capstone, earning CPD points for that category, or having the OMARA determine if the agent is fit and proper.

The LCA points out that, 'persons providing, asking for or receiving a fee or reward for giving, or advertising that they give immigration assistance without holding registration are subject to the operation of criminal offence provisions within the Act'. However, the 'investigation and prosecution of those offences lies outside of the OMARA's regulatory authority despite those allegations frequently being made to the OMARA'. The LCA also suggest a lack of resourcing in the Commonwealth for the investigation of misconduct by non-RMAs may explain the lack of prosecutions. Having no financial penalty (and therefore no ability to simply infringe) may also contribute to the lack of any form of compliance measures.

Similarly, the MIA states, 'the overarching issue that impacts the perception of the Australian migration profession and its standing, is completely outside the control of either the profession or the OMARA – *unregistered migration practice*', and that little action is taken to eradicate unregulated and unlawful practice. The MIA supports significant increases to penalties as an increased deterrent to unlawful behaviour.

The MIA made the same recommendations (including that the financial penalty for providing immigration assistance by a person who is not an RMA be increased to $100,000) to the JSCOM inquiry. Other submitters to the JSCOM inquiry also pointed out 'a number of challenges in reporting, investigating and prosecuting instances of individuals providing unregistered immigration assistance'.

The Asylum Seeker Resource Centre advised JSCOM that 'current legislation already contained significant penalties for individuals convicted of providing unlawful immigration assistance but was of the view, however, that these powers were ineffective'.

The JSCOM noted the current arrangement of reporting unlawful practice against an RMA to the OMARA, and reporting unregistered operators to the ABF, can be confusing as to which agency has jurisdiction. This can be especially confusing for individuals from culturally and linguistically diverse backgrounds who wish to make a report against either a registered or an unregistered agent.[145]

The adequacy of penalties was also discussed at the Advisory Group meeting on 18 February 2021. Members showed support for increasing penalties, regulating businesses providing immigration assistance in addition to individuals (along the lines of the United Kingdom's framework), and applying penalties regardless of whether or not the provider charged a fee for their service.

Members also discussed the potential for an additional Ministerial intervention power to allow a visa application to be re-assessed if the applicant was a victim of unlawful immigration assistance (and therefore had their application cancelled or denied).

3.3.5. Penalty comparison with like-minded Commonwealth countries

A comparison of penalties of Australia's regulatory regime and other like-minded Commonwealth countries with comparable schemes is at *Table 14*. It shows that while Australia's imprisonment penalties are the highest when compared to Canada, New Zealand and the United Kingdom, Australia's financial penalties are significantly lower than those same countries.

[145] JSCOM (2019:39,43-44,48-49) *Report of the inquiry into efficacy of current regulation of Australian migration and education agents* [online document], Commonwealth of Australia, accessed 10 September 2020

The Government of Canada has passed legislative amendments to progress a new regulatory regime, including:

- doubling the maximum amount of the criminal fines under the *Immigration and Refugee Protection Act* (IRPA) and the *Citizenship Act* for those providing advice or representation without authorisation.
- providing regulation-making authority for the establishment of administrative penalties and consequences – including monetary penalties – administered by IRCC and aimed at ensuring compliance with Canada's immigration and citizenship legislation.

The new system of administrative penalty and consequences and related regulations is anticipated for 2022. This tool is intended to help strengthen compliance with the IRPA and the *Citizenship Act* by deterring non-compliance through a negative consequence such as a monetary penalty.

Table 14: Penalties for unlawful immigration assistance in comparable foreign jurisdictions

Country	Penalty
Australia	Under sections 280-282 of the Act, unlawful immigration assistance can attract a penalty of up to $13,320 (when no fee for service is charged) or a maximum 10 years' imprisonment (when a fee for service is charged). Unlawful immigration assistance is within the purview of the ABF.
Canada	Penalties for unlawful representation under the *Immigration and Refugee Protection Act 2001* are up to $200,000 (CAD) or two years' imprisonment. ICCRC does not currently have the authority to pursue unlicensed immigration consultants but shares complaints with the Royal Canadian Mounted Police (RCMP) and Canada Border Services Agency (CBSA).[146] Enforcement and penalties only result where the unauthorised practitioner commits additional offences (e.g. fraud, human smuggling, or human trafficking – enforced by CBSA) or calls him/herself a lawyer, which would attract the attention of the provincial law societies. The ICCRC advises that the toughest sentence to have been applied in Canada against an individual for misconduct was the revocation of the professional's licence and permanent ban on the individual's ability to reapply. While a cost award and monetary fines were also imposed, these could not be enforced. The Government of Canada is investing in new resources to improve its ability to conduct investigations and to enable the IRCC to issue new administrative penalties to ensure compliance with federal immigration and citizenship legislation; as well as more resources to pursue criminal investigations of complex cases related to immigration and citizenship consultants. New investments will also go towards public education activities and targeted outreach, including to diaspora communities in Canada. Outreach positions have been established internationally to ensure that information is spread within those countries, including the consequences of using an unauthorised representative.
New Zealand	Maximum Penalty under the *Crimes Act 1961* (NZ) is seven years' imprisonment and up to a $100,000 (NZD) fine. Maximum penalty under the *Immigration Advisers Licensing Act 2007* is seven years' imprisonment and up to a $100,000 (NZD) fine. In addition to this, offenders can be ordered to pay reparation to a victim, or an amount that does not exceed the value of the commercial gain (where the offence occurred in the course of producing commercial gain), in accordance with the *Sentencing Act 2002*.

[146] ICCRC (n.d.), *Top 20 Tips on How to Prevent Immigration Fraud* [online document], ICCRC, accessed 11 December 2020

Country	Penalty
	The toughest sentence to have been applied in New Zealand is just under four years in prison for Richard Martin (incl. INZ Fraud convictions).[147]
United Kingdom	The *Immigration and Asylum Act 1999* (UK) provides for penalties up to two years imprisonment or a fine not exceeding the statutory maximum (which is unlimited) or both, for provision of unlawful immigration advice or immigration services. This maximum penalty does not always reflect the severity of the offending and the harm caused and for this reason the OISC also charge offenders under *the Fraud Act 1996* (UK) (the Fraud Act). In particular, Fraud by False Misrepresentation attracts a maximum custodial sentence of 10 years. The OISC can also apply to the county court to obtain a restraining order preventing the person from providing immigration advice or immigration services.[148] The heaviest sentences imposed on unregulated advisers that are prosecuted by the OISC have been where charges have been brought under the Fraud Act, attracting a custodial sentences of five years.

3.3.6. Penalty comparison with other Australian regulatory regimes

A further comparison of penalties with Australian regulatory regimes for lawyers and tax agents is at *Table 15*. It shows that while the migration advice industry attracts a higher maximum imprisonment penalty, both the legal profession and tax agent services attract much higher financial penalties, up to $55,500, in comparison to the migration advice industry ($13,320).

Table 15: Penalty comparison with Australian regulatory regimes

Activity	Description	Penalty	Financial equivalent
Migration agents – providing migration advice when not registered or exempt (no fee charged)	A person who is not a registered migration agent must not give immigration assistance.	60 penalty units.	$13,320*
Migration agents – providing migration advice when not registered or exempt (fee charged)	A person who is not a registered migration agent must not ask for or receive any fee or other reward for giving immigration assistance.	Up to 10 years' imprisonment.	n/a
Lawyers (NSW) – engaging in legal practice by unqualified entities (fee or no fee charged)[149]	An entity must not engage in legal practice in this jurisdiction, unless it is a qualified entity.	250 penalty units or imprisonment for 2 years, or both (for an individual).	$27,500*
Tax Agents – providing tax agent services if unregistered (fee or no fee charged)	A person contravenes this subsection if they provide a service that they know is a tax agent service and	250 penalty units (for an individual).	$55,500*

[147] NZIAA (2012) *Former immigration lawyer guilty of 93 charges* [online document], MBIE, accessed 11 December 2020
[148] OISC (2017) *About us* [online document], GOV.UK, accessed 11 December 2020
[149] Legal practice is governed by State and Territory laws; offences and penalties vary between jurisdictions. The above refers to the s 10 of the Legal Profession Uniform Law as a general indicator.

Activity	Description	Penalty	Financial equivalent
	they are not a registered tax agent.		

**As of 1 July 2020, one penalty unit under Commonwealth Law is $222.*[150]

3.3.6.1. Commonwealth benchmark

Another consideration when evaluating the penalty for unlawfully providing immigration assistance is the existing Commonwealth benchmark. Section 3 of the Criminal Code and the Crimes Act contain offences of general relevance to Commonwealth administration. Relevant comparable offences of general application in the Criminal Code that attract a penalty of either six or 12 months, or 10 years imprisonment are:

- Section 135.1 – General dishonesty
- Section 136.1 – False or misleading statements in applications
- Section 137.1 – False or misleading information
- Section 137.2 – False or misleading documents.

3.3.7. Lack of prosecutions

Twenty-nine referrals were made to ABF Investigations regarding unlawful immigration assistance during 2019-2020; nine referrals were made for 2020-2021 (up to 30 September 2020). As at 30 September 2020, there were 136 open migration-related investigations being undertaken nationally, of which at least 21 investigations related to unlawful immigration assistance. These investigations included foreign worker exploitation, illegal labour hire networks and migration related fraud.

From 1 July 2019 to 30 September 2020, no investigations relating to unlawful immigration assistance reached prosecution. The lack of prosecutions means that there are fewer comparative sentences, and penalties are generally lower.

However, prosecution does occur occasionally. On 5 February 2021, a 38 year old Perth woman was sentenced to a total of six years, six months imprisonment, with a non-parole period of four years, six months, for the following 12 offences:

- 10 x s.281(1) of the Act – receiving a fee/reward for providing immigration assistance
- 1 x s. 400 of the *Criminal Code* – dealing with proceeds of crime worth more than $10,000
- 1 x s.21(4) *Foreign Passports Act 2005* – possessing foreign travel document (29 charges rolled up into one).

In addition to the term of imprisonment, the woman was ordered to forfeit $30,000 cash seized, and received reparation orders relating to eight complainants, for the total amount of $188,235. The woman had been under investigation since 2014, demonstrating that it can take many years for prosecution to occur.[151]

In its 2018 response to the JSCOM, the Department noted that it had 'struggled to get a custodial sentence' in the last five years for the cases of providing 'unregistered immigration assistance' that have gone before the courts; and that the courts were generally sentencing those individuals to a good behaviour bond of three years.[152]

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[150] Federal Register of Legislation (2020) *Notice of Indexation of the Penalty Unit Amount* [online document], Office of Parliamentary Counsel, accessed 11 December 2020
[151] ABF (2021) *Jail for serial fraudster migration agent* [online document], Home Affairs, accessed 7 February 2021
[152] JSCOM (2019:45) *Report of the inquiry into efficacy of current regulation of Australian migration and education agents* [online document], Commonwealth of Australia, accessed 10 September 2020

For example, in 2018, the ABF charged two people for the operation of an unlawful migration business involved in the provision of unlawful immigration assistance to foreign nationals. In December 2019, both women pleaded guilty and received the following sentencing outcomes:

- A 32 year old Chinese National was found guilty of two Act offences and sentenced to an 18-month good behaviour bond.
- A 30 year old Australian was found guilty of three Act offences and sentenced to a two-year good behaviour bond.

3.3.7.1. Alternatives to prosecution

The ABF is able to use limited administrative actions to address unlawful immigration assistance. This includes issuing educational letters to entities suspected of providing unlawful immigration assistance and warning letters to entities where there is evidence they have provided unlawful immigration assistance. Infringement notices may be issued for an offence against Section 280 of the Act. The other offences in Division 2 of Part 3 do not carry financial penalties and therefore infringement notices are not available.

3.3.8. Limitations of powers

The ABF has powers under various legislation to detect, deter and interrupt illicit activity at the border, and may investigate migration agents who engage in unlawful conduct under the Act. The ABF engages with the OMARA to ensure a coordinated approach to criminality involving migration agents and unlawful providers of immigration assistance.

The ABF's investigation of unlawful providers of immigration assistance is often linked to other criminal offences, such as serious migration fraud and foreign worker exploitation. However, due to the limitations of the powers available to the ABF, assistance must be sought from the AFP to execute section 3E Crimes Act search warrants and/or arrest alleged offenders. This includes for the offences pursuant to sections 280-284 of the Act and more serious fraud related offences pursuant to the Criminal Code. A 3E Crimes warrant is the principal Commonwealth search warrant provision and can be applied to all Commonwealth offences, however can only be executed by a police officer.[153]

There is a limitation on the purposes and circumstances for which information seized by the AFP (using section 3E of the Crimes Act – Search Warrants) can be used or shared. The limitation exists because information obtained under statute can only be used for the purposes for which the power was conferred, purposes reasonably incidental to that purpose and for such other purposes that are authorised by statute. Subsection 488AA(3) of the Act permits information that is about, or obtained from a thing seized under a search warrant issued under section 3E of the Crimes Act for the following purposes:

- making a decision, or assisting in making a decision, to grant or refuse to grant a visa
- making a decision, or assisting in making a decision, to cancel a visa
- making a decision, or assisting in making a decision, to revoke a cancellation of a visa
- making a decision in relation to the detention, removal or deportation of a non-citizen from Australia.

Administrative functions in Part 3 of the Act (agent registration and discipline) are not in scope of section 488AA of the Act. As a result, the OMARA does not have access to relevant information to use in administrative decisions, including cancellation of registration[154].

[153] AFP (n.d.) *Search warrant - guidelines* [online document], ABF, accessed 8 February 2021
[154] As distinguished from the offence provisions in Part 3 of the Act, which would be in scope of section 3ZQU of the Crimes Act, facilitating joint AFP-ABF investigations.

3.3.9. Matters for public feedback

We welcome the public's feedback on the following options for reform:

3.3.9.1. Increase financial penalties in section 280(1), and considering increasing penalties in sections 312A and 312B from 60 penalty units to 250 penalty units.

Increasing financial penalties would bring the migration advice industry into line with comparable industries (for lawyers and tax agents) and provide broader scope for handling Commonwealth prosecutions. While section 280 offences clearly fall within the realm of unlawful immigration assistance, amending sections 312A and 312B in Part 3 of the Act may improve the adequacy of penalties for RMAs who fail to disclose their assistance, thereby avoiding scrutiny.

3.3.9.2. Apply penalties to businesses, not just individuals

The OMARA regulatory system regulates individual migration agents ('persons'). Migration agencies as businesses and key office holders as individuals are not liable for offences or misconduct relating to immigration assistance provided by individuals employed by their agency. As such, the businesses and key office holders cannot be penalised if they provide immigration services enabling serious and organised crime, employ staff who are illegal providers of immigration assistance, employ RMAs who breach the Code, or do not report known or suspected illegal immigration.

Entities, such as businesses and corporations that employ the services of migration agents, should be subject to penalties for unlawful immigration assistance. This means that, a business that uses an unregistered migration agent to submit visa application to the Department be held liable; or where a business's activity includes the provision of unregistered migration assistance services, it be held liable.

In order for a penalty to be applied to a business, that business would need to be guilty of an offence. That is, the offence provisions would need to be amended in such a way that the offence can be committed by a business and not only a person.

If penalties are applied to businesses, higher penalties should be applied to businesses and corporations than to individuals. This approach would be in line with existing penalty provisions in the Act and associated Regulations for organising illegal work and cash-for-sponsorship operations with body corporates that are subject to higher penalties than individuals.

Given businesses are also regulated by ASIC, expanding the migration agent regulatory framework to include them may be perceived as dual regulation. However, the introduction of offence provisions that target businesses is unlikely to result in dual regulation but would rather provide criminal offences that could be used by other regulatory agencies. That is, offence provisions would not constitute regulation as such, but rather provide the ability to prosecute where it is the business that commits the offence rather than RMA.

3.3.9.3. Require the payment of reparation and commercial gain

There may be potential to introduce a power in Australia modelled on the New Zealand framework whereby offenders can be ordered to pay reparation and commercial gain (including for visa application fees) by the relevant authority. The relevant authority would be a court, and not the OMARA. While legislative change would be required to the Act, this option offers an alternative and simpler approach than the introduction of a fidelity fund and provides for greater consumer recompense than is currently available.

Part 71 of New Zealand's *Immigration Advisers Licensing Act 2007* states that, in addition to any penalty imposed on a person convicted under any of section 63 (offence to provide immigration advice unless licensed or exempt), section 67 (offence of asking for or receiving fee or reward for immigration advice when neither licensed nor exempt), and section 68 (offence of employing or contracting unlicensed or non-exempt person as immigration adviser), the court may require payment of reparation to a victim (in accordance with the *Sentencing Act 2002*). Part 72 provides for additional penalties for an offence involving commercial gain, whereby the court may, if satisfied that the offence occurred in the course of producing a commercial gain, order that person to pay an amount not exceeding the value of the commercial gain. The value of any gain must be assessed by the court.

During 2020, New Zealand North Shore businessman Mr Peter Woodberg was sentenced to six months community detention, 12 months supervision and ordered to pay $5600 reparation to victims, following his guilty plea to three representative charges laid by the NZIAA for providing immigration advice to migrants without being licensed or exempt.[155] In a similar case, Mr Timothy Joseph Spooner was sentenced to four months' home detention and ordered to pay $7050 reparation to victims following his guilty plea in May 2019 to five charges laid by the IAA for providing advice to immigrants when he was neither licensed nor exempt.[156]

In the United Kingdom, the OISC has no powers to compensate clients who have received poor advice or services from regulated advisers. However, the Commissioner will often recommend that regulated advisers return some or part of client fees where services delivered have been found to be poor. In relation to unregulated advisers the criminal court may order the offender to financially compensate the victim for any losses incurred. This is 'means tested' and is therefore limited to what the offender can afford. In most cases the compensation awarded does not cover the full cost of the victim's loss. It is possible for the victim to pursue the offender through the civil courts to seek recovery of fees that have been unlawfully charged. This action is rarely taken due to the legal costs involved with bringing a private action.

3.3.9.4. Remove differentiation between fee-for-service and no fee-for-service

Taking payment for providing unlawful immigration assistance is considered a 'higher-order' / aggravated offence than providing unlawful immigration assistance and not taking payment; the offence therefore may attract a greater penalty. There is currently a significant difference in the penalty arrangements for both scenarios. Section 280 of the Act (unlawful immigration assistance) attracts a penalty of up to 60 penalty units; while section 281 of the Act (charging fees for unlawful immigration assistance) attracts a penalty of up to 10 years imprisonment.

However, there is a need to prove that payment was asked for or provided, and further, that the payment was for immigration assistance and not for another purpose. The ABF has indicated that proving payment can be difficult, especially if payments are made offshore or in cash and are not readily traceable.

In other Commonwealth countries, there is no differentiation between the application of penalties, regardless of whether a fee is being charged or not for the provision of unlawful immigration assistance. This is the preferred position due to the difficulty in proving payments.

3.3.9.5. Introduce the ability to apply both financial infringements and/or imprisonment for related offences under subsections 281(1), 281(2), 282(1), 283(1), 284(1) and 285(1)

Further to the above recommendation, currently infringement notices may only be issued for an offence against section 280 of the Act (unlawful immigration assistance). The other offences in Division 2 of Part 3 do not carry financial penalties and, as such, infringement notices are not available.

No longer differentiating between fee-for-service and no fee-for-service, and applying the same available penalties/infringements to both, would broaden the application of available penalties/infringements to sentencing authorities.

3.3.9.6. Introduce provisions to make it a criminal offence to knowingly provide immigration assistance for the purposes of enabling serious and organised crime

In March 2019, ACIC reported that creating criminal offences for knowingly providing immigration assistance for the purposes of enabling serious and organised crime could help disrupt assistance to organised crime and strengthen the regulated market.

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[155] NZIAA (2020), *Unlicensed immigration adviser sentenced to community detention* [online document], MBIE, accessed 11 December 2020

[156] NZIAA (2019), *Unlicensed immigration adviser sentenced to home detention* [online document], MBIE, accessed 11 December 2020

Immigration assistance enabling serious and organised crime involves both simple and sophisticated methodologies. At the most basic level, unlawful providers and migration agents can advise serious and organised criminals on vulnerabilities in the visa system and how to exploit specific visa programs.

RMAs are not currently required by legislation to take reasonable steps to confirm the identity of their clients or legitimacy of sponsors (e.g. confirming that a business sponsoring a visa application actually exists).

Case Study 7: Criminally complicit RMA

An RMA with declared and undeclared links to PPV (and other visa) applicants, is linked to non-citizens with criminal (drug related) convictions and law enforcement interest. This individual has lodged or assisted to lodge over 150 PPV applications, while only formally declaring immigration assistance with a small number of applications.

Provisions currently contained in the Criminal Code encompass the breadth of organised crime related activity. This includes:

- associating in support of serious organised criminal activity (section 390.3)
- supporting a criminal organisation (section 390.4)
- committing an offence for the benefit of, or at the direction of, a criminal organisation (section 390.5)
- directing activities of a criminal organisation (section 390.6)

These provisions may be used to prosecute the act of providing immigration assistance to a criminal organisation and/or in support of criminal activity, even if they are not an RMA. However, the inclusion of specific provisions to penalise immigration assistance undertaken for the purposes of organised crime would further underscore the Government's stance on this serious issue. It would also close any loopholes that may be exploited by agents or unlawful operators working with international criminals to circumvent Australia's immigration laws.

Should this measure progress, further consideration will need to be given to defining 'serious and organised crime' with relevant internal stakeholders, and ensuring the provision of appropriate evidence gathering powers for the ABF for implementation. This would be progressed in consultation with the AFP.

3.3.9.7. Do *not* expand Australian criminal offences and/or civil penalties for visa applicants and sponsors using unlawful immigration assistance

Individual visa applicants and sponsors cannot currently be prosecuted or fined for using unlawful providers of immigration assistance. Developing an offence for engaging illegal providers of immigration assistance would place a level of responsibility on the consumer, including vulnerable clientele, to undertake due diligence when seeking immigration assistance.

This proposal is not recommended because such a provision could deter people from reporting to the ABF that they are or were using an unregistered agent, which could in turn impact on investigations.

Further, it could be difficult to prove the applicant knew that the migration agent was unregistered when they engaged their services. According to the ABF, anecdotally, high volume Protection Visa fraud indicates that the visa applicants believe they are applying for a work visa, and do not know the nature of their claims, making these cases unlikely to be able to be prosecuted.

3.4. The powers of the OMARA to address RMA misconduct

3.4.1. Executive Summary

The Authority is empowered under the Act to act as the industry regulator for RMAs. The functions of the Authority are set out in section 316. Subsection 315(2) of the Act specifies that the functions and powers of the Authority may only be exercised or performed by the Minister or a delegate of the Minister. The Minister has delegated functions of the Authority to officers of the OMARA within the Department.

The Act provides the OMARA with powers to assess complaints, request information and sanction agents. However, the OMARA faces several limitations under current provisions, resulting in inefficiencies in its investigative and disciplinary abilities.

This chapter examines inadequacies in current legislation that need to be addressed to strengthen the OMARA's ability to address misconduct by RMAs, while removing redundant provisions to reflect modern day business practices. There is potential to amend Part 3 of the Act, to:

- empower the OMARA to compel the provision of documents under threat of penalty
- remove redundant subsections
- simplify the information gathering powers and penalties
- include provisions to bar RMAs based on fitness and propriety and clarify that the OMARA may bar agents for complaints received during their period of registration as well as after their registration has lapsed
- better reflect that OMARA is part of the Department.

The Department has further considered but does *not* recommend introducing a system of demerit points to sanction RMAs or empower the OMARA to enter and search premises and sanction entities that employ RMAs.

3.4.2. Background

In Australia, it is an offence for a person to provide immigration assistance unless registered with the Authority, currently the OMARA, or unless exempt under the Act. As part of its mandate, OMARA administers a comprehensive regulatory framework, including relevant provisions of the Act, to ensure that:

- clients needing migration services understand their rights
- RMAs understand their obligations
- only suitable people are registered as agents and that unsuitable people are refused registration or re-registration
- RMAs maintain the knowledge and skills needed to provide accurate and timely advice to their clients
- RMAs are monitored for integrity of conduct and quality of immigration assistance
- clients of registered or formerly registered agents have an effective way to complain
- complaints are efficiently managed and processed.

Section 316 of the Act sets out the OMARA's functions and responsibilities, giving it the authority to regulate RMAs through different powers, including:

- registration of migration agents
- investigation of complaints against RMAs
- determining when an RMA has breached the Code
- taking appropriate disciplinary action against RMAs or former RMAs.

3.4.3. Stakeholder views

In relation to the discussion paper, 10 industry stakeholders provided comment on whether the OMARA's current powers to address RMA misconduct were sufficient. Although half of the submissions were satisfied with the adequacy of the OMARA's powers, the other half recommended further enhancing the OMARA's powers to include the ability to conduct workplace compliance audits, impose conditions to address competency issues, and order sanctioned RMAs to provide refunds and/or compensation to clients.

The AAT's submission further recommended the OMARA be empowered to sanction certain RMA behaviour. This included shadow representation, late lodgement of submissions and lodgement of applications with no prospect of success, at different stages (primary stage, merits review and judicial review) by different associated RMAs, to avoid the perception of contravening the Code.

3.4.4. Matters for public feedback

The OMARA's primary role as a regulatory body is its investigative mandate. Consumers of migration advice and organisations (including the Department) that operate in this space can lodge a complaint against an RMA for misconduct that breaches their obligations under the Code.

The OMARA received 454 complaints in calendar year 2020, with a total of 479 complaints on hand on 31 December 2020[157]. A significant number of new complaints (274) were finalised in less than three months, including complaints dismissed for insufficient evidence, no jurisdiction and no merit to the complaint. However, a significant cohort of on-hand complaints remain under process for 12 to 24 months due to the resource-intensive nature of investigating each claim put forward in a complaint.

This delay not only creates a growing backlog that affects the efficiency of the OMARA's complaints handling operations, but can create uncertainty for RMAs who may have to wait for up to a year or more to know the outcome of a complaint against them. Consumers may also have to wait for extended periods before their complaint is addressed, by which time they may not be able to remain onshore.

The main investigative regulatory framework underpinning the investigation and complaints handling function (Division 4 of Part 3 of the Act) of the OMARA is significantly outdated and inefficient due to the evolution of the Authority from an industry self-regulation body to a separate government regulator that was subsequently amalgamated into the Department. A number of ad hoc amendments to the Act have also been enacted over a period of time, resulting in unclear and redundant provisions that do not reflect the current business environment. There is an increasing need to overhaul the current framework to make it simpler and more streamlined, with the aim of increasing productivity gains in the OMARA's complaints handling process.

We welcome the public's feedback on the following reform options, which could address RMA misconduct, and potentially increase efficiencies in the OMARA's internal administration and collaboration with partner agencies. These initiatives could further enhance disciplinary outcomes, ultimately granting the OMARA the appropriate tools to manage the integrity and image of the migration advice industry in today's modern operating environment.

3.4.4.1. Amend Part 3 of the Act to empower the OMARA to compel the provision of documents under threat of penalty and remove redundant subsections

Section 308 of Part 3 of the Act grants the Authority the power to investigate complaints against RMAs. It allows the Authority to gather information from RMAs by requiring them to:

- make a statutory declaration in response to questions
- appear before its representatives
- provide specific documents or records relevant to the agent's registration.

[157] The number of on hand complaints does not correlate to the number of registered migration agents with complaints made against them – an agent may have multiple complaints against them at any point. The oldest case delays are due to factors including agents not responding, OMARA seeking legal advice or awaiting ABF investigation.

In practice, the OMARA only requests statutory declarations and evidence from RMAs electronically. RMAs are not required to appear in person before representatives of the OMARA, making subsections 308(2) and (2A) redundant.

Although the OMARA has the ability to sanction an RMA's non-compliance in relation to the information request (by highlighting their non-compliance in any disciplinary outcome), it does not have the power to enforce compliance, inhibiting the effectiveness of the investigation. This can cripple the fact-finding process and, until very recently, the OMARA had limited options to sanction such behaviour.

The passage of the *Migration Agents Registration Application Charge Act 2020* (concurrently with the Regulation Act) in mid-2020 has enabled the OMARA to refuse an application for registration as an RMA if the applicant does not provide requested information. However, section 288B (which was inserted 11 August 2020 as an outcome of this Acts package) applies only to persons who have applied for registration and not those who are already registered as migration agents.

Legislative amendment to allow the OMARA to sanction RMAs who do not provide requested documents that the OMARA considers relevant to assess a complaint against them. This would allow the OMARA to more efficiently finalise cases, ensuring disciplinary actions can be progressed in a more timely manner.

3.4.4.2. Simplify the information gathering powers and penalties in Part 3 of the Act under one section

Similar to section 308, section 305C confers the OMARA with the authority to request documents or information when considering whether to refuse an agent's registration or to discipline them. Under this section, if an RMA does not provide the requested information within 14 days, they may be penalised up to 60 penalty units for the offence.

As both sections 308 and 305C require RMAs to give information or documents, combining the two sections and allowing the broader powers in 308 available to circumstances specified in 305 will remove the considerable overlap and simplify the Act by listing information gathering powers and corresponding penalties under one provision, making it easier to understand. Guidance will be provided to industry about this change to avoid any misinterpretation that associated penalties have been removed or no longer apply.

3.4.4.3. Amend Part 3 of the Act to include provisions to bar RMAs based on fitness and propriety, and clarify that the OMARA may bar agents for complaints received during their period of registration as well as after their registration has lapsed

Under the Act, the OMARA has the authority to sanction RMA misconduct by barring them from being an RMA for up to five years. The barring regime is set out in Division 4A of Part 3, under section 311A. However, this section may be misconstrued to imply that the OMARA's ability to bar agents is only enlivened if a complaint is received while the RMA is registered. This is not the intention of this provision.

Section 316 under subsection 316(1A) and (1B) clarify that the OMARA may start (and finalise) their investigation of an RMA even when the agent is no longer registered, as long as a complaint is received within 12 months of the deregistration date. The Department recommends that the provisions are amended to clarify that complaints about an RMA's misconduct, received either while they are registered or after their registration has lapsed, can be considered.

There is also no capacity under this section to bar a person from being an RMA based on fitness and propriety. This requirement could be added to the provision so that in addition to being able to bar agents upon receipt of a specific complaint, the OMARA is able to exercise its authority to bar a person for up to five years from registering as a migration agent if they are not a fit and proper person. The criteria for being a fit and proper person will need to be articulated clearly to the industry through policy guidance (see Chapter 2.1).

3.4.4.4. Amend Part 3 of the Act to reference the OMARA only

Section 321A of the Act, which was added to complement the referral powers in section 319, was drafted in 2004 when the MIA was under appointment by the Minister to operate as the Authority. It allowed for the disclosure by the Authority of personal information about an RMA to the Department or a review body, including the AAT or the IAA.

Since the OMARA joined the Department in 2015, the information sharing provision set out in paragraph 321A(1)(a) has not been updated to account for the OMARA having been delegated powers of the Authority by the Minister.

It would be prudent to amend section 321A to articulate legislative authorisation specifically for the OMARA for the purposes of sharing information referred to in this section. This is to ensure full compliance with Australian Privacy Principles (APP), namely APP 6.2(b). The Department therefore recommends that the reference to the MARA in section 321A be amended to refer explicitly to the OMARA. This will provide for comprehensive compliance with the APP for any necessary information sharing between the Department, the Minister and the OMARA.

Broader consideration should also be given to referencing the OMARA directly in Part 3 of the Act due to the outdated and oftentimes unclear nature of the MARA's association with the OMARA.

3.4.4.5. Do *not* amend Part 3 of the Act to strengthen the OMARA's investigative powers, allowing it to sanction entities that employ RMAs and enter and search premises

Due to the phrasing of the relevant section of the Act, the OMARA is only empowered to gather information from RMAs by way of requesting evidence in response to a complaint. This limits the OMARA's investigative abilities by excluding entities that employ RMAs, and non-RMA directors and board members of organisations, from within its purview. Such restrictions render the OMARA powerless against unregistered company managers who may be involved in facilitating migration fraud.

Currently the OMARA must work with the ABF when migration fraud is suspected. There has been considerable debate about whether migration fraud could be reduced by strengthening the suite of powers available to the OMARA to allow it to sanction non-RMA entities, compel the provision of evidence and enter and search premises where migration fraud is suspected. For example, in the United Kingdom, the OISC has the power to enter premises to conduct a premise audit and to do this without notice, under warrant. This allows it to take swift action to sanction regulated advisers that act in an unfit or incompetent manner.

However, the OMARA is not a law enforcement body but a regulator that makes administrative decisions. Allocating additional responsibility to officers of the OMARA to investigate businesses and business owners in the course of investigating a complaint would entail granting officers the power to enter the home offices of sole practitioners, seize computers/servers and undertake digital forensics at premises. This would require extensive changes to the Act and other related legislation.

Furthermore, granting the OMARA powers to seek warrants would require it to comply with the Australian Government Investigation Standards and require training officers in some degree of Use of Force to safely execute these powers. Clarification would also be needed on OMARA's responsibilities if evidence of other offences not related to the Act was found in seized documents/computers.

This approach is therefore not recommended as it would be an unnecessary duplication of functions for the OMARA to take up law enforcement responsibilities alongside the ABF. Instead, optimising collaboration between the OMARA and the ABF would result in a more efficient allocation of resources, allowing the OMARA to continue to function as an administrative body. Measures on how to increase co-operation with the ABF and to more efficiently sanction misconduct in the industry are examined in Chapters 3.3 and 3.6.

3.4.4.6. Do *not* introduce a system of demerit points to sanction RMAs

Currently under section 303 of the Act, the OMARA can discipline an RMA by cancelling or suspending their registration or cautioning them. The Department has examined the concept of demerit points as a way to complement the OMARA's existing powers to sanction agents.

This concept originally evolved from the JSCOM inquiry report, which recommended the introduction of a demerit point system for education agents who were found to be in breach of the *Education Services for Overseas Students Act 2000*, National Code of Practice for Providers of Education and Training to Overseas Students 2018, or the Act.[158] Education agents are not within the scope of the migration agent regulatory framework or this Review.

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[158] JSCOM (2019:100) *Report of the inquiry into efficacy of current regulation of Australian migration and education agents* [online document], Commonwealth of Australia, accessed 10 September 2020

The inquiry report further recommended that the structure of the demerit point system be modelled after the Approved Destination Status (ADS) scheme, administered by Austrade. As part of the ADS scheme, Australian inbound tour operators (ITOs) must conduct tour services for tourists in accordance with the provisions of ADS Code of Business Standards and Ethics. ADS ITOs are allocated 10 points when approved to operate under the scheme. Any ITOs found to have breached a clause of the code are sanctioned and lose points. ITOs that continue to breach the code, lose all their points and are suspended for three months. After that time has lapsed, the ITOs are permitted to re-join the scheme with a 12-month probation period and five points. If an ITO's points balance reaches zero again, their approval is cancelled.

3.4.4.6.1. *Stakeholder views*

The Department's discussion paper sought feedback on whether a system of demerit points was viable for the migration advice industry, requesting that stakeholders provide comment on whether they would like to see such a system from part of the OMARA's suite of powers going forward. Of the nine submissions received on the topic, eight submissions opposed the concept.

The rationale presented in the opposing submissions included that the current sanction system was sufficiently rigorous and that the high industry compliance rate did not warrant additional restrictions. Some submissions stated that the demerit points system would only apply to RMAs and not to legal practitioners and therefore would be discriminatory for agents registered with the OMARA. The sole supporting submission suggested that points be docked from agents who have a visa refusal or those who withdraw a visa application, with agents with zero points required to re-sit the Capstone (or a CPD on the subject) to get their registration reinstated.

3.4.4.6.2. *International comparison*

Table 16 below details powers that regulators in New Zealand, Canada and the United Kingdom have available to them to sanction migration industry members. The table demonstrates a demerit system is not currently in place in its proposed form in any comparable Commonwealth immigration assistance regulatory regime. While its implementation may increase the tools the OMARA has at its disposal to regulate RMAs, setting up and formalising such a system would be complex.

Table 16: Sanctioning powers available to overseas migration industry regulators

Disciplinary Body	Empowered under	Sanction options available
Immigration Advisers Complaints & Disciplinary Tribunal (New Zealand)	*Immigration Advisers Licensing Act 2007* (the IAL Act)	The sanctions that may be imposed are set out at section 51(1) of the IAL Act: **Section 51 - Disciplinary sanctions** (1) The sanctions that the Tribunal may impose are: (a) caution or censure, (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period; (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions; (d) cancellation of licence; (e) an order preventing the person from reapplying for a licence for a period not exceeding 2 years, or until the person meets specified conditions, (f) an order for the payment of a penalty not exceeding $10,000; (g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution; (h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person

Disciplinary Body	Empowered under	Sanction options available
		to the licensed immigration adviser or former licensed immigration adviser; (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.
Discipline Committee - College of Immigration and Citizenship Consultants (Canada)	*College of Immigration and Citizenship Consultants Act* (the College Act)	Sanctions available are set out in Section 69(3) of the College Act: **Section 69 (3) - Professional misconduct or incompetence** 69 (3) If the Discipline Committee determines that the licensee has committed professional misconduct or was incompetent, the Committee may, in its decision, (a) impose conditions or restrictions on the licensee's licence; (b) suspend the licensee's licence for not more than the prescribed period or until specified conditions are met, or both; (c) revoke the licensee's licence; (d) require the licensee to pay a penalty of not more than the prescribed amount to the College; or (e) take or require any other action set out in the regulations.
OISC (United Kingdom)	*Immigration and Asylum Act 1999,* *Nationality, Immigration and Asylum Act 2002*; and the *Immigration Act 2014*	The OISC has the ability to sanction by: (a) cancelling registration or refusing continued registration (b) limiting or varying levels of work advisers may undertake, (c) laying a disciplinary charge against a regulated adviser. A charge upheld by the Tribunal can result in the refund of client fees and/or imposing restrictions or a prohibition on the regulated adviser providing immigration advice and services; (d) applying for a restraining order or an injunction; (e) prosecuting for illegally providing immigration advice and/or services including an unregulated adviser working at a regulated organisation or working above their level of registration; (f) prosecuting for illegally advertising immigration advice and/or services; (g) other various enforcement options i.e. Cautions and Warnings.

Although implementing a system of demerit points would give OMARA more powers to sanction improper conduct which may not meet the high threshold required to formally caution or suspend an agent, setting up and maintaining a demerit points system would be a complex undertaking. Given the subjective nature of many complaints, a demerit infringement would still need some form of investigation. This would require additional resources and investment in order to automate the reinstatement of points after the specified suspension period has lapsed as well as to calculate demerit points each RMA has at any given time.

OMARA officers would also need to be trained on the demerit points allocation process, and due to the significant impact demerit points may have on the reputation and earning capacity of an RMA, an appeal procedure may need to be implemented so that agents can request an internal review of their sanction. The alternative to an internal review process could be that the agents lodge their appeal at the AAT, which may increase cases at the AAT. The complexity involved in implementing a system of this magnitude would not validate the diminishing returns it would offer in terms of marginally better policing and sanctioning of agent misconduct, which in large part is already efficiently managed by options currently available to the OMARA.

3.5. Improving compliance with AAT practice directions

3.5.1. Executive summary

The AAT is an independent review authority that plays an important role in the Australian immigration system. It works as a *de novo* review mechanism to independently examine and provide fair, economical and efficient review of administrative decisions. Within the migration context, the AAT has been conferred jurisdiction to review Part 5 and Part 7 decisions under the Act, and separately under sections 136 and 500 of the Act to review certain business visa decisions and character-related visa decisions including sections 501 and 501CA decisions.

This chapter examines ongoing efforts by the Department, including the OMARA, in collaboration with the AAT to raise migration advice industry awareness of the AAT's Practice Directions, which are key to its effective operation.

These initiatives are largely shaped by submissions received from the AAT and other stakeholders in response to the Department's recent consultation on *Creating a world class migration advice industry*. In its communication with the Department, the AAT has emphasised the need for RMAs to be aware of, and to comply with, its Practice Directions. There is a need for improvement in both respects, including by some experienced agents representing clients at the AAT.

Existing strategies to encourage industry compliance include the revised Code, which supports the Government's broader efforts towards delivering an improved legislative framework to govern the migration advice industry. The revised Code will be the culmination of several rounds of consultations with key stakeholders to ensure that their concerns and suggestions were taken into account.

Scheduled to commence in 2021, the new Code is expected to encourage RMAs to deal with the AAT in a manner that is consistent with the professional obligations imposed on all professional advocates participating in migration related merits review processes before the AAT.

Other measures to raise awareness of, and compliance with, the Practice Directions include:

- the release by the Department of supplementary policy guidelines that explain these instructions in simple terms
- enhanced liaison between the OMARA and the AAT to allow for efficient referral of allegations of non-compliance by agents
- initiatives discussed in other parts of the Review report, such as provisional licensing and a proposed tiering system.

Combined, these measures will ensure the AAT's Practice Directions are understood and observed by RMAs in their dealings with the AAT, and that misconduct is promptly addressed. The Department does not recommend further reform measures at this time, noting appropriate monitoring and evaluation of the efficacy of the above measures will ensure that ongoing compliance issues can be promptly addressed if they arise.

3.5.2. Background

The AAT was established by the *Administrative Appeals Tribunal Act 1975* (the AAT Act) and commenced operations on 1 July 1976. It was created to conduct independent merits review of administrative decisions made under a wide range of Commonwealth laws. Prior to 2015, the review of most migration and refugee visa-related decisions was undertaken by the Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT). In 2015, the AAT was amalgamated with the former MRT, RRT and the Social Security Appeals Tribunal to enhance synergies, optimise case management and standardise best practices.

The AAT's caseload has grown significantly over recent years, particularly applications for review of migration and refugee visa-related decisions that are reviewed in the MRD.

More than 36,000 applications were lodged in the MRD in 2017-18 and again in 2018-19, double the lodgements in 2015-16 and quadruple the number in 2007-08. In 2019-20, the MRD received almost 30,000 applications[159], and conducted more than 11,000 hearings. As at 31 January 2021[160], there were 59,104 cases on hand in the MRD, comprising 86 per cent of all active cases in the AAT. This increase is due to a confluence of factors including increased visa lodgements, more efficient case processing by the Department, and in some cases, apparently unscrupulous behaviour by applicants and agents lodging review applications to buy more time for themselves or their clients in Australia.

Applicants were represented by an RMA in approximately **half** of the cases finalised in 2019-20.[161] The AAT therefore has to rely increasingly on the competence, professionalism, and ethical conduct of RMAs to ensure that it can efficiently finalise decisions.

3.5.3. AAT Practice Directions

Practice Directions made by the AAT President pursuant to s.18B of the AAT Act set out the AAT's procedures when conducting reviews of decisions. These Practice Directions, and any updates or revisions, are published on its website. This allows those representing themselves or their clients at the AAT to be informed about proper procedures and best practices that enable the AAT to discharge its statutory objective and undertake its review function with as much expedition as possible.

The Practice Directions for the MRD set out instructions and requirements relating to matters such as:

- applying for review
- communicating with the AAT
- changing representation
- providing evidence and submissions to the AAT
- translations of documents
- responding to invitations to give, or comment on, information
- hearings, including responding to hearing invitations and seeking adjournments
- interpreter requests
- witnesses, including taking evidence by phone.

Practice Directions are viewed by the AAT as a centrally important tool for case management. RMAs representing clients at the AAT do not always comply with the AAT's Practice Directions and the guidelines mentioned within it. This not only makes it considerably more difficult for the AAT to conduct merits review in a manner that accords with the AAT's legislative objective, but also adds to the burgeoning caseload by causing delays, hearing postponements and an overall slowdown in the efficiency of the AAT's operations.

3.5.4. Addressing non-compliance and RMA conduct

The AAT does not currently compile statistical data about rates of compliance/non-compliance with the existing Practice Directions by individual RMAs, however internal consultation among AAT members indicates that non-compliance by RMAs with Practice Directions is a significant concern.

In their submission to the Department during the third stage consultation phase on the revised Code, the AAT underscored the importance of industry compliance with its Practice Directions to allow it to effectively manage its caseload. It provided feedback on how to best encourage compliance through rephrasing and adding Tribunal specific language to certain clauses within the Code.

The Department has since taken the AAT's feedback on board in drafting the Code which, when released, will provide more emphasis on adhering to professional requirements when representing clients at the AAT.

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[159] Application numbers lower year-on-year due to COVID-19.
[160] AAT (2021) *AAT Caseload Report* [online document], Commonwealth of Australia, accessed 26 February 2021
[161] AAT (2020), discussion paper submission

The AAT has also observed that issues arise in relation to the extent to which some RMAs understand and act in accordance with the behavioural and ethical norms expected of representatives in a tribunal. For example, some RMAs adopt inappropriate approaches in hearings, including interrupting the Tribunal or attempting to answer questions about factual matters on an applicant's behalf.

In a feedback survey conducted by the AAT in 2020, fewer than half of all RMAs who were not legal practitioners reported that they had read the AAT's Practice Directions. Further complicating matters is the fact that according to the AAT's internal analysis, as of July 2020, 49 per cent of the MRD's 63,179 active cases had an RMA representative and 26 per cent of those 3511 RMAs with active MRD cases had been registered for fewer than four years. This raises concerns that there is a sizeable cohort of inexperienced RMAs conducting work in the Tribunal who may not be fully across the AAT's rules and regulations and the complexity required to deal with cases at the AAT.

Mindful of the above statistics, the AAT has been actively working to develop a framework to help better familiarise RMAs with its expectations and has provided important feedback to the Department and the OMARA to address this issue.

The OMARA, working closely with the AAT, released a Practice Guide[162] in June 2020 to better articulate to RMAs their responsibilities when representing clients at the AAT. The short document is designed to supplement any gaps in knowledge that RMAs may have about the functioning of the AAT and provide new and longstanding agents alike with a resource that they can use to refresh their understanding of the AAT's processes when representing clients.

The Practice Guide highlights the obligations an RMA has under Part 2 of the Code to 'take appropriate steps to maintain and improve their knowledge of legislation relating to migration procedure and portfolio policies and procedures'[163] and reminds RMAs that this includes the AAT's Practice Directions. It provides RMAs with an easy to locate index of the current Practice Directions relevant to migration and refugees matters, including COVID-19 special measures and other information on conducting and prioritising migration and refugee reviews. The guide goes into further detail about the role of an RMA at hearings, best practices around providing submissions and supporting evidence, and cautioning agents about submitting vexatious applications and otherwise misleading the AAT.

3.5.5. Future Initiatives

The AAT's submission to the discussion paper articulated the need for awareness to be raised among RMAs with regards to following the AAT's Practice Directions. Other suggestions included exploring a period of supervised practice in conjunction with a tiering structure for RMAs, ensuring the OMARA has an appropriate range of powers to address competency issues, and reviewing the curriculum for the Graduate Diploma and the content of the Capstone to ensure there is sufficient coverage of the types of matters important for providing effective assistance in a merits review process at the AAT.

The Department has taken the AAT's recommendations on board and continues to work with it to ensure that RMAs are aware of the importance of adhering to the AAT's Practice Directions through different initiatives to be implemented in the coming year. This includes the following measures:

3.5.5.1. Developing Policy Guidelines

The Department will prepare policy guidelines to be released concurrently with the revised Code. These guidelines will provide examples and explanations about themes discussed in the Code, including representing clients at the AAT and steps RMAs can take to ensure they assist the AAT and its members to fulfil the AAT's statutory objective.

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[162] OMARA Practice Guide (2020) *Taking a matter to the Administrative Appeals Tribunal* [online document], Home Affairs, accessed 23 March 2021

[163] OMARA (2017) *Code of Conduct for Registered Migration Agents* [online document], Home Affairs, accessed 23 March 2021

The OMARA is working with universities offering the Graduate Diploma, and CPD providers, to ensure RMAs are properly educated about their obligations. This is to ensure that both the new generation of agents and existing agents are well versed not only in legislation, but also AAT practice and procedure, including the professional etiquette required of them when appearing before the AAT and other review bodies.

3.5.5.2. Improved liaison between the OMARA and the AAT

The AAT will continue to refer to the OMARA for investigation, where appropriate, instances of agent misconduct, including gross non-compliance with behavioural and ethical norms expected of representatives in a Tribunal. In addition, improved communication between the two entities via regular meetings will help to increase levels of industry awareness and compliance with the Practice Directions. These meetings will also assist the OMARA to analyse issues highlighted by the AAT and provide relevant solutions through better awareness and training of RMAs with regards to their rights and responsibilities when appearing at the AAT.

Separately, other communication channels between the OMARA and the AAT are also being strengthened via deeper operational liaison between the two organisations to allow for better cooperation on suspected unlawful activity. This increased cooperation will assist with improving educational opportunities for RMAs and enforcement of improper conduct to prevent representatives from lodging vexatious applications for review with the AAT. The AAT Practice Guide is the first product to stem from this enhanced cooperation model.

3.5.5.3. Tiering / Provisional Licensing

In Chapters 1.3 and 2.4, consideration has been given to a provisional licence that would limit representation by new agents at the AAT, or a tiering system that will only permit experienced agents to represent clients at the AAT. This tiering structure may be modelled after the United Kingdom's OISC competency levels, with only those agents that fulfil advanced knowledge, skills and advocacy requirements to be allowed to represent clients at appeal hearings.

The Department has also reviewed advisory models in other Commonwealth countries with similar immigration systems, including New Zealand and Canada, to consider measures that may supplement or be better suited than the tiering regime. This includes a provisional licensing model for new agents that allows them to be supervised in a tribunal setting for up to two years before being able to represent clients themselves. In Canada, ICCRC's new competency-based Immigration and Refugee Board (IRB) Specialization Program will be launched in June of this year. It is expected that the Specialization Certification will become mandatory for RCICs choosing to practice before IRB tribunals as of July 1, 2022.

3.5.5.4. Information Sessions

Educational sessions for RMAs, involving AAT speakers, may also be considered as a component of, or alternative to, the tiering structure. These workshops could form part of an RMA's CPD requirement with an evaluation at the conclusion of the session. Such sessions could be made mandatory in advance of an agent's initial appearance before the AAT and would provide a valuable learning resource for new agents. Classes could also be offered when new Practice Directions or directives are introduced, in the form of online or via pre-recorded interactive sessions, which would assist both veteran and junior RMAs to review best practices and revise the AAT's guidelines before a hearing. If supported by the AAT, this measure would be relatively simple to implement and would be a softer approach in tackling the issue of agent non-compliance. It would also align with the Government's deregulation agenda.

3.5.6. Matter for public feedback

The Department does not recommend further reform measures at this time. The OMARA and the AAT should continue to monitor and evaluate of the efficacy of the above measures to ensure that ongoing compliance issues can be promptly addressed if they arise. Public feedback is welcome on this recommendation.

3.6. Establishing an independent regulator

3.6.1. Executive summary

Individuals from CALD backgrounds engage the services of RMAs for a variety of reasons, including assistance to complete complex visa applications and forms, comprehension of the immigration legislation, and ease of communication through a common language. These people are often socially, legally and financially vulnerable and are open to exploitation from the actions of unscrupulous, unlawful and unethical RMAs, and unlawful providers of immigration assistance.

In February 2019, JSCOM proposed to establish an Immigration Assistance Complaints Commissioner (Complaints Commissioner) to help address the actions of unscrupulous and unlawful industry players, including RMAs and unlawful operators. The JSCOM proposed it would be beneficial for all complaints to be handled by a single statutory authority: the Complaints Commissioner, and that the Act should be amended to establish a statutory authority that should be modelled on the Aged Care Complaints Commissioner.[164]

The Aged Care Complaints Commissioner was introduced in January 2016 to separate complaints handling from the Department of Health, which continued to oversee aged care funding and regulation. The now Aged Care Quality and Safety Commissioner oversees the regulation of Commonwealth-funded aged care services by the Aged Care Quality and Safety Commission (ACQSC). The Commission has become a national end-to-end regulator of aged care services in Australia, with no separation between complaints handling and other regulatory functions including compliance.

The rationale behind the establishment of a Complaints Commissioner is important to the professionalisation of the migration advice industry. While the majority of submitters to the JSCOM inquiry were of the view that RMAs were 'diligent, professional and played a vital role in Australia's immigration system, there were submitters who reported anecdotal evidence that some migration agents were engaged in unlawful or unethical behaviour'.[165] The proposed functions of a Complaints Commissioner were intended to address this concern, thereby increasing consumer protections.

On 15 November 2019, the Assistant Minister referenced consideration of stronger penalties as an alternative approach to establishing a Complaints Commissioner in an address to an industry event[166]. The Assistant Minister subsequently agreed for the JSCOM recommendation to be considered within the scope of the Review.

The concept of a Complaints Commissioner was included in the discussion paper *Creating a world class migration advice industry*, released in June 2020. Five supportive responses to the proposal were received from key stakeholders and are summarised in this paper. By way of comparison to Australia's current regulatory framework, a summary of commissioner frameworks in like-minded Commonwealth countries and other Australian commissioner models is also included.

Proposals considered in this chapter include:

- establishing an independent Complaints Commissioner, or statutory authority
- establishing a Complaints Commissioner within the ABF or the Department
- not establishing a Complaints Commissioner or any alternate mechanism.

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[164] JSCOM (2019:xvi,48) *Report of the inquiry into efficacy of current regulation of Australian migration and education agents* [online document], Commonwealth of Australia, accessed 11 December 2020
[165] JSCOM (2019:ix) *Report of the inquiry into efficacy of current regulation of Australian migration and education agents* [online document], Commonwealth of Australia, accessed 11 December 2020
[166] The Hon Wood J MP (2019), *Speech at Migration Alliance National Conference 2019* [online document], Parliament of Australia, accessed 11 December 2020

As discussed elsewhere in the report, there is potential to implement initiatives that would give effect to the intent of a Complaints Commissioner, including, but not limited to:

- improving coordination between the OMARA, the ABF and the AFP when dealing with unlawful immigration assistance and misconduct of RMAs
- strengthening penalties to bring the migration advice industry in line with comparable industries (for lawyers and tax agents) and provide more incentive and broader scope for handling Commonwealth prosecutions
- publishing information on the pricing arrangements of RMAs
- introducing a period of supervised practice for RMAs
- education outreach – updating practice guides and publicly available information via the OMARA website.

The Department does *not* recommend establishing an independent regulator under the auspices of a Complaints Commissioner. The Department considers that the cost of establishing such an authority cannot be justified for the migration advice industry at this time.

Further, pursuing this option in line with the structure of the ACQSC will remove the information-sharing benefits, strengthened investigatory mechanisms and efficiencies gained when the OMARA merged into the Department in 2015.

With that merge, the OMARA gained access to relevant departmental systems, which have allowed the OMARA to more thoroughly investigate applicants' visa histories and their previous compliance, and draw information that may form trends or highlight areas for focus[167].

As part of the Department, the OMARA can more readily collaborate with the ABF on investigations into visa and migration fraud committed or facilitated by RMAs. It can also actively liaise with ACIC by tapping into organised crime intelligence, and relationships with facilitators in the migration advice industry, to target a small number of RMAs involved in criminal activity including illegal labour hire schemes.

Locating the Complaints Commissioner and associated existing functions in an independent entity external to the Department has adverse implications for its investigative capacity and that of the ABF, including blurred lines of responsibility, duplication of effort, less access to analytics and intelligence, and stepping away from existing, well-functioning complaints mechanisms such as Border Watch.

Establishing an independent authority would be costly both in terms of time and money, and would require significant legislative and administrative change. It would pose significant implications for the OMARA, the functions of which would likely be subsumed into a Complaints Commissioner model.

On balance, and given the current fiscal environment and negative economic impact of the global pandemic on the migration advice industry, it is recommended that the Government not establish a Complaints Commissioner at this time.

Rather, the Government could implement a range of less costly initiatives suggested in this draft report that would focus on consumer protections and addressing unlawful conduct by RMAs.

[167] The Department only uses personal information when such use complies with the *Privacy Act 1998* and the Australian *Privacy Principle 6: Use or disclosure of personal information*.

3.6.2. Strategic context

In 2019, JSCOM's inquiry report (recommendation three)[168] proposed the amendment of the Act to establish a statutory authority, the Complaints Commissioner, with the power to:

- resolve complaints about immigration services[169]
- detect, deter, disrupt, investigate and prosecute unregistered practice[170]
- impose sanctions[171] or fines and/or order the payment of costs, payment of refund or compensation
- publish registered migration agent performance data[172]
- educate people and immigration business and agents about the best ways to handle complaints and the issues they raise[173]
- provide information to the Minister in relation to any of the Complaints Commissioner's functions, if requested
- in consultation with practicing RMAs, publish information on the pricing arrangements of migration agents.

Some of the above proposals are covered by reform proposals within this report, and do not give rise to a clear need for a separate entity, for example, introducing penalties whereby an offending RMA would be liable for reparation and commercial gain, or reinstating the requirement for an RMA to identify their range of fees charged during the previous 12 months for the purposes of the OMARA publishing aggregated information on pricing arrangements.

The ABF notes that the proposed function of the Complaints Commissioner did not appear to have any role in the investigation/prosecution of migration agents involved in visa and migration fraud. Subject to the model, if a Complaints Commissioner were to be established, there would be clear benefits in the Complaints Commissioner having a role in the investigation/prosecution of corrupt agents involved in such criminal offences.

There have been a number of significant developments in the migration advice industry to strengthen consumer protections and increase administrative efficiency within the OMARA. Further legislative changes were recently introduced by the Regulation Act to:

- expand the definitions of 'immigration assistance' and 'makes immigration representations' to include assisting a person to make a representation to the Minister in relation to the revocation of a visa refusal or cancellation decision on character grounds
- allow the OMARA to refuse an application for registration as an RMA if the applicant does not provide requested information, instead of leaving the application unfinalised indefinitely
- remove legal practitioners with unrestricted practising certificates from the regulatory scheme governing migration agents.

The first two amendments above came into effect on 11 August 2020, and will deter those not registered as migration agents from assisting another person in making such representations to the Minister. They also ensure that people who need immigration assistance in relation to visa refusals and cancellations can only receive advice from RMAs. The removal of unrestricted legal practitioners from the OMARA regulatory scheme complements the Government's deregulation agenda, and commenced on 22 March 2021.

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[168] JSCOM (2019:xvi) *Report of the inquiry into efficacy of current regulation of Australian migration and education agents* [online document], Commonwealth of Australia, accessed 11 December 2020
[169] The OMARA is currently responsible for resolving complaints about RMAs, and refers complaints regarding unregistered immigration assistance to the ABF.
[170] This is a power already held by the ABF.
[171] Under s316 of the Act, the MARA currently has the power to take appropriate disciplinary action against RMAs.
[172] The OMARA publishes Migration Agent Activity Reports twice a year on its website [online document].
[173] Complaints about RMAs can be made via the OMARA website: https://www.mara.gov.au/using-an-agent/resolving-disputes-with-your-agent/make-a-complaint-about-an-agent/

Separately, the global pandemic has placed considerable pressure on the migration advice industry. With nearly 40 per cent of RMAs working as sole traders, and one-third of all RMAs operating out of Victoria, the measures taken to reduce the spread of the virus have had a significant economic impact on the industry. A marked slowdown in international travel due to border closures has also affected RMAs and their clients. This tight fiscal environment means that RMAs are unlikely to have any appetite for increases in fees to partially fund the establishment of, and/or ongoing cost of, a potential Complaints Commissioner.

3.6.3. History of the current regulatory model

Regulation of the migration advice sector has a long history and has been the subject of numerous reviews and extensive public consultation. The report of the Kendall Review briefly summarises this history.[174] The industry moved from being largely unregulated prior to 1992, to a statutory, self-regulating model in 1998 when the peak industry body – the MIA – was appointed as the regulator.

In 2008, the Hodges Review recommended that an independent statutory body with greater powers to protect consumers be established to regulate the industry. [175]

The OMARA, led by a Chief Executive Officer and an Advisory Board, as a discrete office attached to the then Department of Immigration and Border Protection, was established. Its functions were underpinned by the necessary statutory powers, allowing it to investigate complaints in relation to the provision of immigration assistance by RMAs, and take appropriate disciplinary actions against RMAs or former agents. For the 2019-20 financial year, the OMARA's operating budget was $2.5 million with an average staffing level of 23.

In 2014, the Kendall Review considered that the hybrid arrangement whereby the OMARA was discreetly attached to the Department, did not deliver the best results for the efficient and effective regulation of the migration advice sector. The Kendall Review also advised that 'given the relatively small size of the migration advice profession, the creation of an independent statutory body to perform the role of the OMARA would be unsustainable'.

The Kendall Review recommended the OMARA be fully integrated into the Department, noting 'it is essential for consumer protection outcomes that there be timely and effective cooperation between the OMARA and the different areas of the Department responsible for the investigation of alleged unregistered practice or criminal conduct by registered agents'. [176]

3.6.4. Consultation on establishing a Complaints Commissioner

Five out of 55 responses to the discussion paper made mention of a Complaints Commissioner role, all indicating support for the establishment of an independent authority or regulator to deal with misconduct, as per *Table 17* below.

Some of the submissions indicate support for an independent Complaints Commissioner that would provide regulatory and disciplinary authority for RMAs, whereas other submissions appear to support the Complaints Commissioner as a mechanism to address misconduct. Depending on these functions, support for the Complaints Commissioner could potentially vary.

One of the reasons put forward by Fragomen in favour of establishing a Complaints Commissioner is that the OMARA, which has been delegated the powers of the Authority as outlined in the Act, currently has limited powers and no jurisdiction with respect to unregistered practice overseas.[177]

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[174] Kendall, Dr C N (2014) *2014 Independent Review of the Office of the Migration Agents Registration Authority* [online document], Home Affairs, accessed 10 December 2020

[175] Hodges, J (2008) *2007–08 Review of Statutory Self-Regulation of the Migration Advice Profession* [online document], Commonwealth of Australia, accessed 10 December 2020

[176] Kendall, Dr C N (2014:25-26) *2014 Independent Review of the Office of the Migration Agents Registration Authority* [online document], Home Affairs, accessed 10 December 2020

[177] A Complaints Commissioner does not resolve matters of extraterritoriality – see Chapter 3.2.

Newland Chase raised a concern around probity regarding the Department being responsible for both making decisions in relation to visa applications, and regulating RMAs. Addressing the illegal provision of immigration assistance, including off-shore, was a key concern across discussion paper responses.

Table 17: Summary of submissions on Complaints Commissioner

Stakeholder	Submission view
Fragomen	Supportive of the JSCOM's recommendation to establish a single statutory authority, a Complaints Commissioner, to handle all complaints relating to both RMAs and individuals who are unregistered, and for detecting, deterring, disrupting, investigating and prosecuting unregistered practice. Support the need to address unregistered immigration assistance, and propose doing it through establishing a Complaints Commissioner.
LCA	The Government should create an independent statutory authority empowered to regulate and govern RMAs (and education agents) in line with Recommendation 3 of the JSCOM report (which recommended the establishment of a Complaints Commissioner).
MIA	The MIA recommends the establishment of an independent Complaints Commission as the regulatory and disciplinary authority for RMAs.
Newland Chase	There should be an independent regulator to deal with misconduct. It can be difficult to properly represent clients when the government department that regulates RMA activity is (ultimately) the same one that decides the visa applications. Many RMAs are reluctant to actively advocate for clients due to a fear that it has the potential to affect their registration.
Aguilus Solutions	OMARA or a similar independent statutory regulatory body from the Department must be equipped to provide a duty of care to ensure its representatives are competent and professional when dealing with the public. Any professional providing any form of Australian immigration assistance must be registered through OMARA or a newly created independent statutory regulatory body.

3.6.5. Commissioners in like-minded Commonwealth countries

Canada's House of Commons Standing Committee on Citizenship and Immigration (CIMM) published a report in June 2017 entitled *Starting Again: Improving Government Oversight of Immigration Consultants*. The Committee studied the framework governing immigration and citizenship consultants and found it to be inadequate.

In response to the CIMM report, the Government of Canada announced in 2019 a new governance regime, including the establishment via statute of a strengthened self-regulatory regime for consultants in the form of the College of Immigration and Citizenship Consultants (the College). The *College of Citizenship and Immigration Consultants Act* (College Act) received Royal Assent in June 2019 and came into force on December 9, 2020. The new College will have expanded authorities and is meant to operate at arms' length from the government, with strong oversight from the IRCC. The College is anticipated to open in 2021 with enhanced powers and tools for oversight, enforcement and investigation, and expanded authority to identify unauthorised immigration practitioners (ghost consultants), obtain evidence, and hold offenders responsible for their actions.[178] These statutory powers are similar to those proposed for Australia by the JSCOM through a Complaints Commissioner.

Similarly, the NZIAA is an independent authority established to protect the interests of consumers of immigration advice and has sufficient powers under statute to, among other matters, investigate people giving immigration advice without a license or exemption.[179] This is the role owned by the ABF in Australia.

[178] ICCRC (n.d.) *Questions and Answers Bill C-97 – Act Summary* [online document], ICCRC, accessed 10 December 2020
[179] NZIAA (n.d.) *What we do* [online document], MBIE, accessed 24 November 2020

By way of contrast, the OISC in the United Kingdom is an executive non-departmental body sponsored by the Home Office. The OISC is solely responsible for the investigation of complaints against OISC regulated advisers and has sanctioning powers associated with the determination of complaints. The Commissioner may, should he wish to do so, also bring a disciplinary charge to The First Tier Tribunal (Immigration Services) regarding a complaint. The Tribunal has additional sanctioning powers related to the return of client fees and the ability to impose restrictions on the provision of immigration advice or immigration services, or prohibit the provision of immigration advice or immigration services by the relevant person.

A summary of the functions of these regulatory authorities is provided in *Table 18*.

Table 18: Summary of regulatory authorities in like-minded Commonwealth countries

Country	Regulatory Authority	Functions of the regulator
Australia	OMARA, within the Department, led by an Executive Level Two officer.	• Determine and approve entry to practice requirements • Register migration agents • Monitor the conduct of RMAs and adequacy of the Code • Determine and approve continuing professional development standards • Investigate complaints against RMAs • Administer disciplinary procedures against RMAs • Inform appropriate prosecuting authorities about apparent offences.
Canada	ICCRC is transitioning into the new College pursuant to the College Act.	ICCRC's mission is to protect consumers of immigration services through effective regulation of immigration consultants and promotion of the benefits of using only authorised immigration representatives.[180] ICCRC fulfils its mandate by: • establishing entry-to-practice requirements of applicants seeking admission into the regulated professions • overseeing their professional development and conduct under the Code of Professional Conduct • licensing professionals • receiving, investigating and adjudicating complaints • administering a disciplinary process to sanction professionals who fail to meet the regulator's standards.
New Zealand	The NZIAA is independent of Immigration New Zealand.	NZIAA was set up to promote and protect the interests of people receiving New Zealand immigration advice. They do this by: • issuing licenses to people who are fit and competent to give immigration advice • maintaining competency standards and a code of conduct for immigration advisers • investigating people giving immigration advice without a licence or exemption • receiving complaints from people who have received poor immigration advice.
United Kingdom	OISC is an executive non-departmental public body, sponsored by the Home Office.	OISC's main duties are to: • publish a code of standards and other guidance for immigration advisers • maintain a register of regulated advisers

[180] ICCRC (n.d.) *Vision & Mission* [online document], ICCRC, accessed 27 August 2020

Country	Regulatory Authority	Functions of the regulator
		• refuse entry to or cancel advisers who don't keep to the required standards of good practice, and discipline, restrain or prosecute as appropriate • maintain oversight of the designated professional bodies in Scotland and Northern Ireland with this duty.[181]

3.6.6. Other Australian independent regulator models

Australia operates in a highly regulated environment, with many commissioner models (excluding the ACQSC) regulating Australian Government agencies as well as other entities. For example:

- the Australian Commission for Law Enforcement Integrity provides independent assurance to government about the integrity of prescribed law enforcement agencies (including the AFP, the Department, and ACIC) and their staff members, and investigates law enforcement related corruption issues
- the Office of the Australian Information Commissioner conducts investigations, reviews decisions and handles complaints relating to privacy, freedom of information and government information policy, and protects the public's right of access to documents under the *Freedom of Information Act 1982*
- the Office of the Australian Human Rights Commission investigates and resolves complaints about alleged breaches of human rights against the Commonwealth and its agencies.

3.6.6.1. Aged Care Quality and Safety Commission

According to its 2019-20 Annual Report, the ACQSC commenced on 1 January 2019, and delivers regulatory functions under the *Aged Care Quality and Safety Commission Act 2018*.[182] It was established to progress reforms to the aged care regulatory model in line with the recommendations from the 2017 Carnell Paterson report on the R*eview of Aged Care Quality Regulatory Processes*.[183] On 1 January 2020, the aged care regulatory functions of the Department of Health, including approval of providers, aged care compliance (relating to both the Quality and Prudential Standards), and compulsory reporting were transferred to the ACQSC, marking its transition into the role of national end-to-end regulator of aged care services in Australia.

Like the proposed Immigration Assistance Complaints Commissioner, the ACQSC's focus is on protecting the safety and well-being of (aged care) consumers. It is an Australian Government statutory authority within the Health portfolio that regulates 5,035 Commonwealth-funded aged care services (at 30 June 2020). During 2019-2020, the ACQSC finalised 8,087 complaints. The ACQSC's total operating income was $90.9 million including government appropriations, sales of goods and rendering of services, and other revenue. Total operating expenses were $91.67 million, mainly comprised of employee benefits and supplier expenses. The ACQSC has a senior executive team of 10 staff, a Risk and Audit Committee and a thirteen-member Advisory Council. At 30 June 2020, the ACQSC had 516 staff across Australia including 84 per cent full-time employees and 149 leadership (EL1 and above) roles. The ACQSC is subject to the scrutiny of the Office of the Australian Information Commissioner, Commonwealth Ombudsman and the Australian Government's Regulator Performance Framework.[184]

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[181] OISC (2017) *About us* [online document], GOV.UK, accessed 27 August 2020
[182] ACQSC (Aged Care Quality and Safety Commission) (2019:12) *ACQSC Annual Report 2018-19* [online document], Commonwealth of Australia, accessed 27 August 2020
[183] Carnell K and Prof Paterson R (2017) *Review of National Aged Care Quality Regulatory Processes* [online document], Department of Health. Also of relevance is the Senate's Community Affairs References Committee (2017) Report into the Effectiveness of the Aged Care Quality Assessment and accreditation framework for protecting residents from abuse and poor practices, and ensuring proper clinical and medical care standards are maintained and practised [online document], Parliament of Australia. Both accessed 27 August 2020.
[184] ACQSC (2020) *ACQSC Annual Report 2019-20* [online document], Commonwealth of Australia, accessed 27 August 2020

3.6.6.2. Regulation of tax practitioners

Commissioner models are not the only type of regulatory architecture. The Tax Practitioners Board (TPB), funded by the Australian Government, operates independently of the Australian Taxation Office to regulate tax agents and financial advisers (collectively tax practitioners) and protect consumers of tax practitioner services. The TPB is also responsible for ensuring compliance with the *Tax Agent Services Act 2009* (TASA), under which its functions are not dissimilar in nature to the OMARA (except the TPB can investigate complaints against unregistered agents), including:

- administering the registration system for tax practitioners
- administering the Code of Professional Conduct
- issuing guidance on relevant matters to support practitioners
- investigating conduct that may breach the TASA, including Code non-compliance, conduct that results in a tax practitioner no longer meeting the 'fit and proper person' requirement for registration, or breaches of the civil penalty provisions
- resolving complaints lodged about practitioners and unregistered agents
- applying administrative sanctions for Code non-compliance
- seeking Federal Court of Australia civil penalty orders in response to breaches by registered tax practitioners and entities that should be registered but are not.

The tax practitioner industry is significantly (almost 20 times) larger than the migration advice industry regulated by the OMARA, with the number of registered tax practitioners reaching 78,181 in 2019-20. According to the TPBs 2019-20 Annual Report, the TPB consists of 142 staff, and is overseen by an eight-member Board and Chief Executive Officer, with an operating budget of $20,622,000 and capital budget of $1,416,000. The TPB reviewed 5,215 cases under the TASA during 2019-20, with more than one breach possible per case.[185]

The TPB recovers a portion of the costs of processing tax practitioner registrations by way of an application fee charged at the time of applying to become registered or to renew an existing registration. In 2019-20, the TPB received application fee payments from tax practitioners of $13.2 million. The Department collected revenue of approximately $10.9 million per annum on behalf of the Government from both commercial and non-commercial RMAs. This revenue will decrease, as legal practitioners providing immigration assistance are no longer regulated by the OMARA.

3.6.6.3. Regulation of legal practitioners

The legal practitioner industry is of a similar size to the tax practitioner industry. According to the national profile of solicitors report, there were 76,303 lawyers as of October 2018[186], the majority of whom were are also members of the LCA[187], providing industry representation at the national level. While there is no single national regulatory body regulating the industry, legal practitioners are regulated by their relevant state or territory based legal services commission or relevant legal professional body. State and territory legal professional bodies have a broad range of powers, underpinned by statutory schemes, to resolve consumer-related issues and uphold standards of behaviour in the legal profession. This includes the authority to apply financial penalties for improper conduct, and recommending compensation for affected clients.

For example, the Office of the Legal Services Commissioner, an independent statutory body in NSW, deals with complaints about lawyers under the relevant jurisdictional legislation. According to the national profile, NSW was home to the largest proportion (32,679, or 43 per cent) of registered solicitors in 2019-20.

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[185] TPB (Tax Practitioners Board) (2020) *Annual Report 2019-20* [online document], Australian Government, accessed 27 August 2020

[186] URBIS (2018) *2018 National Profile of Solicitors*, [online document], Law Society of NSW, accessed 27 August 2020

[187] The LCA is a federal organisation representing 65,000 Australian lawyers through their bar associations and law societies and Law Firms Australia (the Constituent Bodies)

3.6.7. Matters for public feedback

We welcome the public's feedback on the following advice:

3.6.7.1. Implement initiatives that will give effect to the regulatory intent of a Complaints Commissioner

There is potential to strengthen policies, legislation, processes and procedures to achieve the intention of the Complaints Commissioner function, while retaining (and enhancing) the information-sharing benefits and strengthened investigatory mechanisms gained when the OMARA joined the Department in 2015. Pursuing this option would provide opportunities for enhanced collaboration between the ABF and the Department, including data/intelligence matching opportunities.

This is the preferred option, particularly given the stress the global pandemic has placed on the migration advice industry, the considerable costs associated with establishing an independent statutory authority, and the time that would be required to implement significant administrative and legislative change to regulate a relatively small industry. Further, it poses the least disruption to existing ABF and Departmental processes and is unlikely to require the offset of substantial costs, thereby maintaining funding for other portfolio activities.

A regulator does not necessarily need to be independent in order to carry out its functions effectively. The regulatory history of the industry has already seen a separate Authority integrated into the Department in 2015 on the recommendation of an independent reviewer. The benefits of retaining the current model, and implementing additional initiatives to give effect to the regulatory intent of a Complaints Commissioner, outweigh the benefits of establishing a new, and costly, independent authority to regulate a relatively small industry. Under the current model, RMA registration fees in FY 2019-20 were more than $10 million (revenue collected by the Department and remitted to the Commonwealth Government), which would not support the funding of an independent regulator.

The Department considers this approach to be consistent with the Government's 'fit-for-purpose' regulatory policy. It offers an alternative approach to 'hard' regulation to strengthen the professionalisation of the industry in line with the Government's preference for reducing, rather than increasing, industry red tape.

3.6.7.2. Do *not* establish an independent Complaints Commissioner

An independent regulator could be established pursuant to JSCOM recommendation three, and would establish a single authority to manage both lawful and unlawful immigration assistance. It could provide a greater deterrence to individuals from doing the wrong thing, and increase the profile of immigration assistance and related regulatory functions. Establishing an independent authority would send a strong public message about the Government cracking down on unlawful behaviour and may relieve a consumer's need for legal representation when seeking compensation or refund.

However, establishment of an independent regulator would be a significant shift in Government policy and likely absorb the existing regulatory functions of the Department (in the OMARA), in the same way that a year after the ACQSC was established, the relevant functions of the Department of Health were incorporated. This would also have the effect of duplicating some compliance functions of the ABF, and create an overlap with existing administrative arrangements and enforcement powers within the Home Affairs Portfolio.

The Department agrees with the sentiment of the Kendall Review's finding that, given the relatively small size of the migration advice industry, the creation of an independent statutory body to perform the role of the OMARA would be unsustainable. Bringing in the functions of the ABF to address unlawful immigration assistance within a new independent statutory authority is also not recommended. This option would likely cause significant disruption to the operations of law enforcement in the ABF, and negate the benefits gained in relation to information and intelligence access and systems sharing, when the OMARA was fully incorporated into the Department in 2015.

3.6.7.3. Do *not* establish a Complaints Commissioner within the Department

There is also potential for the establishment of an internal, senior-executive Commissioner role, either within the ABF or the Department, supported by a number of administrative staff. While this approach would be a substantially more cost efficient alternative to establishing an independent statutory authority, it would not fully address the concerns of the JSCOM or key stakeholders, as it provides for what is essentially an internal restructure without the independence of a statutory authority.

It would still provide for data/intelligence matching opportunities between the OMARA and the ABF, and addressing unlawful immigration assistance could become a higher priority with increased exposure within the portfolio.

Changes would be required to the Act (for the Department) and potentially to an instrument of delegation (for the ABF). It would also potentially require changes to the ABF Act and the *Customs Act 1901* and associated guidelines, if, for example, investigators were to be expected to be Use of Force qualified.

If a Complaints Commissioner were to be established in the Department, rather than in the ABF, there would potentially be a duplication of effort. The Department does not have any governance/policy support for investigations positions. Creation of an investigative area in the Department would undo some of the efficiencies gained from the formation of the ABF.

Further, if ABF investigations were subsumed into the Department, the ABF's priorities could be affected. There would be a potential disconnect on the enforcement role being removed from the ABF, limiting cross-cutting abilities within the organisation, and potentially a loss of investigatory expertise during the establishment phase. This could also affect the public perception of the OMARA's regulatory focus.

3.6.8. Further initiatives already underway

Since the start of the program year 2019/2020, the OMARA has undertaken a number of education initiatives for consumers and industry encompassing social media posts, website updates, information products, forms and practice guide reviews and presentations, including:

- enhanced stakeholder engagement between the OMARA and key industry stakeholders via regular quarterly meetings, and state and territory legal service regulators
- facilitating departmental speakers to present on key topics of interest at industry conferences; and contributing to presentations to community organisations and consular forums on the risks associated with using unlawful immigration assistance
- education outreach – updating practice guides (e.g. 'Know your Client' and 'Representing Clients at the Administrative Appeals Tribunal') and fact sheets (e.g. on who can give immigration assistance in Australia) and publicly available information via the OMARA website; updating procedural instructions (e.g. 'Working with the Migration Advice Industry'); and hosting a booth at the Industry Summit 2019
- developing a new business system by the OMARA, to simplify usability and consumer messaging and highlight areas of focus for consumer protection, such as the Register of migration agents, the OMARA's disciplinary decisions and how to report unlawful immigration assistance
- development of a social media strategy to raise awareness of the OMARA website and Register with consumers, and promote the engagement of RMAs[188]
- OMARA website re-design and better linking the Home Affairs website to the OMARA website and highlighting the importance of RMAs
- developing a checklist for immigration assistance to assist consumers when choosing to use the services of an RMA

[188] The OMARA launched a social media campaign in August 2019. As at 19 November 2020, social media posts have resulted in a combined reach of 120,000 Facebook users and 9000 users of LinkedIn.

- an updated OMARA Consumer Guide following the removal of unrestricted legal practitioners from OMARA regulatory scheme
- revision of the existing Memorandum of Understanding between the Department (including the OMARA) and the AAT to allow for a more efficient referral of allegations of non-compliance by RMAs
- revision of the Code to remove duplication of information; assist agents to understand their professional and legal obligations to clients; and to bring the Code into line with modern business practises.

Further beneficial initiatives examined in the Review include and are not limited to:

- enhanced guidance and quality controls within the CPD framework, including through facilitating the provision of a defined career pathway for new or less experienced RMAs, while supporting all RMAs to provide higher quality assistance in more complex fields through targeted training
- introducing a tiering system
- improved transparency by publishing information on the pricing arrangements of migration agents on the OMARA website
- introducing a mandatory 12-month provisional licence during which an RMA would be permitted to provide immigration assistance only under supervision of an experienced RMA or a legal practitioner.

Appendix A: Overview of migration assistance frameworks in Australia, Canada, New Zealand, and the United Kingdom

Table 19: Overview of the frameworks

Category	Australia	Canada	New Zealand	United Kingdom
Regulatory Authority	Office of the Migration Agents Registration Authority (OMARA). OMARA is a section within the Department of Home Affairs (the Department).	Immigration Consultants of Canada Regulatory Council (ICCRC) ICCRC will transition into the new College of Immigration and Citizenship Consultants pursuant to the *College of Immigration and Citizenship Consultants Act 2019* (SC) (the College Act).	Immigration Advisors Authority (NZIAA). The NZIAA is independent of Immigration New Zealand.	Office of Immigration Services Commissioner (OISC). OISC is an executive non-departmental public body, sponsored by the Home Office.
Functions of the regulator	• Determine and approve entry to practice requirements • Register migration agents • Ensure agents understand their obligations • Determine and approve CPD standards • Maintain effective complaint mechanism • Investigate complaints and administer disciplinary procedures	ICCRC's mission is to protect consumers of immigration services through effective regulation of immigration consultants and promotion of the benefits of using only authorized immigration representatives.[189] ICCRC fulfils its mandate by: • Establishing entry-to-practice requirements for applicants seeking admission into the regulated profession • Overseeing their professional development and conduct • Licensing professionals	IAA was set up to promote and protect the interests of people receiving New Zealand immigration advice. They do this by: • issuing licenses to people who are fit and competent to give immigration advice • maintaining competency standards and a code of conduct for immigration advisers • investigating people giving immigration advice without a licence or exemption	OISC's main duties are to: • publish a code of standards and other guidance for immigration advisers • maintain a register of regulated advisers • refuse entry to or cancel registered advisers who do not keep to the required standards of good practice • Take enforcement action including prosecution against immigration advisers who practice without regulation in the UK.

[189] ICCRC (n.d.) *Vision & Mission* [online document], ICCRC, accessed 27 August 2020

Category	Australia	Canada	New Zealand	United Kingdom
		• Receiving, investigating and adjudicating complaints • Administering a disciplinary process to sanction professionals who fail to meet the regulator's standards.[190]	• receiving complaints from people who have received poor immigration advice.[191]	• maintain oversight of the designated professional bodies in Scotland and Northern Ireland with this duty.[192]
Nomenclature	Registered Migration Agent (RMA)	Regulated Canadian Immigration Consultants (RCIC) and Regulated International Student Immigration Advisors (RISIA)	Licensed Immigration Adviser (LIA)	Registered immigration adviser
Key legislation	Part 3 of the *Migration Act 1958*	*Immigration and Refugee Protection Act* (IRPA) and the *Citizenship Act*	*Immigration Advisers Licensing Act 2007*	*Immigration and Asylum Act 1999* (UK), Part V, *Nationality, Immigration and Asylum Act 2002* and the *Immigration Act 2014*.
Professional Code of Conduct	Code of Conduct for Registered Migration Agents	Code of Professional Ethics	Licensed Immigration Advisers Code of Conduct	Code of Standards
Regulation of business	No	No	No	Yes, organisations are regulated by OISC.
Are lawyers within the remit?	No	No	No	No

[190] ICCRC (n.d.) *National Regulatory Body* [online document], ICCRC, accessed 27 August 2020
[191] NZIAA (n.d.) *What we do* [online document], MBIE, accessed 27 August 2020
[192] OISC (2017) *About us* [online document], GOV.UK, accessed 27 August 2020

Category	Australia	Canada	New Zealand	United Kingdom
Public register of migration agents	Yes https://portal.mara.gov.au/search-the-register-of-migration-agents	Yes https://iccrc-crcic.ca/find-a-professional/	Yes https://iaa.ewr.govt.nz/PublicRegister/Search.aspx	Yes https://home.oisc.gov.uk/register_of_regulated_immigration_advisers/register.aspx
Media presence	**Website:** https://www.mara.gov.au/ No social media accounts. The Department's accounts are used for any major announcements.	**Website:** https://iccrc-crcic.ca/ **YouTube:** https://www.youtube.com/channel/UCkcOe8472hN2HgutqwrvdIQ The YouTube page targets immigration consultants and includes videos advising it is illegal to provide immigration services if not licensed. These videos are in English, French, Punjabi and Mandarin. **Mobile app:** contains links to the register of immigration consultants, filing a complaint, contacting ICCRC and various consumer information. **Facebook:** https://www.facebook.com/Iccrc-111053727029923/ **Twitter:** https://twitter.com/iccrc	**Website:** https://www.iaa.govt.nz/ No social media accounts found	**Website:** https://www.gov.uk/government/organisations/office-of-the-immigration-services-commissioner **YouTube:** https://www.youtube.com/channel/UC6idrmEALrSXJ_tgowoR8EA **Facebook:** https://www.facebook.com/OISCofficialpage/ **Twitter:** https://twitter.com/officialOISC

Table 20: Theme 1 – Qualified industry

Category	Australia	Canada	New Zealand	United Kingdom
Course	Graduate Diploma of Australian Migration Law and Practice	English: Graduate Diploma in Immigration and Citizenship Law. Queen's University Faculty of Law is the sole accredited English-language provider of the course. French: From Fall 2021, the Université de Montréal will be the sole accredited French-language provider of the *D.E.S.S. en réglementation canadienne et québécoise de l'immigration*	Graduate Diploma in NZ Immigration Advice	Specified periods of relevant work experience and tiered examinations, or legal qualifications related to Legal Aid contracts.
Course English requirement (IELTS, for comparison)	A minimum overall band score of 7.0 on IELTS (Academic) with no sub-score of less than 6.5.[193]	IELTS (Academic) minimum overall score 6.5 with at least 6.5 for each component and equivalents (which is lower that the EPE test requirement).[194]	A minimum overall band score of 7.0 on IELTS (Academic) with minimum scores of Writing 7.0, Reading 6.5, Listening 6.5, and Speaking 6.5 and equivalent scores.[195]	N/A
Units taught	1. Introduction to Australian Migration Law and Practice 2. Australian Visa System 3. Australian Visa System – Economic Migration 4. Advocacy and Review 5. Australian Visa System – Family Migration and Refugees 6. Australian Visa System – Cancellations	1. Foundations of Canadian Immigration Law 2. Ethics and Professional Responsibility 3. Temporary Entry 4. Economic Immigration 5. Family Class Immigration 6. Refugee Protection & Trauma –Informed Client Service 7. Enforcement 8. Citizenship	1. Introduction to the Immigration Industry and Professional Responsibilities 2. Introduction to Immigration Law and Decision-Making 3. Temporary Entry, Compliance and Unlawful Status 4. Residence 5. Professional Practice	N/A

[193] ACU (Australian Catholic University) (n.d.) *Graduate Diploma in Australian Migration Law and Practice* [online document], ACU, accessed 7 September 2020
[194] QU (Queen's University) (n.d.) *Graduate Diploma in Immigration and Citizenship Law – Apply* [online document], QU, accessed 7 September 2020
[195] TOIT (Toi-Ohomai Institute of Technology) (n.d.) *Graduate Diploma in New Zealand Immigration Advice* [online document], TOIT, accessed 7 September 2020

Category	Australia	Canada	New Zealand	United Kingdom
	7. Foundations of Ethical Practice 8. Applied Migration Law and Case Management[196]	9. Immigration Practice Management[197]	6. Specialist Immigration Areas 7. Managing Client Cases 8. Applied Practice (work placement) OR Applied Practice (if unable to arrange a work placement)[198]	
Exam	Migration Agents Capstone Assessment	Entry To Practice Exam (EPE)	Nil	Competence Assessments, which vary for levels 1, 2 and 3.[199]
English assessment (IELTS, for comparison)	IELTS Academic 7 minimum overall with no lower than 6.5 in any module, or equivalent.	IELTS Academic - Listening - 8, speaking - 7, reading - 7, writing - 7. The average score is irrelevant.	IELTS Academic 7 minimum overall with no lower than 6.5 in any module or equivalent.	No specific external assessment of English required. Written assessment of language skills.
Supervised practice	Nil	Nil	Two years of supervision to become a full licenced advisor. This requires to work under the direct supervision of a person holding a full immigration adviser licence.[200]	The normal supervisory period is up to twelve months, at which point the OISC expects the supervisee to submit a competence statement at the higher Level for which he/she has been supervised and be ready to take a competence assessment.[201]

[196] ACU (Australian Catholic University) (n.d.) *Course Map, Graduate Diploma in Australian Migration Law and Practice* [online document], ACU, accessed 26 August 2020
[197] QU (n.d.) *Graduate Diploma in Immigration and Citizenship Law – Program* [online document], QU, accessed 7 September 2020
[198] TOIT (n.d.) *Graduate Diploma in New Zealand Immigration Advice* [online document], TOIT, accessed 7 September 2020
[199] OISC (n.d.) *Competence assessment process* [online document], GOV.UK, accessed 4 September 2020
[200] NZIAA (n.d.) *Licensing* [online document], MBIE, accessed 4 September 2020
[201] OISC (2017) *Guidance Note on Supervision* [online document, GOV.UK, accessed 4 September 2020

Table 21: Theme 2 – Professional industry

Category	Australia	Canada	New Zealand	United Kingdom
Integrity	Currently, the OMARA cannot register anyone applying to become a migration agent who is not: • an Australian citizen • an Australian permanent resident who holds an Australian permanent visa, or • a New Zealand citizen who holds a special category visa (and physically in Australia when the OMARA is considering the application). In addition, applicants cannot: • be under 18 years of age • have been refused registration within 12 months of applying • have had a previous registration cancelled within five years of applying • have previously been barred from registering	Applicants must demonstrate that they are of good character and good conduct. This assessment is first undertaken before the person sits the prescribed exam for entry to the profession. The following elements are considered: • fairness and open-mindedness • honesty and truthfulness • integrity and trustworthiness • moral or ethical strength • respect for and consideration of others • respect for the rule of law and legitimate authority • responsibility and accountability. Evidence that may put the character of a person into question includes whether the person: • is currently the subject of any criminal proceeding or has criminal charges filed against him/her for which the final disposition or judgment has not yet occurred	Persons are prohibited from being a licensed immigration adviser if they: • are an undischarged bankrupt; • are prohibited or disqualified from managing a company; • have been convicted of an immigration-related offence • have been removed or deported from New Zealand • have been unlawfully in New Zealand. Further restrictions upon licensing exist in relation to a person who: has been convicted, whether in New Zealand or in another country, of a crime involving dishonesty, an offence resulting in a term of imprisonment, or an offence against the *Fair Trading Act 1986* (or any equivalent law of another country); • under the law of another country: – is an undischarged bankrupt, or	Section 83 (5) of Part V of the Immigration and *Asylum Act 1999* (the Act) places a statutory duty on the Immigration Services Commissioner to exercise her functions so as to secure, so far as reasonably practicable, that those who provide immigration advice or immigration services – • are ‘fit’ and ‘competent’ to do so • act in the best interests of their clients • do not knowingly mislead any court, tribunal or adjudicator in the United Kingdom • do not seek to abuse any procedure operating in the United Kingdom in connection with immigration or asylum (including any appellate or other judicial procedure) • do not advise any person to do something which would amount to such an abuse. Section 83 applies to both individual advisers and advice organisations. There are two guidance on fitness documents: for advisors and for owners.

Category	Australia	Canada	New Zealand	United Kingdom
	unless the barred period has expired, or • have had a previous registration suspended unless the suspension has expired.[202] Sub-section 290(1) of the Act provides that OMARA must not register an applicant if it is satisfied that: • the applicant is not a fit and proper person to give immigration assistance, or • the applicant is not a person of integrity, or • the applicant is related by employment to an individual who is not a person of integrity and the applicant should not be registered because of that relationship. Section 290 of the Act also provides the matters that the OMARA must take into account.	• is currently subject to any outstanding arrest warrant in any province/territory or internationally • has been notified by any professional organization that he/she is the subject of a complaint that remains open • has ever pleaded guilty to, or been found guilty or convicted of, any criminal or other statutory offence in any jurisdiction (other than parking and non-criminal traffic offences) for which a Pardon has not been granted, which in the opinion of the Registrar reflects adversely on their honesty, trustworthiness or fitness to practice • has ever been found guilty in a civil proceeding involving fraud, dishonesty or theft • has ever disobeyed an order of any court in any jurisdiction.[203]	– has been prohibited or disqualified from managing a company, or – has been convicted of an immigration offence, or – has been removed or deported from the country. In determining a person's fitness to be licensed, the Registrar may take into account any conviction or disciplinary proceedings in NZ or overseas, and whether or not the person is related by employment or association to a person to whom a licence would be refused.[204]	The OISC criteria for assessing fitness (for advisors and owners) are: • the likelihood of compliance with the OISC's Regulatory Scheme • a history of honesty and legal compliance, and • a history of financial probity.[205] A conviction under section 25 or 26(1) (d) or (g) of the Immigration Act 1971 is an automatic disqualification from regulation by the OISC by schedule 6 paragraph 4 of the Immigration and Asylum Act 1999

[202] OMARA (n.d.) *Steps to register as a migration agent – Before you apply* [online document], Home Affairs, accessed 27 August 2020
[203] ICCRC (n.d.) *Good Character and Good Conduct Regulation* [online document], ICCRC, accessed 27 August 2020
[204] LCA (2020:35-36), discussion paper submission
[205] OISC (n.d.) *Guidance on Fitness (Advisers)* [online document], GOV.UK, accessed 25 August 2020

Category	Australia	Canada	New Zealand	United Kingdom
Information on pricing arrangements	Not published Explanation as to why fees vary is published on the OMARA's website.[206]	Not published The ICCRC is taking steps to establish a suggested fee guide for immigration services, in order to uphold and protect the public interest.[207]	Not published IAA website states that "A licensed immigration adviser must set fees that are fair and reasonable in the circumstances. Licensed advisers vary in expertise, the fees they charge and the level of service they offer. You may wish to speak to several advisers before deciding which one best meets your needs" and explains why fees vary.[208]	Not published The OISC does not require registered organisations to publish their fees. Codes require that fees are reasonable and directly relate to work completed. Fee scales must be approved by the OISC and clients made aware of fees in advance of work commencing in a 'client care letter'.
Industry fidelity fund	Nil	Following the release of a Canadian Parliamentary Inquiry Report in June 2017 which highlighted the need for heightened consumer protection for those using the services of Canadian immigration consultants, the ICCRC is now working with the Canadian government to establish a compensation fund to help the victims of unscrupulous immigration consultants.[209]	Nil	Nil

[206] OMARA (n.d.) *Steps to choose a registered migration agent* [online document], Home Affairs, accessed 23 March 2021
[207] ICCRC (2019:12) *2019 Annual Report* [online document], ICCRC, accessed 25 August 2020
[208] NZIAA (n.d.) *How much should an adviser cost?*, MBIE, accessed 21 August 2020
[209] House of Commons Canada (2017:28-29) *Starting Again: Improving Government Oversight of Immigration Consultants* [online document], Report of the Standing Committee on Citizenship and Immigration, Parliament of Canada, also see Zimonjic P (2019) *Immigration minister details plans to go after unethical immigration consultants* [online document], both accessed 25 August 2020

Category	Australia	Canada	New Zealand	United Kingdom
Tiering	Nil	A Specialization Program is being developed to provide additional training for those wanting to represent clients at the independent administrative Tribunal - Immigration and Refugee Board of Canada (IRB).[210]	**To become a provisional licensed adviser** • Complete half of the Graduate Diploma in NZ Immigration Advice • Signed supervision agreement and arrangement • No fitness issues **To become a full licensed adviser** • Completed Graduate Diploma in NZ Immigration Advice • Two years of supervision • No fitness issues • Submit an upgrade application from provisional to full licence.	**Level 1 – Advice and Assistance advisors** are permitted to make applications that rely on the straightforward presentation of facts to meet a set of qualifying criteria, **Level 2 – Casework advisors** are authorised to handle more complex applications within the Immigration Rules as well as applications outside the Rules and applications under UK visas and immigration concessionary or discretionary policies, and **Level 3 – Advocacy and Representation advisors** are able to conduct work done following the lodging of the notice of appeal (substantive appeals work and representing clients at bail and appeal hearings) as well as the conduct of specialist casework.[211]
Continuing professional development	10 points per year – 12.5 minimum hours – mandatory Ethics or Code of Conduct points required.	16 hours per year[212]	20 hours per year[213]	The number of hours is not prescribed, CPD activities are undertaken based on the identified skills/knowledge requirements.[214]

[210] ICCRC (2019:12) *2019 Annual Report* [online document], ICCRC, accessed 25 August 2020
[211] OISC (2017:5-19) *Guidance on Competence* [online document], GOV.UK, accessed 10 October 2020
[212] ICCRC (n.d.) *Continuing Professional Development (CPD)* [online document], ICCRC, accessed 24 August 2020.
[213] NZIAA (n.d.) *CPD hours and mandatory activities* [online document], MBIE, accessed 24 August 2020
[214] OISC (2019) *OISC Continuing Professional Development (CPD) Scheme and Guidance Booklet* [online document], GOV.UK, accessed 10 October 2020

Table 22: Theme 3 – Misconduct and unlawful activity

Category	Australia	Canada	New Zealand	United Kingdom
Disciplinary sanctions for misconduct	If an agent has breached the Code of Conduct for registered migration agents, is not a person of integrity or a 'fit and proper person,' the OMARA can: • caution the agent • cancel or suspend the agent's registration • bar a former agent from registration for up to five years.[215]	The ICCRC's Tribunal Committee has the power to: • impose terms, conditions or restrictions on a Member's practice • impose a suspension on a Member's license to practice, either before a hearing begins, in the form of an interim suspension, or after a hearing has concluded • revoke a Member's license to practice [216] • prohibit a Member whose membership is suspended from using any designation, term, title, initials, or description implying that the member is authorized to practice • issue a reprimand • require specified rehabilitative measures, including specified professional development	The Authority has the following powers: • Where the Authority is aware of specific non-compliance issues, it may hold targeted workshops to encourage compliance and clarify expectations. • The Authority may refuse to renew an adviser's licence if the adviser does not meet the required competency standards. • Where the Registrar believes there are grounds for complaint against a licensed adviser he may refer an own motion complaint to the Tribunal as per Section 46 of the Act. • The Authority will directly contact individuals in breach of the Act to give them an opportunity to explain their situation and to gain an understanding of how to comply with the Act before	The Commissioner has the power to take the following action against registered organisations and individuals: • Cancel registration or refuse continued registration • Limit or apply conditions to registration (for example reducing the advisers level of registration) • Lay a disciplinary charge against an organisation, which can result in the refund of client fees and/or imposing restrictions or a prohibition on the regulated adviser providing immigration advice and services. • Various enforcement options, including cautions, warnings, and criminal prosecution against an unregulated adviser working at a regulated organisation or working above their level of registration.

[215] OMARA (n.d.) *Steps to choose a registered migration agent* [online document], Home Affairs, accessed 23 March 2021
[216] ICCRC (n.d.) *Revocations, Suspensions and Restrictions* [online document], ICCRC, accessed 1 September 2020

Category	Australia	Canada	New Zealand	United Kingdom
		courses or specified counselling or treatment • require payment of a monetary penalty and/or the Council's reasonable costs of investigation and legal fees for the hearing and specify the timing and manner of payment.[217]	deciding whether to take stronger enforcement action. • The Authority uses warning or information letters to inform, change behaviour and/or deter individuals from repeat or new non-compliant behaviour. • Where there is reason to suspect non-compliance, any person authorised by the Registrar may enter premises and obtain information. • Prosecution against those who seriously breach the Act with a high degree of harm.[218]	
Penalties for unlawful activity	Under sections 280-284 of the *Migration Act 1958*, unlawful migration assistance can attract a penalty of up to ten years imprisonment. Unlawful immigration assistance is within the purview of the ABF.	Penalties for unlawful representation are up to $200,000 CAD or two years imprisonment.[219] *ICCRC does not currently have the authority to pursue unlicensed immigration consultants but shares* complaints *with the Royal Canadian Mounted Police and*	Maximum Penalty under the *Crimes Act 1961* (NZ) is 7 years imprisonment and up to $100,000 fine. In addition to the penalty, the court may order the offender to pay reparation to the victim or an amount not exceeding the value of the commercial gain as a result of the offence, if applicable. [221]	*Immigration and Asylum Act 1999* (UK), Section 91 provides for penalties up to two years or a fine not exceeding the statutory maximum (which is now unlimited),[223] or both, for provision of unlawful immigration advice or immigration services.

[217] ICCRC by-law s.30.10
[218] NZIAA (n.d.) *Enforcement policy* [online document], MBIE, accessed 25 August 2020
[219] *Immigration and Refugee Protection Act 2001* (SC), s 91(9)
[221] *Immigration Advisers Licensing Act 2007* (NZ), s 63, s 71, s 72
[223] Linklaters (2015) *Statutory maximum fine now unlimited* [online document], Linklaters, accessed 24 August 2020

Category	Australia	Canada	New Zealand	United Kingdom
		Canada Border Services Agency.[220]	The toughest sentence – just under four years in prison for Richard Martin (incl. INZ Fraud convictions).[222]	
Do penalties apply offshore?	No Part 3 of the *Migration Act 1958* does not apply extraterritorially.	Yes Individuals providing Canadian immigration/citizenship services abroad are subject to Canadian law even if they reside outside of Canada.[224]	Yes Anyone providing NZ immigration advice anywhere in the world must be licensed, unless exempt. INZ must refuse applications from an adviser who is neither licensed nor exempt.[225]	No Only immigration advice and/ or services provided by an organisation or individual in the UK is regulated under the 1999 Act.[226]
Complaints Commissioner (or alternative)	No	The ICCRC's Tribunal Committee has the power to: • impose terms, conditions or restrictions on a Member's practice • impose a suspension on a Member's license to practice, either before a hearing begins, in the form of an interim suspension, or after a hearing has concluded	The Immigration Advisers Complaints & Disciplinary Tribunal (Tribunal) hears complaints against licensed immigration advisers.[228] It also hears appeals against decisions made by the Immigration Advisers Authority. Tribunal has the following powers: • caution or censure • require the adviser to undertake specified training • suspension	The First Tier Tribunal (Immigration Services) hears appeals against decisions made by the Commissioner to refuse registration to applicant organisations or to cancel the registration or refuse continued registration of regulated organisations. The First Tier Tribunal (Immigration Services) will also consider disciplinary charges brought by the OISC against regulated advisers.

[220] ICCRC, *Top 20 Tips on How to Prevent Immigration Fraud* [online document], ICCRC, accessed 25 August 2020
[222] NZIAA (2012) *Former immigration lawyer guilty of 93 charges* [online document], MBIE, accessed 11 December 2020
[224] ICCRC (n.d.) *National Regulatory Body* [online document], ICCRC, accessed 24 August 2020
[225] NZIAA (n.d.) *Who can give advice?* [online document], MBIE, accessed 24 August 2020
[226] OISC (2018) *Immigration Assistance* [online document], GOV.UK, accessed 24 August 2020
[228] The Ministry of Justice (n.d.) *Immigration Advisers Complaints & Disciplinary Tribunal* [online document], New Zealand Government, accessed 1 September 2020.

Category	Australia	Canada	New Zealand	United Kingdom
		• revoke a Member's licence to practice. [227]	• cancellation • order preventing the adviser from reapplying for a licence for up to two years • order for payment of a penalty not exceeding $10,000 • order for the payment of costs • order directing adviser to refund fees or expenses • order directing adviser to pay reasonable compensation.[229]	

[227] ICCRC (n.d.) *Revocations, Suspensions and Restrictions* [online document], ICCRC, accessed 1 September 2020
[229] NZIAA (2020) *Complaints Process* [online document], MBIE, accessed 1 September 2020

Appendix B: Fit and Proper Person Test questions

The migration agent registration process includes verification by the OMARA that the applicant is a person of integrity. As part of this process, applicants are required to answer specific questions pertaining to their background and past conduct, including the following:

- Have you been prohibited from operating as a registered migration agent; or are currently subject to any special conditions as a result of criminal, civil or disciplinary proceedings relating to your licence as an immigration adviser?
- Has there ever been a finding of guilt against you for a criminal offence in Australia or another country (except a conviction that is spent under Part VIIC of the *Crimes Act 1914* (Cth))?
- Are you the subject of any criminal proceedings in any country?
- To the best of your knowledge and belief: Are you currently, or have you previously been, the subject of an inquiry or investigation, including one by:
  - a department or agency of the Commonwealth, including the Migration Agents Registration Authority or the Migration Agents Registration Board; or
  - a department or agency of a state or territory of Australia; or
  - a professional association; or
  - a corporate regulatory agency; or
  - a consumer protection organisation?
- To the best of your knowledge and belief: Are you currently, or have you previously been the subject of disciplinary action?
- Have you ever been declared bankrupt or applied to take the benefit of any law for the relief of bankruptcy or insolvent debtors, or compounded with your creditors, or made an assignment to remuneration for the benefit of your creditors?
- Have you been a director or executive director of a corporation which became insolvent whilst you were a director or executive officer?
- To the best of your knowledge and belief: Have you ever been, or are you currently, the subject of an investigation by an educational institution on the grounds of academic misconduct?
- To the best of your knowledge and belief: Have you ever been terminated from employment for a reason relating to your conduct?
- To the best of your knowledge and belief: Have you ever applied for a security clearance related to any employment and the clearance was not provided?
- Have you ever had a civil penalty sanction imposed upon you in any country?
- Is there any other finding, event, conduct or fact which may affect your fitness, propriety and/or integrity to provide immigration assistance (other than disclosed in your previous responses)?
- While not registered, have you ever:
  - given immigration assistance in Australia; or
  - advertised yourself as giving immigration assistance in Australia; or
  - made immigration representations for a fee or reward in Australia?

Appendix C: Introducing a tiering system – summary of stakeholder tiering models

Table 23: Summary of stakeholder tiering models

Stakeholder Link to submission	Tiering model summary
Newland Chase Submission	Tiering could be similar to a chartered system. This would require extra study and exams if an RMA wanted to be a chartered migration agent. The system should be independently run by the profession (rather than OMARA) as is the case with other professions.
Ieva Vaityte, Astute Immigration Advisory Submission	Tier 1 – Visitor, Student and skilled visas, as the majority of them do not deal with complexities, such as health or character waivers. Tier 2 – Family and Employer-Sponsored visas. These visas require a better understanding and thorough assessment of potential applicants and their sponsors, inclusive of schedule 3, 4, 5 and 8 assessment and possible waiver requests. These visas also cost more in Government fees, hence the frequent and continuous evaluation of compliance, even after the application is made. Tier 3 – All of the above plus applications to the AAT and Ministerial Intervention. All graduates would enter Tier 1, after completing the Capstone. Entrance to Tier 2 and 3 could be achieved through a peer review system.
Roz Germov Submission	The Government should take urgent steps to introduce a system of tiered registration in relation to the categories of services individual registered migration agents are permitted to provide. Entry to the higher tiers should be restricted to those members of the industry with sufficient competency to conduct cases before the AAT MRD, the Immigration Assessment Authority and requests for Ministerial intervention under sections 195A, 197AB, 197AD, 351 or 417 of the Migration Act 1958 (Cth) (the Ac"). Non-legally qualified agents should be prohibited from acting in the General Division of the AAT or to advise on Australian Citizenship. General Division matters are adversarial and involve complex character related matters, business visa cancellations and citizenship refusals. The Department is always represented by a solicitor or barrister. General Division reviews require advocacy skills and involve examination in chief and cross examination. Non-legally trained migration agents do not have the skills or training for this sort of representation.
Migration Alliance Submission	Current arrangements with respect to CPD continue but that consideration at least be given to the development of specific "tiers" of CPD that reflect the level of expertise of the RMA. This must be addressed as this is on the agenda. A survey of the profession in relation to tiering accompanies this draft submission. The concept of tiering is commonplace in other professions but in this case is restricted to the idea that professionals as they progress through the profession will inevitably have different CPD needs at different times. To encourage practitioners to engage with their CPD "needs", consideration may be given to Practitioners being "tiered" according to the number of years of registration so that they undertake CPD consistent with their experience rather than entry level subjects. Consideration may be given to the weighting of CPD in order to achieve that outcome.

Stakeholder Link to submission	Tiering model summary
Dr Philip West Submission	Do not support tiering generally or the LCA model. However, supports accreditation to do AATs and Ministerial intervention which he states is, in effect, a type of tiering. Accreditation should be required for a person who is going to run a case for a client that is effectively in a type of court with submissions that must be of a very high standard and often need to involve high-level legal research related to case law. The specialisation could be something as simple as being required to do X number of extra, regular professional development (PD) activities specifically related to AAT (Ministerial) and Case Law research. He recommends five day full-time equivalent PD to gain this accreditation.
Law Council of Australia Submission	A new tiered registration system to govern the types of immigration assistance an RMA will be authorised to provide during their career and thereby inform the OCS framework, the registration process, and the CPD framework for CPD providers and CPD obligations of each RMA. A tiered system should properly reflect the escalating complexity and risk involved when providing immigration assistance as well as the competency and practice capability of each RMA as they progress during their career. RMAs would then progressively qualify to assist and represent clients with matters before the Department; matters before the AAT MRD and the IAA; and requests for Ministerial intervention (MI). Tier 1: Immigration assistance in connection with matters before the Department Tier 2: Immigration assistance in connection with matters before the Department, the AAT MRD and the IAA Tier 3: Immigration assistance in connection with matters before the Department, the AAT MRD, the IAA and the Minister - with legal practitioner advice on judicial review availability and their judicial review prospects before the RMA can apply for MI on their behalf. The system would have entry requirements, applications and exams for each tier, with staggered registration application fees payable to enter each tier and initial concessions to legacy RMAs. There would be exemptions on entry exams for legacy RMAs, and an EOI process for legacy RMAs to apply to enter a tier. The regulator would, in association with the Department and AAT, assess each RMA's competence to practice in their chosen tier.
Jack Li and Monica Gruszka Submission and submission (identical content)	Do not support tiering, but suggest a new professional structure: Provisional Immigration Practitioner (PIP), Certified Immigration Practitioner (CIP) and Fellow Immigration Practitioner (FIP), through implementing Continuing Professional Development (CPD) specialised areas (SA). The professional structure should be managed by the successful completion of specialised areas and related real-life cases. New RMAs are PIPs – after 12 months supervision, apply for CIP. CIP must do all five CPD SA: upon completion of all SA with related real-life cases, CIP apply for FIP. FIP should maintain CPD SA annually to retain title. FIP able to represent clients in immigration court matters. FIP certificate should be considered as equivalent to legal practising certificate for purposes of immigration assistance, and the Minister should facilitate. OMARA to maintain register of the professional structure.

Appendix D: CPD provider requirements

CPD provider requirements

Once the CPD provider has been approved by the OMARA (derived from the CPD provider approval letter):

- The successful applicant gets notified by email that their application to become a CPD provider for RMAs has been approved under Regulation 9N of the Regulations.
- The approval is for a period of two years.
- CPD providers may develop and deliver CPD activities without further approval from the OMARA during the two-year period. CPD activities must comply with the Regulations and the Instrument made under Regulation 3AA – this is currently the CPD Instrument.
- A condition of the approval is that the provider must comply with the CPD provider standards.
- The OMARA will undertake monitoring to ensure that providers understand and comply with the new standards and framework.
- When a CPD provider develops new activities, they need to advertise them on the OMARA website and report them to the OMARA.
- System modifications will need to be made before a CPD provider can generate their own activity numbers – IDs for the different activities in the OMARA's system, specifying the number of CPD points for the activity. To obtain an activity number, a CPD provider needs to email the OMARA and provide this information:
  - CPD activity name
  - Type (workshop, seminar etc.)
  - Points
  - Hours
  - Mandatory topic (Y/N)
- Mandatory activities. Agents need to complete one point relating to Ethics or the Code per year. There are no specific approved names for mandatory activities, provided they relate to either of these two topics for a minimum of one point.
- RMAs need to obtain at least five points from workshops or other Category A activity types. Category A activity types should not be marked as mandatory unless they relate to the topics of Ethics or the Code.
- RMAs are awarded CPD points for developing CPD activities.
- Providers are required to provide the OMARA with the details of their website when available so that the OMARA may publish it on its website at: https://www.mara.gov.au/becoming-an-agent/professional-development/current-providers-of-cpd

Appendix E: Immigration assistance exemptions

Migration Act 1958

Subsection 280(1) of the Act provides that a person who is not a registered migration agent must not give immigration assistance. Exemptions to this prohibition are listed in *Table 24* below.

Table 24: Section 280 exemptions

Subsection	Exemption
280(2)	This section does not prohibit **a parliamentarian** from giving immigration assistance.
280(3)	This section does not prohibit **an Australian legal practitioner** from giving immigration assistance in connection with legal practice.
280(4)	This section does not prohibit **an official** from giving immigration assistance in the course of his or her duties as an official.
280(5)	This section does not prevent an individual from giving immigration assistance of a kind covered by subsection 276(2A) **if the assistance is not given for a fee or other reward**.
280(5A)	This section does not prevent **a close family member** of a person from giving immigration assistance to the person.
280(5B)	This section does not prevent **a person nominating a visa applicant** for the purposes of the regulations from giving immigration assistance to the applicant.
280(5C)	This section does not prevent **a person sponsoring a visa applicant** for the purposes of the regulations from giving immigration assistance to the applicant.
280(6)	This section does not prohibit an individual from giving immigration assistance in his or her capacity as: (a) a member of **a diplomatic mission**; or (b) a member of **a consular post**; or (c) a member of an office of **an international organisation**.

Migration Agents Regulations 1998

The Regulations allow some persons in some circumstances to provide assistance, which would normally constitute immigration assistance, except in those circumstances. Exemptions are listed in *Table 25*:

Table 25: Regulations exemptions

Regulation	Exemption
3C Assistance given to migrating employees	For the purposes of subsection 276(4) of the Act, a person does not give immigration assistance if the person gives assistance referred to in subsection 276(1) or (2) of the Act in these circumstances: (a) the person is: (i) the employer or prospective employer of the person to whom the assistance is given; or (ii) an employee of the employer or prospective employer of the person to whom the assistance is given who is acting on the employer's behalf; …

Regulation	Exemption
3D Representations made on behalf of migrating employees	For the purposes of subsection 282(5) of the Act, a person does not make immigration representations if the person makes representations of the kind referred to in subsection 282(4) of the Act in these circumstances: (a) the person is: (i) the employer or prospective employer of the person on whose behalf the representations are made; or (ii) an employee of the employer or prospective employer of the person on whose behalf the representations are made who is acting on the employer's behalf; …
3F Assistance given to professional development applicants (This regulation is not operative)	For the purposes of subsection 276(4) of the Act, a person (the ***adviser***) does not give immigration assistance if the adviser gives assistance referred to in subsection 276(1) or (2) of the Act to another person (the ***applicant***) in these circumstances: (a) the adviser is: (i) a professional development sponsor of the applicant; or (ii) an employee of a professional development sponsor of the applicant who is acting on the sponsor's behalf; and (b) the applicant is in a class of persons specified in an instrument made under regulation 3EA; and (c) the applicant has made or intends to make an application for a visa in relation to which the professional development sponsor has sponsored, or intends to sponsor, the applicant; …
3G Representations made on behalf of professional development applicants (This regulation is not operative)	For the purposes of subsection 282(5) of the Act, a person (the adviser) does not make immigration representations if the adviser makes representations of the kind referred to in subsection 282(4) of the Act on behalf of another person (the applicant) in these circumstances: (a) the adviser is: (i) a professional development sponsor of the applicant; or (ii) an employee of a professional development sponsor of the applicant who is acting on the sponsor's behalf; and (b) the applicant is in a class of persons specified in an instrument made under regulation 3EA; and (c) the applicant has made or intends to make an application for a visa in relation to which the professional development sponsor has sponsored, or intends to sponsor, the applicant; …

Glossary of frequently used abbreviations and acronyms

AAT MRD	Administrative Appeals Tribunal, Migration and Refugee Division
ABF	Australian Border Force
ABF Act	*Australian Border Force Act 2015*
ACIC	Australian Criminal Intelligence Commission
Advisory Group	Migration Advice Industry Advisory Group
AFP	Australian Federal Police
Assistant Minister	Assistant Minister for Customs, Community Safety and Multicultural Affairs, the Hon Jason Wood MP
CALD	Culturally and linguistically diverse
CPD	Continuing Professional Development
CPD Instrument	*Migration Agents (IMMI 17/047: CPD Activities, Approval of CPD Providers and CPD Provider Standards) Instrument 2017*
Crimes Act	*Crimes Act 1914*
Criminal Code	*Criminal Code Act 1995*
Discussion paper	*Creating a world class migration advice industry* discussion paper
FPP	Fit and Proper Person
Graduate Certificate	Graduate Certificate in Australian Migration Law and Practice
Graduate Diploma	Graduate Diploma in Australian Migration Law and Practice
Hodges Review	2007-08 Review of Statutory Self-Regulation of the Migration Advice Profession
ICCRC	Immigration Consultants of Canada Regulatory Council
IELTS	International English Language Testing System
JSCOM inquiry report	The Joint Standing Committee on Migration's Report of the inquiry into efficacy of current regulation of Australian migration and education agents
Kendall Review	2014 Independent Review of the Office of the Migration Agents Registration Authority
KPI	Key performance indicator
LCA	Law Council of Australia
MA	Migration Alliance
MARN	Migration Agent Registration Number
MIA	Migration Institute of Australia
NZIAA	New Zealand Immigration Advisers Authority
OCS	Occupational Competency Standards for Registered Migration Agents
OISC	Office of the Immigration Services Commissioner
PTE Academic	Pearson Test of English Academic
PRP	Practice Ready Program
Public consultation	Public consultation on *Creating a world class migration advice industry* (as part of the Migration Agents Instruments Review)
RCIC	Regulated Canadian Immigration Consultant

Regulation Act	*Migration Amendment (Regulation of Migration Agents) Act 2020*
RMA	Registered Migration Agent
The Act	*Migration Act 1958*
The Authority	Migration Agent Registration Authority
The Capstone	The Capstone Assessment
The Code	Code of Conduct for Registered Migration Agents
The Department	The Department of Home Affairs
The Regulations	*Migration Agents Regulations 1998*
The Review	Migration Agents Instruments Review
TOEFL IBT	Internet Based Test of English as a Foreign Language

Attachment A: Chronology of Australian migration advice industry regulation

Table 26: Key milestones in the migration advice industry regulation

Date	Key milestone
1948	***Registration with no monitoring*** The *Immigration Act 1948* provided that a person could become a 'registered agent' by satisfying certain fitness and character requirements.
1958	The *Migration Act 1958* (the Act) provided that a person who gave notice of their intention to practice as an immigration agent, and who received an acknowledgement of that notice, could practice unless the Minister established they were not fit and proper to continue ('negative licensing'). Penalty provisions for false advertising and overcharging for services were introduced. There was no specialist body to monitor or investigate registered agents.
1989	The *Migration Legislation Amendment Act 1989* amended the Migration Act and removed the requirement to provide notice of intention to practice as an immigration agent. It inserted penalty provisions directed at the activities of migration advisers. The Act required that agents not engage in false advertising, provide statements of accounts to clients and not misrepresent their relationship with the Government and the Department.
September 1992 to March 1998	***Commonwealth regulation*** The Migration Agents Registration Scheme (the MARS) was established. The MARS included the Migration Agents' Registration Board administered by the Department of Immigration, Local Government and Ethnic Affairs; it was charged with regulating the migration advice sector. The scheme was introduced to address concerns about the lack of consumer protection in the industry.
1997	*Review of the Migration Agents Registration Scheme* A key finding of the review was that full regulation had achieved mixed results. The MARS had increased consumer protection levels, but its mechanisms for dealing with complaints were expensive, slow and unresponsive to consumer concerns.
March 1998 to July 2009	***Self-regulation under MIA*** Following the 1997 review, the MIA assumed the role of the Migration Agents Registration Authority (MARA). The MIA acted as a regulator of the industry under a Deed of Arrangement with the Commonwealth, which represented statutory self-regulation.
1999	*Review of statutory self-regulation of the migration advice industry* The review found that while statutory self-regulation had achieved its objectives, the industry was not yet ready to move to full self-regulation. The review concluded that the current period of statutory self-regulation be extended for a further three years until 21 March 2003, with a further review to be conducted within that time.
2002	*Review of statutory self-regulation of the migration advice industry 2001-02* This review found that the industry is not yet ready to move towards voluntary self-regulation. Further, it found that regulatory intervention was still necessary to alleviate a number of concerns, including the quality of service and the level of professionalism within the industry.

Date	Key milestone
2007-2008	*Hodges Review* The review made 57 recommendations, including establishing an independent statutory body with greater powers to protect consumers, strengthening the regulatory framework and raising the entry requirements.
July 2009 to June 2015	***Return to Commonwealth regulation*** The OMARA started operating as a discrete office attached to the Department of Immigration and Border Protection. This structure was a result of the Hodges Review.
2014	*Kendall Review* The review examined the performance of the OMARA as the industry regulator, its organisational capability and challenges, and the quality and effectiveness of its internal controls and governance. The Review made 24 recommendations, the majority of which were supported by the Government.
July 2015 to present	***Regulation by the OMARA as part of the Department*** The OMARA started to progressively consolidate into the Department of Immigration and Border Protection, pursuant to a recommendation of the Kendall Review.
2019	*JSCOM Inquiry* The JSCOM inquired into the efficacy of the regulation of Australian migration agents and made 10 recommendations. The Government has not yet provided its response to the inquiry.
22 March 2021	*Removal of unrestricted legal practitioners from the OMARA scheme* Unrestricted legal practitioners providing immigration assistance were removed from the OMARA regulatory scheme, to be solely regulated by relevant state and territory legal professional bodies. This change was introduced pursuant to a recommendation of the Kendall Review. Legal practitioners who hold a restricted practising certificate may choose to remain registered with the OMARA for a transitional period of two years, extendable by the OMARA to up to four years in reasonable circumstances.