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15 June 2021

**Via Upload to the Department's Website**

Department of Home Affairs

**Submission**

**RE: Migration Agents Instruments Review**

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**Profession Definition in General**

1. The definition of a profession in general can be found from various sources, including academic, regulatory bodies and associations etc.
2. The model adopted by the Legal Profession Admission Board (LPAB) to educate its registered students is the one defined by Richard and Daniel Susskind.<sup>1</sup>
3. Richard and Daniel Susskind indicate that there are four common characteristics of all professions:
  - They have specialist knowledge;
  - Their admission requires certain credentials;
  - Their activities are regulated;
  - They are bound by common values or ethics.

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<sup>1</sup> Susskind and Susskind (2015) The Future of the Professions

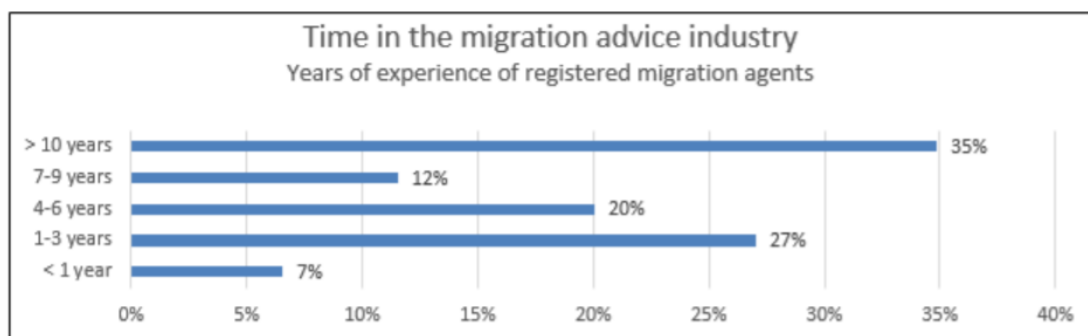
4. Australian migration law and practice is one of the most complex areas in Australian laws. The dynamic and complex legislative scheme makes its practitioners keep on learning to keep abreast with the related legislation and policy. There are over 3,000 pages of legislation and more than 20,000 pages of policy guidelines to interpret the migration law and regulations.
5. The Office of the Migration Agents Registration Authority (OMARA) has stipulated the requirements for a person to be admitted in accordance with the Migration Law. The person must show proof of education in migration law, possess the right English language skills, be a fit and proper person, have professional indemnity insurance, and have access to a professional library to become a migration agent.
6. The Migration Act 1958 has conferred the power to OMARA to regulate migration agents. Therefore, a migration agent must comply with the Code of Conduct published by OMARA. Also, a migration agent must complete continuing professional development (CPD) set out by the Migration Agents Regulations 1998.
7. A migration agent is expected to maintain higher order of obligations or norms to provide immigration assistance to his or her clients. As a migration agent, he or she must be responsible, responsive and accountable. To stay registered as a migration agent, he or she must take at least one CPD point on either ethics or the Code of Conduct each year.
8. Therefore, I submit that migration assistance is a profession.

## Profession Definition adopted in Migration Agents Instruments Review

9. The Consultation Report states that the Department has used a Five Elements (5E) model (which provides that any profession should include Education, Ethics, Experience, Examination and Entity) to assess whether the current migration industry belongs to a profession.
10. The Department concludes that the migration industry is advancing to a professionalisation but has not achieved a professional's status due to its unsatisfactory Experience element.
11. Firstly, the experience element is defined as the personal capabilities and expectations of experience required to practice in a profession. The MARA's Migration Agent Activity Report (1 January - 30 June 2020) shows that 67% of the migration agents have over 4 years of experience. The percentage for those having one to three years' experience is 27%. Only 7% have less than one year's experience.

## 2.4. Experience of registered migration agents

This graph shows that at 30 June 2020, of the 7132 RMAs, 7% were registered for less than one year, 27% had been registered between one and three years and 35% had been registered for more than 10 years.



12. The Consultation Report diverted away from the Experience element. Instead, it looked at the experience required to be admitted as a registered migration agent. I submit that this element was misinterpreted, and accordingly, the conclusion of non-profession status is misleading. This would have an enormous negative impact on many, especially those who have been serving in the industry for many years.
13. Secondly, the 5 Elements (5E) model was developed by the Professional Standards Councils (PSC). The PSC describes different viewpoints regarding the definition of a profession. The 5E model selected is for the purpose of applying for a Professional Standards Scheme.
14. PSC states that a Professional Standards Scheme is only one indicator of professionalism. An association that decides not to apply for a scheme may still be a profession.<sup>2</sup> For example, the Australian Psychological Society (APS) does not have a current Professional Standards Scheme. Therefore, the application of the 5E model was used incorrectly in assessing the professional status of the migration industry.

## Public Profile

15. There is a view held by some people that a lawyer enjoys a superior position to a migration agent, especially after the passage of the deregulation bill. This can also be found in other countries, including Canada, New Zealand, and the United Kingdom.

<sup>2</sup> <https://www.psc.gov.au/what-is-a-profession/regulatory-view>, Accessed on 14 June 2021

16. However, it has been reported in a closed social media forum that inexperienced lawyers made some mistakes that affected vulnerable clients. For example, a lawyer gave wrong advice to the couple who got married in Australia holding subclass 300 prospective Marriage visa about the refund issue and the re-application for an onshore 820 visa.
17. Furthermore, the below table shows the number of registered migration agents holding a legal practitioner certificate (lawyer-RMA) and registered migration agents without such a certificate (RMA) who received disciplinary action before the deregulation. Though the figures for lawyer-RMA are slightly better, lawyers practising in this field tended to have the same risks of failure in the profession. For example, the percentage of the lawyer-RMAs in the industry is 34.4% in 2018, while considering those who were disciplined, 20.8% are lawyer-RMAs.

## Freedom of Information Request FA 20/07/00786

The number of migration agents and legal practising certificate holders that have been cautioned, suspended, barred or cancelled each year during the last 5 program years:

Program Year	Caution	Suspension	Cancellation	Barring	Total	Number of PC holders	%
2014 -15	0	2	3	0	5	1	20.0%
2015 -16	7	0	5	6	18	1	5.6%
2016 -17	0	7	8	1	16	1	6.3%
2017 -18	1	8	8	7	24	5	20.8%
2018 -19	1	11	12	5	29	8	27.6%
2019 -20	1	9	11	3	24	6	25.0%
	Non-PC RMA	PC RMA	Total	%PC RMA			
30-Jun-18	4845	2538	7383	34.4%			

18. To protect the consumer and also raise the legal status of the registered migration agent, Canada, New Zealand, and the United Kingdom have implemented relevant measures:

Country	Measures Taken
Canada	Individuals providing Canadian immigration/citizenship services abroad are subject to Canadian law even if they reside outside Canada. <sup>3</sup>
New Zealand	Any person who provides immigration advice must be licensed unless they are exempt, including people from China, India or anywhere in the world. <sup>4</sup>
the UK	A dedicated hotline is created for the general public. For example, a consumer can ring to confirm a registered adviser or get a referral for the registrar. <sup>5</sup>

<sup>3</sup> <https://icrc-crcic.ca>, Accessed on 14 June 2021

<sup>4</sup> <https://www.iaa.govt.nz/for-migrants/who-can-give-advice/>, Accessed on 14 June 2021

<sup>5</sup> <https://www.gov.uk/government/publications/oisc-fags/oisc-fags>, Accessed on 14 June 2021

19. I recommend that the migration agent industry be promoted and developed into a world-class standard by making it a mutually respected profession amongst all associations.

## Conclusion

20. The Department has invested significant time and effort to restructure the migration advice industry by drafting a 168-page consultation report. While more stringent measures have been recommended for new entrants and currently registered migration agents, this is also an excellent opportunity to reform it into a high respected profession. My recommendations were submitted in the previous paper and also enclosed.

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22 July 2020

Department of Home Affairs

## **Submission**

**RE: Creating a world class migration advice industry**

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### **Purpose**

1. This submission is to address how to create a world class migration advice industry.

## Migration Agent History

### Immigration Restriction Act 1901

2. The Immigration Restriction Act 1901<sup>1</sup> was an Act of the Parliament of Australia which limited immigration to Australia. There are no agent-related words in this Act. However, it specifically stated that any person assisting other persons to contravene the Act would be guilty of an offence under Section 12.

### Immigration Restriction Act 1905 - 1940

3. The 1901 Act was amended a number of times until 1940. During these periods, there was no introduction of any language about migration agents.

Immigration Restriction Amendment Act 1905<sup>2</sup>

Immigration Restriction Act 1908<sup>3</sup>

Immigration Restriction Act 1910<sup>4</sup>

Immigration Act 1912<sup>5</sup>

Immigration Act 1920<sup>6</sup>

Immigration Act 1924<sup>7</sup>

Immigration Act 1925<sup>8</sup>

Immigration Act 1930<sup>9</sup>

Immigration Act 1932<sup>10</sup>

Immigration Act 1933<sup>11</sup>

Immigration Act 1935<sup>12</sup>

Immigration Act 1940<sup>13</sup>

### Immigration Act 1948

4. In the Immigration Act 1948<sup>14</sup>, the definition of “registered agent” was first inserted. It means a person registered under section 14H, which stated that the application to register shall be supported by such evidence of the good fame, integrity and character of the applicant.

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<sup>1</sup> <https://www.legislation.gov.au/Details/C1901A00017>

<sup>2</sup> <https://www.legislation.gov.au/Details/C1905A00017>

<sup>3</sup> <https://www.legislation.gov.au/Details/C1908A00025>

<sup>4</sup> <https://www.legislation.gov.au/Details/C1910A00010>

<sup>5</sup> <https://www.legislation.gov.au/Details/C1912A00038>

<sup>6</sup> <https://www.legislation.gov.au/Details/C1920A00051>

<sup>7</sup> <https://www.legislation.gov.au/Details/C1924A00047>

<sup>8</sup> <https://www.legislation.gov.au/Details/C1925A00007>

<sup>9</sup> <https://www.legislation.gov.au/Details/C1930A00056>

<sup>10</sup> <https://www.legislation.gov.au/Details/C1932A00026>

<sup>11</sup> <https://www.legislation.gov.au/Details/C1933A00037>

<sup>12</sup> <https://www.legislation.gov.au/Details/C1935A00013>

<sup>13</sup> <https://www.legislation.gov.au/Details/C1940A00036>

<sup>14</sup> <https://www.legislation.gov.au/Details/C1948A00086>

5. The Immigration Act 1949 had minor amendments of the Immigration Act 1901–1948 without any mention of agents<sup>15</sup>.

#### Migration Act 1958 (the Act)

6. The original bill was introduced to the House of Representatives on 1 May 1958 by Alick Downer, the Minister for Immigration in the Menzies Government. It replaced the Immigration Restriction Act 1901 and formed the current framework.
7. Clause 46 of the Explanatory Memorandum, Migration Bill 1958<sup>16</sup> described “immigration agents” as persons handling immigration applications and passage bookings on behalf of others under Sections 14E to 14N. It provided that persons may not act as immigration agents, for reward, unless registered by the Department. And registration may be granted only to persons who satisfy authorised officers that they are fit and proper persons.
8. Clarification about the concept of “migration agent” and its detailed changes was carried out by the Migration Amendment Act (No. 3) 1992<sup>17</sup>, which is still in force. The title of “Migration Agent” was introduced for the very first time, as well as the terms “immigration assistance” and “immigration legal assistance”. The outline of the Explanatory Memorandum (EM No.3 1992)<sup>18</sup> states that migration agents are identified as persons who provide ‘immigration assistance’. The definition of immigration assistance covers assistance with preparing an application, advising the applicant about the application, preparing for proceedings in relation to the application, and representing the applicant in such proceedings.

By reading the Act and EM No.3 1992 together, it is clear that the scope of services in “immigration assistance” has included “immigration legal assistance”. That is, immigration legal assistance is part of immigration assistance in order to recognise the traditional function of lawyers<sup>19</sup>.

9. EM No.3 1992 also states that the central feature of the proposed regime (the Act) is that it will require migration agents to be registered on a Register of Migration Agents to be maintained by the Secretary of the Department of Immigration, Local Government and Ethnic Affairs. The exemption for lawyers is to provide ‘immigration legal assistance’, with the definition of this being only related to representing clients before the courts and providing legal advice.

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<sup>15</sup> <https://www.legislation.gov.au/Details/C1949A00031>

<sup>16</sup> <https://www.aph.gov.au/binaries/library/pubs/explanmem/docs/1958migrationhr.pdf>

<sup>17</sup> <https://www.legislation.gov.au/Details/C2004A04376>

<sup>18</sup> [http://classic.austlii.edu.au/au/legis/cth/bill\\_em/mab31992235/memo\\_0.html](http://classic.austlii.edu.au/au/legis/cth/bill_em/mab31992235/memo_0.html)

<sup>19</sup> Explanatory Memorandum, Migration Amendment Act (No. 3) 1992, p. 7.



### [Cunliffe v The Commonwealth \(1994\) 124 Alr 120](#)

10. The inclusion of lawyers in the regulatory system of the Migration Amendment Act (No. 3) 1992 was challenged in the High Court, but it was unsuccessful.

### [Migration Amendment \(Regulation of Migration Agents\) Bill 2019](#)

11. The Migration Amendment (Regulation of Migration Agents) Bill 2019 (Deregulation Bill 2019)<sup>20</sup> states that legal practitioners are to be regulated only by their law societies and have the right to give immigration assistance. Meanwhile, all phrases related to 'immigration legal assistance' are repealed from the Act.

### [Theme 1: A qualified industry](#)

12. The efficacy report shows that the migration advice profession has a total of 7,383 Registered Migration Agents (RMAs) having the following educational qualifications:
  - 3,554 non-lawyer agents had completed a Graduate Certificate in Migration Law and Practice;
  - 2,538 agents had obtained an Australian legal practicing certificate; and
  - 1,291 agents had completed either a Migration Agents Registration Authority approved course, the Migration Advice Professional Knowledge Entrance Examination or the Migration Institute of Australia exam<sup>21</sup>.
13. The Department of Home Affairs notes that approximately 75 per cent of RMAs have never had a complaint made against them. Among 727 complaints during the financial year of 1 July 2017 to 30 June 2018, 47 resulted in a sanction decision. That is around 6 per cent of the total complaints.
14. One of the Kendall Review recommendations was to raise the level of technical proficiency required for registration from completion of a Graduate Certificate in Australian Migration Law and Practice and passing an integrated common assessment items exam, to completion of a Graduate Diploma and passing a separate Capstone assessment.
15. The higher-level requirement came into effect on 1 January 2018 with transitional arrangements for those who completed a Graduate Certificate prior to this date.
16. The Department entered into an agreement with the College of Law at the end of 2017 to develop and deliver the Capstone assessment from July 2018.

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<sup>20</sup>

[https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6448\\_aspassed/toc\\_pdf/19216b01.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6448_aspassed/toc_pdf/19216b01.pdf;fileType=application%2Fpdf)

<sup>21</sup>

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Migration/Migrationagentregulatio/Report/section?id=committees%2freportjnt%2f024186%2f26176#footnote50target](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Migration/Migrationagentregulatio/Report/section?id=committees%2freportjnt%2f024186%2f26176#footnote50target)

17. With the royal assent of the Deregulation Bill 2019, legal practitioners are no longer under the regulation of the Office of the Migration Agents Registration Authority (OMARA). Instead, the related law societies will have discretion to impose completion of a Graduate Diploma and passing a separate Capstone assessment for those legal practitioners who practise immigration assistance.

To avoid conflict of interest, I submit that legal practitioners should be prevented from involvement in the Capstone assessment for RMA. Also, the examiners should be appointed from RMA specialists not holding a legal practicing certificate.

## Theme 2: A professional industry

18. After the Deregulation Bill, there will be less than 5,000 RMAs. Thus, it is critical to eliminate any sub-categories, for instance, a tiering system. Firstly, the resources are limited and the tiering system might attract unnecessary costs which will be shifted to consumers in the end. Secondly, the tiering system will confuse consumers, placing them in a more vulnerable situation and making it easier for them to be exploited.
19. Amongst all other factors, the characteristics of an RMA under Section 290 of the Act is that they are a fit and proper person to give immigration assistance. The definition of 'immigration assistance' in Paragraph 8 is inclusive for all the services related to immigration.

Thus, there is no provision in the Act for tiering nor for imposing capstone assessments for an RMA to be re-qualified for further 'immigration assistance'.

If tiering happens, RMAs, especially those who suffer financial losses, might take legal action against the Authority that administers or implements the tiering system, unless there is another amendment bill passed through parliament that gives such a system a green light.

20. To mitigate the concerns of incompetency of some RMAs, the RMA industry should introduce a new professional structure consisting of Provisional Immigration Practitioner, Certified Immigration Practitioner and Fellow Immigration Practitioner, through implementing Continuing Professional Development (CPD).
21. The CPD should comprise of five specialised areas: i) All Visas except Protection Visas, ii) Protection Visas, iii) Visa conditions and Public Interest Criteria (PI), iv) Administrative Appeals Tribunal merit reviews (AAT), and v) Jurisdiction review. Two of these five areas should be made compulsory: All Visas except Protection Visas; and Visa conditions and Public Interest Criteria (PI).
22. The professional structure should be managed by the successful completion of specialised areas and related real-life cases.

- The newly registered migration agent should be designated as “Provisional Immigration Practitioner”. After one year of supervision by a Certified/Fellow Immigration Practitioner, the person can then apply for “Certified Immigration Practitioner”.

Provisional Immigration Practitioners should have access to a cost-free supervisory period of up to six months and there should be a cap on mentoring fees if applicable, to protect their rights and financial obligations as new entrants to the profession.

- Certified Immigration Practitioners should be required to keep up with CPD in each of the five specialised areas each year: All Visas except Protection Visas, Protection Visas, Visa conditions and PIs, AAT, and Jurisdiction review. After the completion of all the specialised areas with related real-life cases, Certified Immigration Practitioners may be permitted to apply for Fellow Immigration Practitioner.
- Fellow Immigration Practitioners should maintain CPD in the specialised areas each year in order to retain the title. Fellow Immigration Practitioners should be able to represent clients in court matters stipulated by the Migration Act under the definition of immigration assistance. The Fellow Immigration Practitioner certificate should be considered as equivalent to a legal practicing certificate for the purposes of immigration assistance matters and the Minister should facilitate this function to uphold the RMA industry.

23. The Office of the Migration Agents Registration Authority (OMARA) should keep a registry of the professional status of RMAs for public query.

### Theme 3: Combatting misconduct and unlawful activity

24. The Department of Home Affairs noted that RMAs provide assistance in lodging just over ten per cent of approximately 3.4 million visa applications. Between 1 January and 30 June 2018 alone, out of nearly two million total applications, approximately 184,000 applications were lodged with the assistance of RMAs.

25. The OMARA’s powers are administrative only. Where potential fraud or other Migration Act offences are identified, they are referred to the Australian Border Force (ABF) and any action taken is subject to ABF priorities<sup>22</sup>.

26. The ABF lacks appropriate information-sharing and evidence-sharing powers. In addition, Migration Act offences are difficult to prosecute due to the onus of burden of proof, which requires significant resources to detect and investigate potential offences<sup>23</sup>.

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<sup>22</sup> Department of Home Affairs, Submission 6, p. 16.

<sup>23</sup> Department of Home Affairs, Submission 6, p. 17.

27. The difficulty of accurately identifying the practices of unregistered migration agents is evidenced by the low percentage of allegations that Border Force receives on the issue<sup>24</sup>.
28. The OMARA is aware that some education agents are providing immigration assistance unlawfully, and registered migration agents find it difficult to compete in this market<sup>25</sup>.
29. The Minister should launch education campaigns to raise public awareness that only legal practitioners and RMAs can provide immigration assistance, with the detailed exemptions list.

It has been well-evidenced that education is the cost-effective way to protect the rights of the public, implement and make changes. Consumers need to know where to get help instead of being exploited due to lack of or inconsistent information.

30. All visa applications lodged with immigration assistance should be accompanied by an endorsement from legal practitioners, RMAs, or exempt persons. Visa applications lodged directly by the applicants or exempt persons should be accompanied by a statutory declaration made by the applicant or exempt person. Fake endorsements or statutory declarations would lead to visa refusal, or cancellation if granted, and an infringement notice would be issued to the related party where applicable.

It is known that some education agents lodge the application on behalf of the applicants for free in order to get commissions back from related education providers. In addition, illegal unregistered parties existing in the market are known to lodge applications on behalf of applicants for fees.

The requirement of a statutory declaration will discourage these illegal practices.

31. A company providing immigration assistance services onshore should have at least one director holding a Certified/Fellow Immigration Certificate. RMAs should not enter into contracts or associate with companies that do not satisfy this condition.

## Conclusion

32. I very much appreciate the opportunity to make a submission regarding my own industry. The immigration advice industry should be structured into a professional body that has its own reputation based on clear and rigorous standards. I would be very happy to be contacted if any items above need further elaboration.

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<sup>24</sup> Department of Home Affairs, Submission 6, p. 22.

<sup>25</sup> Department of Home Affairs, Submission 6, p. 23.