Analysis of the MASSEI appeal to the AAT and on the requirement to gain band 7 scores in IELTS to qualify as migration agent

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The Issues:

Whether or not the decision of the Administrative Appeal Tribunal (AAT) affirming the decision of the Office of the Migration agents Registration Authority (OMARA) is correct in declaring that Mr Massei is 'not a fit and proper person' to become a Migration agent, despite the fact that he had qualified and satisfied the requirements under the provisions of the Migration Act of 1958, but because he failed the International English Language Testing System (IELTS) English language proficiency test to gain a score of 7.0 in at least three bands and a minimum of 6.5 in the fourth.

Statement of the Facts:

Massei who successfully completed the Graduate Certificate in Australian Migration Law and Practice and had completed his training and assessment in the hospitality industry had undertaken the IELTS and has obtained an average grade of 5.5 over four bands. Subsequently, he applied for registration as Migration agent armed with the required certificates to qualify as one.

However, a recommendation was made by the OMARA prescribing the band score of 7.0 in the IELTS, hence, the application of Massei as Migration agent was refused by the OMARA in a decision rendered by it on November 17, 2010 on the sole basis alone, which is his failure to secure the minimum score requirement in an IELTS test.

Argument of the Authority:

It was argued by OMARA that the Tribunal should apply the policy set out in the Policy and Procedures Manual and be satisfied that Massei is not fit and proper person to give migration assistance for his failure to obtain an average grade of 7.0 in the IELTS test.

Argument of Massei

It was the position of Massei that requiring an IELTS score of 7.0 is an ultra vires act committed by the Authority. That there are prescribed requirements set out in the Migration Act of 1958 which should be considered in deciding whether Massei is 'not fit and proper person' to give immigration assistance.

The Decision of the Tribunal

The tribunal affirmed the decision of OMARA that since Massei failed to gain a band score of 7.0 that he was not a fit and proper person to give migration advice and his rejection for registration as a migration agent was upheld by the AAT.

THE LAW GOVERNING MIGRATION AGENTS and OMARA

Before discussing the issues, it is deemed necessary to discuss and scrutinize first the Migration Act of 1958 and the Migration agent Regulation of 1998 which set out the Authority and power of the OMARA.

The Migration Act of 1958 is the governing law in Australian Immigration and is also the basis in formulating the Migration agent Regulation 1998.

Section 316 of the Act provides:

Functions of Migration agents Registration Authority

(1) The functions of the Migration agents Registration Authority are:

(a) to deal with registration applications in accordance with this Part; and

(b) to monitor the conduct of registered migration agents in their provision of immigration assistance and of lawyers in their provision of immigration legal assistance; and

(c) to investigate complaints in relation to the provision of immigration assistance by registered migration agents; and

(d) to take appropriate disciplinary action against registered migration agents or former registered migration agents; and

(e) to investigate complaints about lawyers in relation to their provision of immigration legal assistance, for the purpose of referring appropriate cases to professional associations for possible disciplinary action; and

(f) to inform the appropriate prosecuting authorities about apparent offences against this Part or Part 4; and

(g) to monitor the adequacy of any Code of Conduct; and

(h) such other functions as are conferred on the Authority by this Part.

The authority of the OMARA under the Act was to exercise administrative functions which can be summarized into four:

- **processing** applications for registration
- **administering** continuing professional development
- **monitoring** the conduct of registered migration agents, and
- **investigating** complaints about, and taking appropriate disciplinary action against, registered migration agents who breach the Migration agents' Code of Conduct or otherwise behave in an unprofessional or unethical way.

Comment: This means that the Authority of OMARA under the Migration Act of 1958 is merely administrative in nature and its functions were summarized into four can also be found in the website of OMARA. Amongst these four functions, the processing applications for registration are at the core of this document.

The prescribed qualifications of the migration agent under the Migration agent Regulation 1998 which was prepared on October 1, 2006 and ended in December 31, 2011[1] are towit:

5 Prescribed qualifications

(1) For paragraph 289A (c) of the Act:

(a) a prescribed course is a course specified for the purposes of this paragraph by the Minister in an instrument in writing; and

(b) the prescribed period is the 12 month period immediately before the day on which the applicant is taken to have made the application for registration; and

(c) a prescribed exam is an exam specified for the purposes of this paragraph by the Minister in an instrument in writing.

(2) For paragraph 289A (d) of the Act, a current legal practising certificate issued by an Australian body authorised by law to issue it is prescribed.

The Migration Agents Regulation 1998 also provided the following provision, towit:

4 Transitional

Regulation 6C of the Migration agents Regulation 1998, inserted by item (8) of Schedule 1, applies to an application for registration:

a) made, by not decided by the Migration agents Registration Authority, before 1 July 2005; or
b) made on or after 1 July 2005;

Select Legislative Instrument 2006 No. 158

4 Transitional

The amendments made by Schedule 1 apply in relation to an application to be registered as a registered migration agent that is made on or after 1 July 2006.

Comment: The abovementioned legislations: Migration Act 1958 and the Migration agents Regulation 1998 were the original pieces of legislations that dwell on the application for registration of migration agents. This is the reason why these were mentioned in this analysis so that the reader will have an idea of the existing laws at the time prior to the application of Massei. Massei for initial registration as Migration agent.

[1] Office of Legislative Drafting and Publishing. (2006). *Migration Agents Regulations 1998. Statutory Rules 1998 No. 53 as amended made under the Migration Act 1958*. Attorney-General's Department, Canberra.

In 2009, Migration Legislation Amendment Regulations 2009 **(No. 1) (SLI NO 22 OF 2009)** [2] and Migration Legislation Amendment Regulations 2009 **(NO. 2) (SLI NO 116 OF 2009)** [3] were passed. Both these legislations pursuant to the provision of Section 504 (1) of the Migration Act of 1958, however, pertain only to the granting of visa applications. It was stated in the explanatory statement issued by the Minister for the Immigration and Citizenship that

> "the purpose of the Regulations is to amend the *Australian Citizenship Regulations 2007* and the *Migration Regulations 1994* to improve the operation of immigration and citizenship policy".

These legislations did not tackle any changes or alteration in the requirements for migration agents under the Migration Act of 1958 or in the prescribed qualifications.

In 2010, Migration Legislation Amendment Regulations 2010 (no.1) [4] and Migration Legislation Amendment Regulations 2010 (no.2) [5] were also passed and these superseded those legislations mentioned above. Both of these legislations pursuant to the provisions of Migration Act of 1958 pertain to the issuance of skilled visas. There is nothing in this legislation that tackles the changes in the requirements to be qualified as Migration agent. The required qualifications for Migration agents are still in effect.

Comment: The prescribed qualifications of a Migration agent that are still in effect even with these legislations are (a) a prescribed course is a course specified for the purposes of this paragraph by the Minister in an instrument in writing; and (b) the prescribed period is the 12 month period immediately before the day on which the applicant is taken to have made the application for registration; and (c) a prescribed exam is an exam specified for the purposes of this paragraph by the Minister in an instrument in writing. (2) For paragraph 289A (d) of the Act, a current legal practising certificate issued by an Australian body authorised by law to issue it is prescribed.

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[2] **Commonwealth Numbered Regulations - Explanatory Statements.** *MIGRATION LEGISLATION AMENDMENT REGULATIONS 2009 (NO. 1) (SLI NO 22 OF 2009).* Available at website: **http://www.austlii.edu.au/au/legis/cth/num_reg_es/mlar20091n22o2009529.html**

[3] Commonwealth Numbered Regulations - Explanatory Statements. ***MIGRATION LEGISLATION AMENDMENT REGULATIONS 2009 (NO. 2) (SLI NO 116 OF 2009).*** **Available at website:** http://www.austlii.edu.au/au/legis/cth/num_reg_es/mlar20092n116o2009529.html

[4] Australian Government: Comlaw. (June 3, 2010). *Migration Legislation Amendment Regulations 2010 (No. 1) - F2010L01518* . Available at website: http://www.comlaw.gov.au/Details/F2010L01518

[5] Commonwealth Numbered Regulations - Explanatory Statements. *MIGRATION LEGISLATION AMENDMENT REGULATIONS 2010 (NO. 2) (SLI NO 297 OF 2010)*. Available at website: **http://www.austlii.edu.au/au/legis/cth/num_reg_es/mlar20102n297o2010529.html**

The Office of the OMARA became a discrete office attached to the Department of Immigration and Citizenship (DIAC) from 1 July 2009, following the *2007–08 Review of Statutory Self-Regulation of the Migration Advice Profession* issued in December 2008. [6] The same *REVIEW* recommended the raising of the IELTS band score to 7.0 in academic.

In its 2009-10 Annual Report[7], OMARA has reported its achievements as well as reforms. In this annual report, they had not mentioned that OMARA had four versions of their Policy and Procedures Manual (PPM). The one mentioned in the decision of Massei Case was Introduction to the Manual, September 2010 edition which served as guidance in determining whether an applicant is fit and proper to be a Migration agent.

It is contended by this paper that the AAT was misled by OMARA by not quoting from the first version of the PPM, which should have applied to Massei, and not the tendered version, Version 4 of the PPM, which had the English language proficiency requirements included. Version I made no mention of any English language proficiency requirements.

Introduction to PPM versions 1 August 18, 2009, version 2 September 30, 2009 and version 3 March 1, 2010

The introduction to these versions states that, towit:

> *A guiding principle of the PPM is that it reflects best practice in administrative decision making. Further information about best practice administrative decision making is available in the Administrative Review Council's (ARC) Best Practice Guides for Administrative Decision Makers (see: www.ag.gov.au/arc).*
>
> ***Office staff making decisions under the Act and Regulations must be delegated to do so and must comply with legislative requirements.*** *They must also give due regard to policy guidance such as in the PPM, but should not apply such policy inflexibly. "Decision makers" or "delegates" cannot be directed by another officer to make a particular decision*. (Note: highlighted by the writer.)
>
> *This PPM focuses on key issues and decision making points. It is designed to support the Office in its initial months of administering the OMARA function.* ***This PPM implements a number of recommendations made in the 2007-08 Review of Statutory Self-Regulation of the Migration Advice Profession (the Review) pertinent to the Office's functions****. The PPM will be updated and modified over time to reflect changes such as those arising from legislative amendments and further implementation of the Review recommendations.* (Note: highlighted by the writer.)

[6] Office of the Migration Agents Registration Authority. *Annual Report 2009-10.* Department of Immigration and Citizenship. Available at website: http://www.immi.gov.au/about/reports/annual/2009-10/html/outcome-1/omara.htm

[7] Ibid.

These three versions of the PPM have the same introductions and all stated that in making decision under the Act and Regulations, office staffs must be delegated to do so and comply with legislative requirements. It is ironic however, that in this Introduction alone, one can see inconsistency. As stated, decisions of office staffs must comply with legislative requirements, yet in the next paragraph, it was stated that, towit: "***This PPM implements a number of recommendations made in the 2007-08 Review of Statutory Self-Regulation of the Migration Advice Profession (the Review) pertinent to the Office's functions".***

Comment: This means that the PPM which serves as a guidance for decision maker, is implementing recommendations without legislative enactment authorizing it to perform. Worst is, what it is implementing is not a legislative instrument, but mere recommendation which still needs legislative enactment to have legal and binding effect. It must be stressed that OMARA is supposed to be performing functions of the Minister, which were delegated to it in the Instrument of Delegation and which has complied with legislative requirements such as the Legislative Instrument IMMI 06/056 and IMMI 06/057. Yet, in this PPM, OMARA has gone beyond its delegated authority by giving an announcement to that effect which was stated in the Introduction. For some, this may be trivial, but this provides insight to the attitude of OMARA that they believe that they can go beyond their mandate that they must comply with legislative requirements in rendering decision and its authority must be delegated, by implementing of what is merely a recommendation provided by an inquiry. Such behaviour must be construed as an ultra vires act.

Discussion of the lack of evidence supporting OMARA's recommendations will be addressed in a separate paper. However, that OMARA acts upon a recommendation which was constructed on no evidence, or worse, contrived evidence is something which should be condemned by the Minister and shows a lack of good governance, and abuse of power, by OMARA.

PPM versions 1 to 3 in connection with the prescribed qualifications of the Migration agent

All versions from 1 to 3 of the Policy and Procedures Manual have the same guidelines for the registration of the Migration agents specifically on their prescribed qualifications. Registration requirement under section 3.5.3.2.1 provides the following, towit:

3.5.3.2.1 Registration requirements (initial registration applicants): Section 289A

Applicants for initial registration must not be registered if the Authority is not satisfied that the applicant has met the registration requirements of either s289A (c) or s289A (d). These requirements are summarised below.

Section	Requirement	Further Information	Evidence required (under policy)
s289A (c)	Must have: - completed prescribed course within prescribed period; and - passed prescribed exam within prescribed period	See regulation 5 and Instruments **IMMI 06/056** and **IMMI 06/057.** Prescribed course: specified by Minister in an instrument. Instrument currently relevantly specifies: Graduate Certificate in Australian Migration Law and Practice offered by The Australian National University, Griffith University, Murdoch University and Victoria University Prescribed period: 12 month period immediately before the day on which the applicant is taken to have made the application for registration Prescribed exam: specified by Minister in an instrument. Instrument currently relevantly specifies the "common assessment items relating to registration", which form part of the Graduate Certificate above.	Letter of Completion from course provider acknowledging that applicant satisfied the requirement for the award of the Graduate Certificate in Australian Migration Law and Practice and has achieved a minimum of 50% score on each assessment item.
s289A (d)	Must hold the prescribed qualifications.	See regulation 5. Prescribed qualification: current legal practising certificate issued by an Australian body authorised by law to issue it.	Certified copy of practising certificate.

In respect to the requirements as which is a fit and proper and person of integrity, the versions 1 to 3 of the PPM states that, towit:

3.5.3.2.2 Applicant must not be registered if not a person of integrity or not fit and proper (all applicants): Section 290

Section 290 applies to all applicants. It prohibits the Authority from registering an applicant if the Authority is satisfied that the applicant:

- *is not a fit and proper person to give immigration assistance; or*
- *is not a person of integrity; or*
- *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 incorporates two stages of assessment. The first relates to the applicant. Subsections 290 (1)(a) and 290 (1)(b) prevent the Authority from registering an applicant if the Authority 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.

To determine whether the applicant is fit and proper and a person of integrity, the version 1, 2 and 3 of the PPM has this provision:

Stage One: Assessment of whether the applicant is not "Fit and proper" or not a "Person of Integrity"

Generally speaking, the terms "fit and proper" and "person of integrity" have been taken to indicate an intention to confer a wide discretion to refuse an application. The courts and the AAT have defined the terms as encompassing:

- knowledge of the migration scheme and the ability of the person to fulfil the position of migration agent;
- honesty, knowledge and ability;
- "soundness of moral principle and character, uprightness; honesty";
- conduct, character and reputation; and
- Diligence and professionalism.

The terms "fit and proper" and "person of integrity" are not to be narrowly construed or defined. The terms should be interpreted in context of the activities in which the person is engaged or the activities they will undertake.

The context of s290 includes:

- applicant's giving of *immigration assistance*;

The Migration Regulations 1994, which create offences for misleading statements and advertising, practising when unregistered and misrepresenting a matter; and advertising, practising when unregistered and misrepresenting a matter; and

- the Code of Conduct contained within the Regulations, which refers to the applicant being able to perform diligently and honestly, being able and willing to deal fairly with clients, having knowledge of business procedure, properly managing and maintaining client records, and maintaining client confidentiality.

Subsection 290 (2) specifies what a delegate must take into account when considering whether an applicant is "fit and proper to give *immigration assistance*" or a "person of integrity". The Authority should consider the discussion above when taking these matters into account. The sections below provide further guidance on these matters. It is not an exhaustive discussion and does not prevent the delegate from taking other relevant considerations into account when considering those matters that they are required to consider under s290.

The extent of the applicant's knowledge of migration procedure: Section 290 (2)(a)

Applicants for initial registration are required to meet registration requirements (completion of prescribed course and passing prescribed exam, or holding a practising certificate). Applicants for repeat registration are required to meet CPD requirements. Under policy, meeting these requirements would generally satisfy the Authority that the extent of the applicant's knowledge of migration procedure is appropriate.

The glaring difference between version 1, 2 and 3 of the PPM is this: on page 23 of Office of the OMARA – Procedures & Policy Manual – August 2009: Registration, it was stated that:

Any other matter relevant to the applicant's fitness to give immigration assistance: Section 290 (2)(h)

Other matters the Authority may consider relevant to the applicant's fitness to give immigration assistance are detailed below. These matters should only be taken into account under s290 (2)(h) if they have not already been taken into account under one of the other factors in s290 (2). Other matters of relevance to the applicant's fitness to give immigration assistance include:

- *the applicant's English language ability. For example: can the applicant read, understand, and explain legislation; can they communicate appropriately with government departments? Note that the approved application forms provide detail on how applicants may demonstrate they have adequate English language ability to give immigration assistance;*
- *information received during the 30 day publication period for initial applicants which indicates the applicant may not be fit to give immigration assistance;*
- *whether the applicant has knowingly provided false information on the registration application form, or knowingly failed to declare relevant information on the application form;*
- *whether the applicant has otherwise misled the Authority in the course of the applicant's dealings with the Authority, or failed to disclose relevant information to the Authority as required;*
- *whether the applicant complied with the Code of Conduct when previously registered;*
- *whether the applicant has abused the trust of a client or not acted in a client's best interest (this does not need to be restricted to clients of the applicant in relation to immigration matters);*
- *whether the applicant has unlawfully provided immigration assistance;*
- *whether the applicant has expressed views that are racist in nature or incompatible with providing immigration assistance;*

- *other conduct which adversely affects the character or reputation of the applicant, for example:*
- *failure to comply with a legal order or statutorily imposed conditions;*
- *a finding of contempt of court;*
- *giving false evidence on oath, including in a statutory declaration;*
- *breach of privacy or confidentiality affecting clients;*
- *putting oneself in a conflict of interest situation with a client and failure to deal with that conflict appropriately;*
- *having failed to appropriately manage conflicts of interest;*
- *not being honest, candid or cooperative in dealings with regulatory bodies or a Court, even if no finding of guilt is recorded, or disciplinary action taken, against the person;*
- *having been criticised or censured, disciplined or banned by a professional or regulatory body or Court even, if no finding of guilt is recorded, or disciplinary action taken, against the person;*
- *having been refused a licence for a commercial or professional activity;*
- *having breached a fiduciary obligation, whether to a visa applicant or another person;*
- *demonstrable lack of commercial, technical or professional expertise;*
- *having been an officer of an entity that failed as a result of internal weaknesses or breached its obligations;*
- *having engaged in fraudulent, negligent, deceptive, lax, reckless or imprudent business conduct;*
- *having displayed a general disregard for compliance with the law; or*
- *disciplinary action in employment or failure to obtain a security clearance related to appointment within the last five years.*

To guide the decision maker, the said Manual has this provision:

Officers should also ensure they refer to section 3.5.3.2.2 above which provides general guidance on the term "fit and proper". A broad range of matters may be relevant to the applicant's fitness to give immigration assistance and these matters will often depend on the individual circumstances of each application. Officers should note that the existence of the matters described above do not necessarily mean an applicant is not fit to provide immigration assistance. Rather, the Authority must be satisfied that these matters are relevant to the applicant's fitness to provide immigration assistance. The relevance of such matters may be impacted by factors such as how long ago the matter occurred, the frequency of occurrences, and the circumstances surrounding the matter.

If the Authority is satisfied that any other matter exists which is relevant to the applicant's fitness to give immigration assistance, the Authority must then consider whether, on this basis, the applicant is not fit and proper to provide immigration assistance, or not a person of integrity. If the Authority forms a preliminary view that the applicant is not fit and proper, or not a person of integrity, then the Authority must put the information to the applicant (see section 3.5.3.3).

Consequently, as could be deduced from the above factors, there was no mention of an IELTS exam, or any English language proficiency test to be taken by the initial applicant, in Version 1 of the PPM dated August 18, 2009. As a matter of fact, the Manual only mentions that to determine whether the applicant has the English Language ability "***the approved application forms provide detail on how applicants may demonstrate they have adequate English language ability to give immigration assistance."*** It should be noted that Massei was told that he possessed an inadequate command of English, he advised OMARA that he had an MBA and three other tertiary qualifications, all obtained and taught in the English language.

In the versions 2, 3 and 4 of the Policy and Procedures Manual, the English language ability of the initial applicant is now subjected to a new requirement which is passing the IELTS by obtaining an average score of 7.0 in all bands with a minimum of 7 in three bands and a minimum of 6.5 in the fourth band.

In the PPM version used by OMARA (Version 4, dated September 2010 edition) as the Respondent before the AAT, there was a new provision, which Massei should not have been subjected to, and which the AAT member was not advised that there was a new added provision which Massei was incorrectly subjected to, and was subsequent to his eligility for registration as a migration agents , towit:

> Any other matter relevant to the applicant's fitness to give immigration assistance: Section 290 (2)(h)
>
> > Other matters the Authority may consider relevant to the applicant's fitness to give *immigration assistance* are detailed below. These matters should only be taken into account under s290 (2)(h) if they have not already been taken into account under one of the other factors in s290 (2). Other matters of relevance to the applicant's fitness to give *immigration assistance* include:
> >
> > > ….. the applicant's English language ability. For example: can the applicant read, understand, and explain legislation; can they communicate appropriately with government departments? Note that the approved initial registration application form provides detail on how initial registration applicants may demonstrate they have adequate English language ability to give *immigration assistance.* Please note these standards will change for initial applications received after 31 December 2009 (see footnote below) 6;
> >
> > ----- *All applications for initial registration as a migration agent received on or after 1 January 2010 will need to meet a new increased English language standard. The following standard applies: An IELTS test score of 7.0 with a minimum score of 6.5 in each sub-test (speaking, listening, reading and writing) in the academic module undertaken not more than 2 years prior to lodgement of an Application for Registration as a Migration agent; or An internet based TOEFL (Test of English as a Foreign Language) score of 100 with a minimum score of 22 in each subtest in speaking, listening, reading and writing undertaken not more than 2 years prior to lodgement of Application for Registration as a Migration agent; or Evidence that the applicant has*

successfully completed both of matriculation level with a pass in English (not English as a Second Language) where English was the language of instruction at the school; and a Bachelor degree, or a higher degree, with a minimum of 3 years' equivalent full-time study, where: the degree was conferred by an Australian, New Zealand, UK or Canadian (see NOTE 1) University; and the study was undertaken while the person was residing in the country where the degree was awarded; and English was the language of instruction at the University . NOTE 1: other countries where English is an official language will be considered on a
case by case basis

The PPM version 4 implemented the Prescribed Qualifications for Migration agents pursuant to the Migration Act of 1958. Under 3.5.3.2.1 of the said Manual, it was provided that "applicants for initial registration must not be registered if the Authority is not satisfied that the applicant has met the registration requirements of either s289A (c) or s289A (d).

The requirement prescribed under section 289A (c) are:

Must have: - 1. completed prescribed course within prescribed period; and 2. – passed prescribed exam within prescribed period

The prescribed course is specified by Minister in an instrument. Instrument currently relevantly specifies: Graduate Certificate in Australian Migration Law and Practice offered by The Australian National University, Griffith University, Murdoch University and Victoria University. Prescribed period: 12 month period immediately before the day on which the applicant is taken to have made the application for registration Prescribed exam: specified by Minister in an instrument. Instrument currently relevantly specifies the "common assessment items relating to registration", which form part of the Graduate Certificate above.

Under s289A (d) *it is required that the applicant must hold the prescribed qualifications. And the Prescribed qualification: current legal practising certificate issued by an Australian body authorised by law to issue it. And the evidence to prove is a Certified copy of practising certificate.*

However, these requirements set out in the PPM September 2010 have no bearing in the determination of the application of Massei. How can the decision maker at the time of the application consider these requirements which were not yet published? And the Tribunal committed a grave abuse of discretion in affirming the decision of OMARA to declare Massei as not a fit and proper person by not taking into account the laws applicable at the time of his eligibility for registration as a migration agent.

In error, the introduction to the Manual of the September 2010 edition was mentioned in the AAT decision. The Respondent misled the AAT member by using the wrong version of the PPM.

The correct version which should have been shown to the AAT member was the Policy and Procedures Manual dated August 18, 2009, version 1. The AAT should have been advised that there were also other versions of the PPM such as Versions 2, (September 20th 2009) and Version 3 (March 1st 2010 and Version 4 (September 20th 2009).

There are significant differences between the Versions 1 of the PPM, but to boost their case against Massei, versions 2 and 3 have the same additional qualifications as that of the version 4, that is, the requirement to pass the IELTS test by scoring 7.0, but Versions 2 and 3 have no legislative origin or basis.

The OMARA displayed a level of bad faith

All versions of the Policy and Procedures Manual specified that policy guidance such as the manual **should not be applied inflexibly.** This word *inflexibly* means unbendingly, stubbornly, obstinately. Thus, in considering the qualifications prescribed by the Act and discussed in the Manual, the OMARA was tasked to apply the policy helpfully, favourably and accommodatingly. However, in deciding the application of Massei, OMARA applied the policy rigidly and inflexibly which was in contrast and not in accordance with the mandate of the said Manual. Indeed, the decision maker actively sought out reasons why she should act inflexibly, being incapable of adapting or changing her attitude to meet unusual circumstances.

Comment: The rejection of Mr Massei was solely based on his failure to obtain the IELTS band score of 7.0 which should not have applied to him as the applicable PPM at the time of the application of Massei is the August 18, 2009 version, as it is only the later versions had contained the imposed the IELTS requirements, but which had no legal origin as no legislative enactment was made authorizing OMARA to implement the same.

OMARA had acted unlawfully.

The Better Practice Guidance to Decision Making June 2009

At the time of the application of Massei, there was an existing governing guideline which is described in the *Better Practice Guidance to Decision Making June 2009* [8](hereafter referred to as the Guidance). It discussed the importance of the power to make a decision as stated in B2, Power to Make a Decision, pp. 11 of the said Guidance, towit:

> **B2. Power to make a decision**
>
> It is important that a decision maker is clear about the decision to be made and about the source of power for that decision. The most common source of power is legislation—either an Act of Parliament (a statute) or a subordinate law made by a person or body to whom Parliament has delegated law-making power. Examples of subordinate laws are regulations, statutory rules and ordinances. It is the decision maker's responsibility to know the legislation being relied on and to keep abreast of any amendments.
>
> Not every decision made by a government agency needs to be authorised by legislation. As well as statutory powers, many agencies possess executive powers to perform their normal administrative functions. Among these executive powers are the common legal powers of an ordinary person or organisation—for example, the power to enter into contracts, to acquire and manage property, to publish guides or advice to the public, and to conduct lawsuits. An agency established as a statutory corporation is often given such powers by legislation or the powers can be incidental to the agency's express powers.
>
> Other laws can regulate the use of statutory and executive powers; for example, when an agency enters into a contract of employment it must abide by the general laws relating to employment contracts. [9]

This Guidance should be the source of the authority for OMARA at the time of consideration of Mr Massei's application, for it clearly and unequivocally explained the source and use of their decision-making power. This could have helped OMARA in their decision. The decision maker should have utilised this guidance in assessing the application of Massei and not base her assessment on a journal article which has no bearing on the applicant. It is troubling and disturbing to know that the decision maker, who was tasked to render a decision whether to accept or not the application, went beyond her authority to solicit outside information which she believed supported her belief. Not only did she ignore the evidence before her, the decision maker sent an email to Dr Bob Birrell, referring to him by his first name, and who is a well-known leading anti–migration advocate, and which is a flagrant violation of the guidelines in the PPM and a display of bad faith on her part.

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[8] *Better Practice Guidance To Decision Making (June 2009*). Comcare, Canberra Australia PUB 75. Commonwealth of Australia 2009. Available at website: www.comcare.gov.au

[9] *Better Practice Guidance To Decision Making (June 2009*). Comcare, Canberra Australia PUB 75. Commonwealth of Australia 2009. Available at website: www.comcare.gov.au

Incidentally, the study by Bob Birrell, which strongly influenced the decision maker's opinion, was focused on international students' English proficiency and not about the English language proficiency of migration agents. The email exchange between the decision maker and Birrell was dated September 8, 2010 and the application of Massei was lodged well-before on April 26, 2010, and the decision refusing the application was rendered on November 17, 2010. Interestingly, the question which should be asked is why the decision maker took so long to process Massei's application.

To compound the decision-maker's mischievous behaviour was her misinterpretation of the article, her uncritical acceptance of Birrell's argument, and her subsequent distortion of the Birrell's own interpretation, which was wrong as well in the first place, as a more logical explanation could be given. But Birrell's anti-migration perspective could not state the obvious; that some students do not improve their English language proficiency, despite being in Australia for a number of years, simply because they mingle with their own cultural groups and use their own common language. Often their academic classes are full with their own cultural groups (Weisz 2004; 2006).

In the decision rejecting application of Massei, the decision maker stated that towit:

> " the IELTS score Massei achieved subsequent to completion of the MBA and Graduate Certificate reinforces the policy position that completion of university level study in Australia alone is not reliable evidence of English proficiency."

This statement undermines Australian University credentials as well as challenges its credibility, refutation and goodwill. It is like patently saying that the measurement of one's education is through IELTS test only and that a master's and doctorate level is useless compared to having a band score of 7.0. This is both ridiculous and highly absurd. And the decision maker was saying that there is a policy reinforcing this. What policy is she referring to? Certainly not the PPM, otherwise, she was substituting PPM to legislative instruments recognizing the high standards of education obtained in any university in Australia. Her statement, "I consider this report demonstrates that studying in Australia does not necessarily improve English proficiency" blatantly demonstrates an ignorant attitude towards an Australian education. If there is a possibility that she is correct, she fails to support her opinion with a single piece of evidence. Bushell's case against Massei is purely conjecture, yet rejects out of hand Massei's irrefutable evidence.

This absurdity of downgrading an Australian university education was countered by Marianne Dickie of the ANU College of Law, Australian National University (ANU) and Liana of Migration Alliance (http://library.constantcontact.com/download/get/file/1103672330684-109/ANU+and+MA+IELTS2014+joint+submission+to+OMARA.pdf) who also challenged the necessity for existing migration agents to be required to sit for an English language proficiency test before they can be reregistered after January 1st, 2014.

In paragraph 29 of the "T" documents (see Attachment Two), Bushell based her reasons as being in the national interest; however, she also derided Australia's national interest when she categorically declared that an Australian university level education is not reliable evidence of English language proficiency.

There was also a misplaced and misapprehension of facts committed by the decision maker. Massei was not an international student; however, his English proficiency was compared to that of international students who were the subject of study of Birrell. One cannot help but think that Bushell had a hidden agenda when she rejected the application of Massei and bolstered her decision with an argument that was irrelevant, so as to mislead the Massei. Subsequently, the AAT was seen to be misled by this when it affirmed the decision of OMARA based on its evidence.

The 2007-2008 Review of Statutory Self-Regulation of the Migration Advice Profession

The *2007–08 Review* issued in December 2008[10] which recommended the raising of the IELTS band score to 7 academic only recommended and did not impose the obligation to the OMARA to implement the same immediately. And OMARA at the time was in transition when it became a discrete office attached to the Department of Immigration and Citizenship. Hence, its main concern was to resolve the conflicts and complaints brought about by the services rendered by the registered Migration agents and formerly registered Migration agents.

Highly experienced migration agents Robert Chelliah, Sheelagh Blanckenbergh and Susan Wareham have written extensively and critically on the Review and it has been included under Attachment Three.

More troubling, and which is still being investigated, was that the people appointed to carry out the Review, the External Reference Group (EFG), were hampered in their investigations by members of DIAC and that the Minutes did not reflect the actual discussions. In other words, the Review Report was a sham.

However, the said Review was not a piece of legislation or statute which would be the source of OMARA's authority to impose the new IELTS band score. As an administrative body its function in connection with Part 3 of the Migration Act of 1958 were delegated to it by the Minister in the so-called Instrument of Delegation[11], specifically the implementation of section 289a, s290 and s290a.

Section 289A of the Migration Act 1958 provides:

Applicant must not be registered if does not satisfy registration requirements

An applicant:

(a) who has never been registered; or

[10] Office of the Migration Agents Registration Authority. *Annual Report 2009-10.* Department of Immigration and Citizenship. Available at website: http://www.immi.gov.au/about/reports/annual/2009-10/html/outcome-1/omara.htm

[11] Instrument of delegation.

(b) who is applying to be registered more than 12 months after the end of his or her previous registration;

must not be registered unless the Migration agents Registration Authority is satisfied that he or she:

(c) has completed a prescribed course within the prescribed period and has passed a prescribed exam within the prescribed period; or

(d) holds the prescribed qualifications.

Unquestionably, this provision of the Act is clear and unequivocal. The OMARA is delegated to refuse registration of the applicant unless it is satisfied that he or she has completed a prescribed course within a prescribed period OR holds the prescribed qualifications. The requirements for the satisfaction of OMARA are not concurring. Either of the (c) or (d) qualification will suffice in granting the application for registration. The meaning and the use of the word OR is not the same with the conjunction AND whereby the latter means "along with" or "in addition to".

Enrico Massei was a resident of Australia since 1987 and married to an Australian born citizen. In 2009 he completed a Master of Business Administration at Victoria University which is a full time course conducted over two (2) years. Prior to this, he also completed a course for a Graduate Certificate in Australia Migration Law and Practice in April 2009.

Logically, applying the provisions of section 289A of the Migration Act of 1958 as above mentioned in the case of Massei, even if he did not hold the prescribed qualification which is the current legal practicing certificate yet he has demonstrated his English Language ability when filed his application on April 26, 2010**.** The provisions in PPM versions 2, 3 and 4 in respect to the passing of IELTS by scoring 7.0 does not apply to him for these versions with this provision on passing the IELTS is null and void for the imposition of this requirement as it did not pass legislative enactment. Hence, the score of Massei which is 5.5 is a clear and equivocal demonstration of his English language proficiency.

The Department if Immigration and Citizenship website has publicized the legislative enactments to be effective starting January 2010. Interesting to note that among those legislations was the amendment of the Migration Regulation 1994 and it was stated that, towit:

" From 1 July 2009, the Migration Regulations 1994 *('the Regulations') are amended to change the English language requirements for onshore General Skilled Migration (GSM) visas. In particular, the amendments:*

- *increase the English language requirements for applicants nominating trade occupations (Australian Standard Classification of Occupations (ASCO) Level 4 occupation) by removing the option of 'vocational English';*

- *remove the option for applicants to receive points towards a qualifying score for the General Points Test for 'vocational English';*
- *require applicants applying with 'concessional competent English' to attain an average score of 6 in the International English Language Testing System (IELTS);*
- *provide that applicants applying with 'concessional competent English', will no longer be restricted to being nominated by a State or Territory, or sponsored by a person who resides in a State or Territory, in which arrangements are established for suitable English language training, nor will they be required to enrol in an English language course and pay the fee; and*
- *ensure that where a primary applicant is relying on partner points in the General Points Test, no points will be awarded if the partner has 'vocational English' and if claiming 'concessional competent English', they have not met the new requirements as set out for primary applicants.*

Affected legislation :The following provisions of the Regulations are amended:

- *Subregulation 1.15B(5)*
- *Regulation 1.15E*
- *Schedule 2, clause 485.215*
- *Schedule 2, clause 487.215*
- *Schedule 2, clause 487.224*
- *Schedule 2, clause 885.213*
- *Schedule 2, clause 886.213*
- *Schedule 6B, item 6B33*
- *Schedule 6B, item 6B34*
- *Schedule 6B, item 6B35*
- *Schedule 6B, item 101*
- *Schedule 6B, item 102*
- *Schedule 6B, item 103*
- *Schedule 6B, item 104.*

Additional information: Nil.

Transitional provisions: The amendments apply to applications received on or after 1 January 2010.[12]

Interestingly, perusal of the legislations publicized by the Department of Immigration and Citizenship revealed nothing about the IELTS test score of 7.0 being imposed. This means that it is correct to point out that the provisions in version 2, 3 and 4 of the policy and procedures Manual of the office of the OMARA has no legislative origin but was an offshoot only of the recommendations made by the 2007-2008 Review of Statutory Self-Regulation of the Migration Advice Profession.

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12 Department of Immigration and Citizenship. ***General Skilled Migration English language changes*** *Commencement: 1 January 2010.* Available at website: http://www.immi.gov.au/legislation/amendments/2010/100101/lc01012010-03.htm

From 1 January 2010 initial registration applicants have been required to demonstrate a score of 7.0 in the academic version of the IELTS, up from the previous standard of 6.0. Exemptions and equivalent requirements were also determined that enable initial registration applicants to evidence their ability to meet the requirement.[13] The Minister then enacted a legislation effecting this requirement to all applicants for registration as Migration agents which requirement will take effect on January 2014. Notably, this requirement of passing the IELTS has its legislative origin which is Legislative Instrument IMMI12/035[14] for initial applicant and Legislative Instrument IMMI12/067 for repeat registration.

It is so that the Legislative Instrument IMMI 12/035 which was signed on June 20, 2012 and which took effect on July 1, 2012 revoked the IMMI 06/056 which was signed on September 28, 2006 that prescribed courses for applicants for registration as a Migration agent. It likewise revoked the Legislative Instrument IMMI 06/057 which was signed on September 29, 2006 that prescribed exams for applicants as a Migration agent.

CONCLUSION

Applying the above premises in the Case of Massei and the imposition of IELTS score of 7.0 by OMARA, the following conclusion can be arrived at:

a. It was the Policy and Procedures Manual version 2, 3 and 4 and not a legislative enactment or instrument which amended the Migration Act of 1998 nor superseded the Migration Amendment Legislation Regulation 1998 with regards to the prescribed qualifications of a Migration agent for registration which is to gain a score of 7.0 in IELTS when this was made to be part of the requirement. Hence, having no legislative origin, the said provision in the Manual raising the IELTS score to 7.0 is null and void and this provision on IELTS 7.0 has no valid and legal effect at the time of the application of Massei and even at the time the decision was rendered by the decision maker and at the time the AAT decided the case. In law, the decision-maker and the AAT erred.

b. It was only in June 20, 2012 that Legislative instruments IMMI 12/035 and IMMI 12/067 were enacted specifying the exams to be taken by the applicants for registration as a Migration worker.

c. That Massei qualified as Migration agent for displaying the English Language proficiency through his frequent studies and for complying with the other

[13] *Reform Agenda Priorities.* Department of Immigration and Citizenship. Office of the Migration Agent Registration Authority. Belconnen Australian Capital Territory, Au. Available at website: https://www.mara.gov.au/default.aspx?ArticleID=1435#English_Standards

[14] Department of Immigration and Citizenship. Commonwealth of Australia. *Prescribed courses and exams for applicants for registration as a Migration Agent (Regulation 5).* Belconnen Australian Capital Territory. AU. Available at website: https://www.mara.gov.au/About-Us/News-and-Latest-Updates-/About-Us/About-Us/News---default.aspx

requirements as required under the Migration Act 1958 and under the Migration Agent Regulation 1998, and for being fit and proper and a person of integrity, as there was no other evidence that refuted this fact and were presented by the decision maker, other that he did not achieve a certain band score in the IELTS test.

d. That OMARA committed *ultra vires* act in deciding against the application of Massei based on his failure to obtain 7.0 score in IELTS when this requirement is null and void in the absence of legislative instrument and supported this decision with a study by Bob Birrell on international students which had no bearing on Massei who was not an international student in Australia.

e. The decision maker has exceeded her authority by taking evidence outside those prescribed by the Legislative Instruments IMMI 06/056 and IMMI 06/057 when she based her decision on the study of Bob Birrell

f. That there was a hint of cover up in the case when OMARA attached the September 2010 edition of PPM thereby misleading the AAT in affirming its decision of refusing the application of Massei.

g. That there is a manifestation of bad faith on the part of the decision maker by taking into account and consideration a study of one Bob Birrell whose reply was beyond the period to act on the application of Massei and the said study pertains to English proficiency of international students and not on a migration agent's English language proficiency.

h. With all the above premises considered, Mr Enrico Massei should be registered without any further delay. He is qualified under the Migration Act.

Bibliography

Birrell, B. (2006). "Implications of low English standards among overseas students at Australian universities." People and Place 14(4): 53.

Weisz, M. N., A (2004). "Making the transition to university : do IELTS scores matter?".

Attachment One

How easy is it to gain an average score of 7 in all bands? Notice that none gets an average of 9. It would be more difficult to get more than 7 in all bands, not just an average. Previous calculation show that just 10% of those who average 7 or more, gain more than 7 in all bands.

Average Band scores	30-Jan	19-Dec	6-Mar	24-Oct	17-Apr	27-Feb	10-Apr	21-Nov	12-Dec	14-Jan
0	0	0	0	0	0	0	1.80	0	0	0
0.5	0	0	0	0	0	0	0	0	0	0
1	0	0	0	0	0	0	0	0	0	0
1.5	0	0	1.55	0	0	0	0	0.93	0	0
2	0	0.33	1.04	0	0	0	0	0	0	0
2.5	0	0	0.52	0	0	0	0	0	0.53	0
3	0	0	0	0	0.57	0	0	0	0	0
3.5	1.24	0.33	0	0	1.14	0	0.90	0	0	0.81
4	1.24	0.66	1.55	0	0	0.33	0.90	0	0.53	0.27
4.5	3.10	2.65	2.59	4.81	4.57	0.66	2.70	2.80	5.88	2.17
5	12.73	6.95	13.47	5.77	13.14	9.54	10.81	7.48	12.83	11.68
5.5	15.53	21.85	16.06	16.35	24	11.84	18.92	14.95	17.11	22.01
6	18.94	22.85	22.28	15.38	18.28	23.68	22.52	18.69	18.18	20.65
6.5	16.46	16.22	12.95	19.23	17.71	21.38	15.31	21.49	17.65	18.75
7	**12.11**	**15.23**	**14.51**	**13.46**	**9.71**	**13.16**	**13.51**	**14.95**	**13.90**	**13.04**
7.5	**11.18**	**6.95**	**10.88**	**15.38**	**9.14**	**9.87**	**4.50**	**10.28**	**8.02**	**5.43**
8	**6.52**	**4.97**	**2.07**	**5.77**	**0.57**	**5.92**	**6.31**	**4.67**	**3.21**	**2.72**
8.5	**0.93**	**0.99**	**0.52**	**3.85**	**1.14**	**3.62**	**1.80**	**3.74**	**2.14**	**2.44**
9	0	0	0	0	0	0	0	0	0	0
N	322	302	193	104	175	304	111	107	187	368

% Frequency Distribution for OVERALL RESULT (Academic) to gain an average IELTS score.

To gain the OMARA band scores of 7 in three bands with a minimum of 6.5 in one band makes it 10 times more difficult.

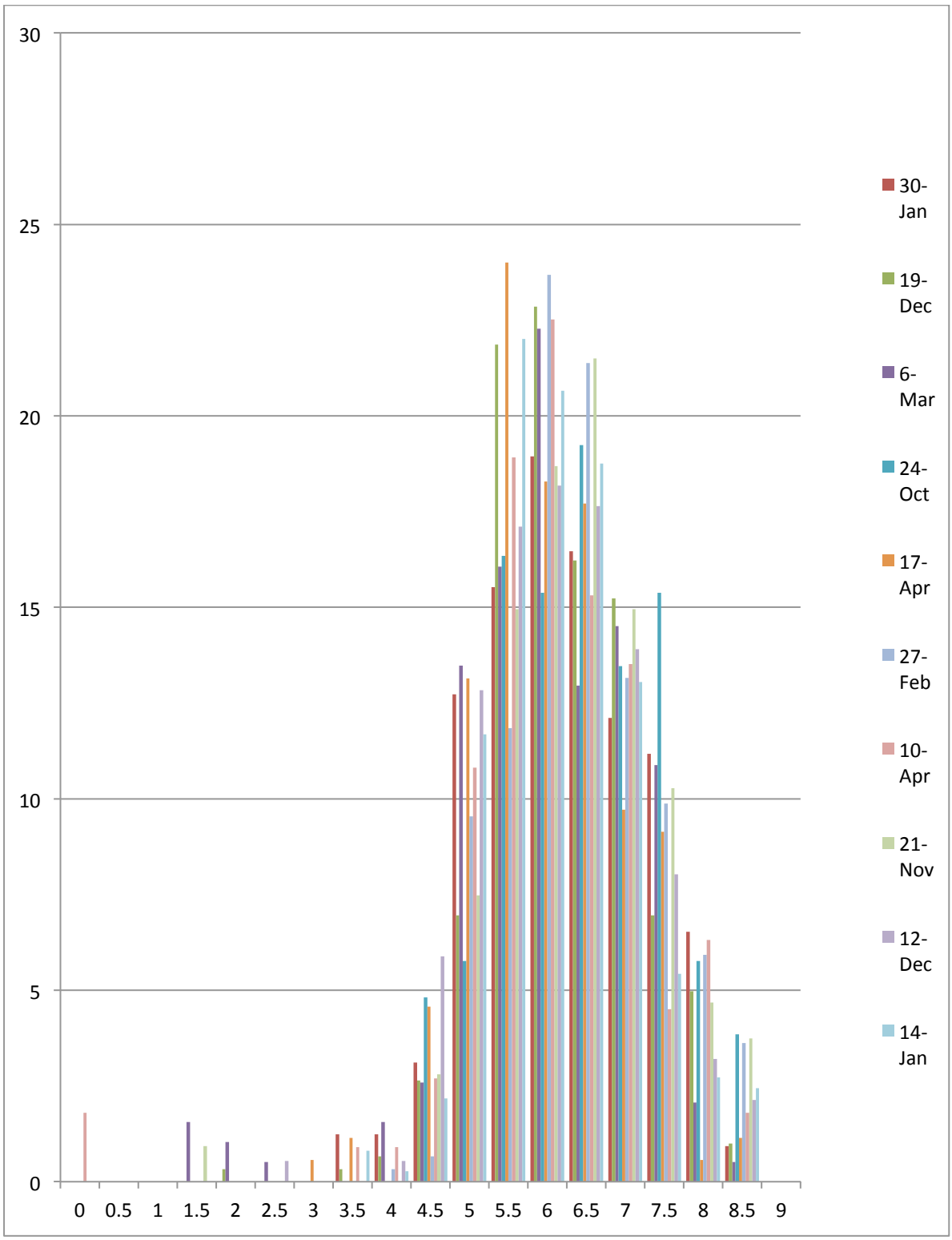

Figure 1: Chart of % Frequency Distribution for OVERALL RESULT (Academics

It is the writing component in the Academic IELTS test which reduces the chances of most candidates.

Band scores	30-Jan	19-Dec	6-Mar	24-Oct	17-Apr	27-Feb	10-Apr	21-Nov	12-Dec	14-Jan
0	0	0	0	0	0	0	0	0	0	0
0.5	0	0	0	0	0	0	0	0	0	0.27
1	0	0	0	0	0	0	0	0	0	0.27
1.5	0	0	0	0	0	0	0	0	0	0
2	0.31	0	0	0	0.57	0	0.92	0	0	0
2.5	0.31	0	0.53	0	0.57	0.33	0	0	0.53	0
3	0	0.33	1.05	0	1.14	0	0	0	0	0
3.5	0.62	0.66	1.58	0.95	0.57	0	1.83	2.70	0	1.63
4	2.48	1.99	2.10	1.90	2.86	1.32	2.75	2.70	2.10	3.26
4.5	8.38	6.64	9.47	7.62	13.71	4.60	5.50	3.60	5.26	8.15
5	16.77	16.61	13.68	14.28	20.57	15.46	23.85	16.22	14.74	17.93
5.5	27.02	22.26	20.53	20.95	25.71	26.64	22.02	16.22	28.95	25.54
6	19.56	21.93	25.79	18.09	17.71	23.03	20.18	22.52	27.37	20.65
6.5	14.28	13.62	14.21	18.09	11.43	14.47	13.76	17.12	12.10	12.77
7	7.45	11.63	6.84	12.38	2.28	8.55	4.59	10.81	3.68	5.43
7.5	1.55	2.32	1.58	2.86	2.85	4.28	3.67	5.40	4.21	2.72
8	1.24	1.99	1.05	1.90	0	1.32	0.92	2.70	0.53	1.36
8.5	0	0	1.58	0.95	0	0	0	0	0.53	0
9	0	0	0	0	0	0	0	0	0	0
N	322	301	190	105	175	304	109	111	190	368

Table: % Frequency Distribution for WRITING (Academic)

Attachment Two

Katharine Bushell's reasons for the rejection of Massei's application were based on the following reasoning. Her reasons were included in the "T" documents tabled at the AAT Hearing.

16. I have considered your application against the Authority's English language policy which specifies the level of English proficiency required to be considered fit and proper to give immigration assistance. The policy has been drafted to give effect to a recommendation of the 2007-08 Review of Statutory Self- Regulation of the Migration Advice Profession (the Review) relating to English language proficiency. Recommendation 16 of the Review recommended that English language proficiency equivalent to an IELTS score of 7 should be the required level of English proficiency for both new and repeat applicants for registration as a migration agent. The policy was implemented on 1 January 2010 for new applicants for registration. It is intended that a• strengthened• English standard for existing agents will be subsequently introduced.

17. The English language policy specifies a number of ways that an agent may meet the English language proficiency requirement. The alternatives to IELTS 7 included in the policy have been made available as it is considered that person meeting these alternatives would be highly unlikely not to have an English proficiency equivalent to IELTS 7 or higher.

23. I have considered your other claims about your English language proficiency outlined in point 11 above. I note in particular your completion of a Masters of Business Administration (MBA), the Graduate Certificate in Immigration Law and Practice and a Certificate IV course in training and assessment.

24. However, I also note that you undertook an IELTS test in June 2010 and achieved an overall score of 5.5. This score is below the acceptable level of English proficiency specified in the English language policy.

25. I have weighed the evidence of your English proficiency based on your education in Australia against that demonstrated by the score you achieved in the IELTS test. I consider that it is open to me to find that the IELTS test score is the preferred indicator of English language ability for the following reasons:

a. The IELTS test was taken more recently, and may therefore be seen to carry more weight as it is more current;

b. The IELTS test is designed specifically to test English language ability with precision. The MBA is only indirect evidence of English language capability, as it implies command of

language required to pass the course, whereas the IELTS test result is direct evidence of that capability.

26. It is open to me to infer from the above that the 2-year full-time MBA you completed prior to the IELTS test indicates that your English language was also not, at that time, of the standard required by policy.

27. It is also open for me to consider that the IELTS score you achieved subsequent for completion of the MBA and Graduate Certificate reinforces the policy position that completion of university level study in Australia alone is not reliable evidence of English proficiency, and certainly does not evidence English proficiency equivalent to IELTS 7.

28. In further consideration of education undertaken in Australia as an indicator of English proficiency, I have had regard to research conducted by Bob Birrell in association with Monash University in relation to the English language requirements of international students and outcomes for Australia's skilled migration program. The article examines why significant numbers of international students, who are required to have an English level of IELTS 6 to undertake bachelor level studies in Australia, are struggling to obtain an IELTS score of 6 on completion of their degrees in Australia. The report states "English deficiencies are widespread ...Even in the case of students coming from countries where most would do their secondary education in English; there was a sizable minority who could not achieve the 'competent' English standard. Two examples are Singapore and India, where the proportion not achieving 6 was 17.8 and .17.3 [per cent] respectively" (Birrell 2006). Bushell selectively drew a negative conclusion despite the clear evidence that such a conclusion was wrong and misleading.

29. This article shows that a significant proportion of international students from countries where English is not the predominant business and community language, but where school education is conducted in English, who qualify for skilled migration in Australia after completing studies in Australia are unable to achieve an IELTS score of 6. I consider, therefore, that a significantly larger proportion would not achieve the score of IELTS 7 which is required to register as a migration agent. I consider this report demonstrates that studying in Australia does not necessarily improve English proficiency nor demonstrate a particular level of English proficiency. This supports my earlier findings that

30. I have also considered your other claims regarding your English language ability, including the number of years you have lived in Australia, the English study you did at school in Italy, the interaction with your grandfather who spoke English and your experience in the hospitality industry. However, for similar reasons to those outlined above, it is open to me to find that the results of the IELTS test are a more persuasive indicator of your English language proficiency.

31. I have considered your comments at paragraphs 13(h) to (i), with a view to considering whether or not the English language policy should apply in your case. However, I do not consider the policy to be discriminatory in that it is not based on a person's race, religion, ethnicity or nationality. The fact that a policy decision was made to apply this

English language policy to new applicants and not existing agents (for whom it is intended a strengthened English standard will subsequently be introduced) does not make it a 'selectively applied' policy given that new entrants have no prior history of provision of immigration assistance.

32. Additionally, I do not consider that the English language policy Is unreasonable or inconsistent with the legislative requirement that a person be 'fit and proper' to give immigration assistance. The provisions of Part 3 of the Act concerning the registration of migration agents must be construed to advance the subject matter of the Act according to the scope and purpose of the Act The objects of the Act are set out in section 4 with the first being to regulate the arrival and • presence in Australia of non-citizens "in the national interest".

33. The duties of migration agents include not just the completing of forms and the handling of funds on behalf of visa applicants but also interpretation of complex legislation and its application to the circumstances of a particular applicant. Migration agents are also required to provide clear advice and information, prepare detailed submissions and generally do justice to the matters provided for in the "Code of Conduct". The end result of an agent's actions should be the timely determination and review of visa applications provided for in the Act. Hence I consider that the proper construction of ss.290(1)(a) and ss290(2)(h)of the Act in relation to the question of whether a person is "fit and proper" to be registered as a migration agent should require a finding of a high standard of English language in order to competently perform their duties.

34. The standard required may be. higher than would exist for normal occupational or migration requirements because the Authority's consumer protection function seeks to ensure that the industry is able to service a clientele that may have little or no English language capability, and the capacity to convey instructions and information to DIAC is often critical to the outcome of the visa application.

35. The fact that the Authority's policy sets a high 'barrier to entry' does not, without• more, make it unlawful or even inappropriate. It simply evinces an intention to ensure a high industry standard.

36. On the above evidence it is open for me to find that your English language proficiency is of a level equivalent to a score of 5.5 in the IELTS test. As such, it is below the level considered acceptable under policy.

37. No evidence has been presented to date that satisfies me that despite not meeting policy requirements, your English proficiency is of an acceptable level to be registered as a migration agent. Accordingly, on the above evidence, it is open to me to find that you are not a fit and proper person to give immigration assistance.

Attachment Three

10 January 2010

Ms Christine Sykes,
Chief Executive Officer,
Office of the Migration Agents Registration Authority

Dear Ms Sykes,

As you may recall, I wrote to you on 18 November 2009 with the support of a group of senior Registered Migration Agents, to inform you that we were preparing a submission about the proposal to introduce IELTS testing for repeat registration for currently registered agents.

That submission is now complete and is attached for your consideration. Please note that because the content of the submission is politically and publicly sensitive, it is submitted for dissemination at your discretion only.

This submission raises a number of concerns with the above-mentioned proposal, ranging from lack of transparency, to a failure to observe natural justice, its political and public implications and a disregard for the recorded perspective of the migration advice profession, to name just a few.

We hope the submission will be of use to you and your board during your decision making process about this issue.

Please do not hesitate to contact me on telephone (removed) or via email rkc@austmigration.com.sg if you would like to discuss any aspect of the attached submission, or if you have any further questions.

Yours sincerely,

ROBERT K. CHELLIAH
MARN 9254011

PROFESSIONALISM OR DISCRIMINATION?

A RESPONSE TO THE PROPOSAL TO REQUIRE REGISTERED MIGRATION AGENTS TO OBTAIN AN OVERALL IELTS SCORE OF 7 IN ORDER TO OBTAIN RE-REGISTRATION

This submission was compiled by Registered Migration Agents Robert Chelliah, Sheelagh Blanckenbergh and Susan Wareham, with input from a number of other RMA's, and consulting journalist Mr Norman Aisbett.

As the primary author and publisher, Mr Chelliah accepts full responsibility for the information and views contained herein.

As is politically and publicly sensitive, it has been drafted for the eyes only of duly authorised regulators of the profession. Accordingly, after the submission enters their hands, any wider dissemination of the submission, whether intended or unintentional, is not the responsibility of Mr Chelliah or any of his fellow authors.

Table of Contents

The submission is substantially based upon the following official discussion papers, reports, surveys and other material that was sourced under the *Freedom of Information Act 1982* (FOI).

1. 2007-08 *Review of Statutory Self-Regulation of the Migration Advice Profession*, Discussion Paper; September 2007.

2. 2007-08 *Review of Statutory Self-Regulation of the Migration Advice Profession*, Final Report; May 2008.

3. Migration Institute of Australia (MIA) submission to 2007-08 Review; October 26, 2007.

4. Migration Agents Registration Authority - *Discussion Paper for Public Comment, English Language Competency Levels for Migration Advice Professionals*; March 2009.

5. Migration Agents Registration Authority - *Final Report, English Language Competency Levels for Migration Advice Professionals*; May 2009.

6. *Changing Together: Perceptions and proposals for reform from stakeholders in the migration advice community*; A report prepared by Think Insight and Advice (Pty Ltd) for the Migration Agents Regulation Authority; June 2009.

7. Official papers and emails obtained under FOI and including copies of the submissions of more than 100 registered migration agents to the MARA in early 2009 regarding English language competency levels for migration advice professionals.

1 Introduction

1.1 Since approximately early 2008 DIAC, the MARA and the MIA have considered introducing a requirement to compel Australia's Registered Migration Agents to have to pass an International English language Testing System (IELTS) test with an overall Band 7 result to obtain re-registration, with possible exemptions for graduates from universities in Australia and other native English-speaking countries.

1.2 This idea arose amidst a series of official inquiries into the future state of the profession, with particular reference to self-regulation and the possibility of the Migration Institute of Australia (MIA) losing its delegated function of the Migration Agents Regulation Authority (MARA). The proposal disregards the evidenced overall perspective of the migration advice profession that lifting the English language competency level for repeat registration will enhance the professional image of the practicing agents. No sound evidentiary data was advanced to support the idea; the only material supplied has been the citation of anecdotal remarks and inferences drawn from subjective observations.

1.3 From the minutes of MIA board meetings it was apparent that some Board members from the National Executive (NE) of the MIA were in favour of submitting currently registered agents to IELTS testing, while others opposed this move. The proposal has led to passionate and divisive discussions amongst the migration professionals who participate in the MIA's on-line *forum* and in other informal and formal gatherings. Some of the discussions on the topic have had a tone of racism and discrimination, bordering on breaching Australia's anti-discrimination legislation.

1.4 In the early part of 2009, the MIA/MARA began to shift from its previously stated official position of support for the IELTS test. By March, it was saying it had not decided on its position and shortly before the new Office of the MARA (OMARA) took over from the MARA in June, the MARA had progressed to the stage of disowning the idea of a compulsory English language test for all existing agents, instead advocating for a case-by-case approach. This altered perspective is recorded in an untitled document obtained under FOI which contains clear recommendations made by the MARA to the OMARA. In contrast, the MIA's formal policy on the issue of an IELTS test for repeat registration has not yet been made clear.

1.5 If adopted, the proposal would require RMA's who are seeking re-registration to pass an IELTS test in the academic module, with an overall band score of 7.0. Many registered agents, including those who are native English language speakers, have expressed their concerns about the proposal, as they feel they would not meet this benchmark. Some agents say the proposed English language test for re-registration is an affront to their skills and, as a matter of principle they would refuse to sit for the test, instead commencing offshore practice, with a subsequent significant loss in OMARA revenue and control of the profession, under current legislation and administrative policy.

2.0 Objections to the Proposal

2.1 Until approximately early 2008, there had been no public expressions of concern by the Department of Immigration and Citizenship (DIAC) or professional regulatory bodies concerning the English capability of RMA's. In fact, although the MIA performed the statutory functions of MARA for more than a decade, until June last year, and throughout this time was responsible for approving all initial entry into the profession, it expressed no concerns at about the standard of English of agents seeking re-registration. Accordingly, the authors of this submission wish to express their concerns about both the sudden introduction of this proposal, which relates to an issue that is so irrelevant to the profession that the MARA did not even identify it for over a decade; and the unjustified urgency that has been attached to the proposal's resolution.

2.2 We oppose the proposal on a number of strong and objective grounds. Our major grounds of opposition are that the introduction of mandatory IELTS testing for re-registration of migration agents:

i., Would be manifestly unfair to existing RMA's since they have already proven their ability to address English language requirements in passing their entry examinations. Requiring them to meet a new English language requirement in order to gain re-registration would effectively submit them to a new entry test; discredit the former registration process which involved significant government expenditure and resources, and show contempt for the achievement of the agents in obtaining their initial registration.

ii. Is not supported by any hard evidence to show that a lack of English language skills is endemic in the profession and/or is impeding registered agents in the performance of their tasks. It is our understanding that there has never been a formal complaint submitted to the MARA or the OMARA concerning the lack of English language skills of an RMA. The MARA's annual reports bear this observation out. In the hypothetical case that such a grievance had been, it could have been dealt with by existing regulatory powers, with no need to put a significant number of professional migration agents to the inconvenience and expense of undertaking IELTS testing.

iii. Violates the principle of natural justice and we are advised that it could well breach Australia's anti-discrimination and/or fair trading laws. The proponents of the IELTS test for existing agents have clearly failed to consider the public and political impact, the general issues of law surrounding it and the lack of ethical propriety of the proposed requirement.

iv. Affronts the multicultural nature of Australian society, since the proposed requirement would be first of its kind in Australia and is at odds with normal corporate governance standards for professional associations in Australia.

v. It targets members of the ethnic community, and this would be recognised immediately by ethnic organisations and both the mainstream and ethnic media. This would give it the potential to gain significant media attention as one of the few Rudd Government initiatives that directly opposes the Government's own policy focus on racial integration and harmony

vi. We accept and support the notion that all professions have the right to evolve and improve and may therefore wish to periodically raise the standards required for initial entry to them. However, we reject the notion of the application of revised entry standards to those who have already addressed entry requirements, particularly in the context of best practice public policy development.

vii. Would put many highly experienced and professional agents at a high risk of failure, resulting in their having to take their practice offshore This is not necessarily because older agents have a poor standard of English-language competency, but because in most cases it would be many years since they last experienced a pressure-cooker, exam-room situation. They might now also lack the hand-writing speed and legibility that is needed to cope with a time-measured exam, considering that like most professionals they would have long-since come to rely most heavily on the computer keyboard. Their exam stress would be compounded by them having much more to lose than prospective entrants to the profession. Also, their IELTS test results would be irrelevant to their professionalism and ability to liaise with DIAC and their clients. There is absolutely no evidence to support the imposition of IELTS testing upon experienced agents who have been practising for many years without being the subject of any complaint about their ability to deliver effective service to clients.

viii. Could lead to lawyers and corporate agents dominating the profession, making too expensive for people of moderate financial means to seek professional assistance to migrate to Australia. The system would favour wealthy applicants to the detriment of talented applicants of more modest means; yet another example of the implemented proposal being one of the few Rudd Government initiatives that contradicts the Government's own policies; in this case, in the areas of egalitarianism, equity and access.

ix. Is not a real measure of English language proficiency; a point raised in discussion by members of the previous MARA Board and a related article attached as ***Folios 1 – 7.***

3.0 The OMARA has the power to adopt a case-by-case approach

3.1 The Office of the MARA already has the power to receive and act on any specific complaint of deficiency in the English language skills of professional agents, but it appears that a formal mechanism to implement this power is yet to be established. Were such a process to be established, it would not be necessary to force IELTS testing upon re-registering agents, as in the rare case where an agent did not meet required standards of English language skill, the OMARA could liaise with them directly.

3.2 Expanding on the above, the OMARA's statutory power allows it to intervene on the receipt of a formal expression of concern from any departmental officer, Tribunal member or skills assessing authority about a registered agent's lack of effective communication skills in the English language. There is no evidence to show that this provision has ever been utilised by the respective authorities.

3.3 It is of significant concern that the proposal for the new requirement to impose mandatory IELTS testing to enable re-registration has evidenced a disturbing lack of transparency. We were refused access to many hundreds of pages of documents under our FOI application. We are disturbed by the quantum of those exemptions, especially since the issue involves a precedent-setting move, which contravenes government-endorsed multicultural and social equity policy. Other professions have practitioners with diverse cultural backgrounds who are also interacting, in the course of their duties, with government departments but they are not being threatened by a similar, extraordinary requirement that targets only professionals of non-English speaking backgrounds, who have already proven their proficiency across all areas of their industry. In the case of registered migration agents, this includes their ability to communicate in English and apply highly complex legislation to their clients' individual cases.

3.4 The proposal will have the unwanted effect of reducing the competitiveness and business viability of agents who are not native speakers of English language. This is a further issue that has already been identified as one of concern by multicultural community members, to whom the ability to converse with an agent in their mother tongue is paramount and far more important than their agent's ability to score a 7 in an IELTS test.

4.0 Analysis and Issues

4.0.1 The following pages examine the various moves towards requiring existing RMA's to pass an IELTS test, with a minimum overall score of 7.0 in the academic module in order be re-registered. In the interests of clarity, each facet of official enquiry is considered separately, although some overlap.

4.0.2 We record our views progressively throughout this submission, in *bold black italics.* In citing the various reports/papers/documents, we have occasionally added underlining to highlight words or sentences, in full or part, which we consider to have a particular importance. We have attached a number of relevant documents, which are marked as *Folios.*

4.0.3 (1) 2007-08 Review of Statutory Self-Regulation of the Migration Advice profession:

4.0.4 In September 2007, the Department of Immigration and Citizenship released a Discussion paper for the 2007-08 *Review of Statutory Self-Regulation of the Migration Advice Profession.* The Review was "to assist the government (to) assess the readiness of the migration advice profession to move from statutory self-regulation to self-regulation by examining (and) make recommendations on how Australia's migration advice profession might further develop and become more professional".

4.0.5 The External Reference Group (EFG) appointed to "guide" the Review was chaired by the Hon. John Hodges, a former Minister of Immigration and Ethnic Affairs, a founding member of the MIA, and a former registered migration agent. The other members of the EFG were: Mr Glenn Ferguson, a Queensland solicitor, RMA and then President of the Immigration Lawyers Association of Australasia; Ms Helen Friedmann, RMA and former DIAC officer; and Mr Len Holt, RMA, former Queensland State President of the MIA, and the immediate Past President of the MIA.

4.0.6 The Review's 57-page Discussion Paper – made public in September 2007 - covered the full gamut of regulatory matters but made no specific mention of English language proficiency regarding prospective or existing agents.

The Discussion Paper attracted 37 submissions from organisations and individuals. The organisations included the DIAC and the MIA. The Review's Final Report was presented to the Government in May 2008 and was released publicly in December 2008.

The MIA made its submission to the Review in October 2007 and acknowledged "concerns" about English language proficiency in the profession. While it recommended raising the entry standard to IELTS 7, at no point did it propose requiring RMA's to pass the same test to obtain re-registration.

The Review's Final Report lists its "Key findings" on Page 8, ***Folios 8-13***, where its eight, dot-pointed findings are listed. The fourth says "there needs to be significant changes made to the entry requirements in order to improve professional standards. Recommended changes include: the Graduate certificate be replaced by a Graduate Diploma; the English language requirements be increased and newly qualified migration agents be required to undertake a year of supervised practice'.

Our view: The specific recommendation for existing, registered migration agents having to pass an IELTS 7 test as a condition of re-registration is not among the "Key findings" of the Review, although it appears later.

In Chapter 5, the Review's Final Report considers the MARA's performance as an industry regulator. Under the sub-heading, "Entry Standards", it says on Page 32, ***Folio 12***,:
"Some submissions also commented on the English language requirement for registration (currently International English Language Testing System (IELTS) 6).
The submission from the department noted concerns that some migration agents demonstrate very poor levels of English, and the anonymous migration agent (who was also quoted early, re new entrants) claimed that: '*…many Registered Migration Agents would fail to achieve even Functional English language ability scores on an IELTS test.'"*

Then, after noting the MIA's proposal for a higher IELTS standard to enter the profession, the report continues: "Some of the submissions discuss whether changes to entry requirements should be applied retrospectively – for example, whether existing registered migration agents who entered the profession prior to the Graduate Certificate should be required to complete it in order to be eligible for continued registration. The same anonymous migration agent submitted:

'*…further, I believe that such a measure should be introduced retrospectively so that it applied to all current and intending registered migration agents. This will help weed out the older registered migration agents who have managed to avoid meeting any standards.'"*

Our view: Most registered migration agents found the matter so unimportant they didn't even submit a response to the discussion paper. Therefore, the weight given by the Review to the opinion of one anonymous respondent, allegedly an agent, casts a significant shadow over the integrity of the Review's findings. As one of approximately 3700 agents registered at the time – this person's opinion represents approximately one thirtieth of one per cent of all agents, yet their opinion is given more weight than that of the over 99% of agents who demonstrated the irrelevance of the issue and its lack of impact on their clients by failing to respond.

In addition, this anonymous "agent's" assertion that older agents have not met any standards is inaccurate. From the introduction of the registration system in 1992, every agent had to meet a relevant standard set at the time.

On Page 44, the Review's Final Report says that levels of English were also discussed in submissions, and then adds:

"However, some existing migration agents have an apparent lack of English language proficiency, which impacts significantly on the levels of service they appear able to provide their clients. Accordingly, it would appear that agents applying for repeat registration as well as existing migration agents should be required to prove their English language proficiency."

The report later recommends "That new and re-registering migration agents be required to prove that they have English language proficiency of at least IELTS 7."

Our view*: *The Review is very vague about the alleged problem of poor English language proficiency among existing agents. In fact, the Review fails to cite, or even identify,

concrete evidence that a problem exists. The breakdown of complaints recorded in successive MARA Annual Reports also fail to identify such a problem. The subjective opinions cited are insufficient to warrant the Rudd Government imposing IELTS testing for re-registration on all RMA's from a non-English speaking background. The report also fails to mention that the majority of older agents have had long years of practice without any concern being raised formally about their English language competence. We also note its failure to recognise that bilingualism plays a critical role in the provision of migration assistance in a multicultural society.

Migration Institute of Australia (MIA) Submission to the 2007-08 Review:

On 26 October 2007 the MIA made a submission to the "2007-08 Review of Statutory Self-Regulation of the Migrant Advice Profession".

The first paragraph of the Executive Summary, ***Folio 14***, states on Page (i): "Australia's registered migration agents play a critical role in providing immigration advice and are now used by more than 70 per cent of applicants in some visa classes. They are among the most professional in the world; they have a high level of knowledge of Australian migration law and procedures, and meet high professional and ethical standards."

On page (ii), the submission lists seven "key recommendations", the first which is broken into eight parts (folio). The issue of English language proficiency is not mentioned.

In Clause 59 & 60, (***Folio 16-17***) , in a section headed, "**Improving professionalism**", and sub-headed, **Entry Level Standards**", the The MIA submission to the Review, (Clause 60, ***Folio 17),*** states *:* "High levels of English language proficiency are also important in the profession to ensure that client needs for representation with (the) DIAC), Ministers, Courts and Tribunals are well conducted. Completion of a Graduate Certificate at an Australian University does require English proficiency but concern has been raised by some members of the profession and DIAC staff that this level of proficiency may not be sufficient.

To address this concern, that the MIA recommends that entry level requirement for all initial registration applicants to demonstrate proficiency in the English language be increased to a requirement for a score of 7 in the IELTS Academic Module."

Our view: The MIA's opening paragraph supports our claim that there is no need to impose IELTS testing on RMA's. This factual statement about the professionalism of RMA's and the fact that they already meet high professional and ethical standards should be sufficient evidence to discredit the whole proposal, as it was made by the full Board of the MARA, the body responsible for professional standards. We agree that migration agents need a good command of the English language but we reject the use of vague insinuations ~~or~~ and inferences to justify a move that could cause unwarranted and, based on the MARA's own advice, unnecessary upheaval in the profession, especially when the same regulators are simultaneously praising currently practising RMA's for having world-best practice.

The MIA submission's talk of "concern", of "some" members of the profession and DIAC staff, and of English-language proficiency that "may" not be sufficient, is unsatisfactory. From their professional dealings, migration agents are already aware that many DIAC, court and tribunal staff have a level of English-language skill that is far below the

standard suggested in the proposal. Accordingly, we question why only migration agents are being singled out for attention.

Please note that some of the points above will be repeated, in some form, later in this submission. That is because the various, recent inquiries into the status of the profession have all made similar mistakes, so for completeness each has been noted.

4.1 MARA Board Minutes

Extracts of the minutes of the Migration Agents Registration Authority Board meeting of 22 August 2008, ***Folios 1-5***, show there was discussion regarding the appropriate level of English language proficiency for existing RMA's. There was also discussion about the proposed use of the IELTS test as a measure. Ultimately, the Board decided:

1/ To accept a recommendation from the MARA Secretariat that an IELTS 7 standard, or a benchmarked MARA approved equivalent, be adopted as the minimum English language requirement for the profession. (Moved: Laura Chao; seconded: Stephen Sinclair).

2/ That individuals applying for initial registration be required to meet the English language requirement from 1 July 2009. (Moved: Ray Brown; seconded, Richard Glazbrook).

3/ The Secretariat was to consult with the profession about the date for the implementation of a once-off compulsory English language requirement to be met by existing RMA's at the time of applying for repeat registration (Moved: Stephen Sinclair; seconded: Brian Jones).

The Board met again on 23 October 2008. The minutes of that meeting state that: "Some directors were of the opinion that currently registered agents should not be required to undertake an English language test".

This Board passed the following motion: That IELTS academic band score of 7.0 with minimum scores of 6.5 in each module (of reading, listening, speaking and writing) is adopted for initial registrants and will be implemented no earlier than 1 Jan 2010 (subject to consultation with universities) and with exemptions to be determined (subject to consultation with relevant stakeholders) (Moved: Stephen Sinclair; seconded Christopher Levingston)

We note that this standard for initial registrants has now been implemented.

The minutes then say that: "Regarding the English language requirement for currently registered migration agents at the time of implementation, the Board had mixed opinions as to whether a grandfathering clause should apply".

The minutes continue: "The Board agreed that consultation and expert opinion be sought before a decision is made regarding whether the new level will be adopted for existing RMA's.

"The Chief Executive officer is to inform existing RMA's that the standard and implementation date set is currently only for initial applicants, and the Board is still to decide whether or not the existing English language standard is concerning enough to warrant a change.

"The Board recognised that there was some anecdotal evidence to suggest that English language standards needed improving and they welcomed any hard evidence that could be produced."

Our view: It is obvious from the minutes of the 22 August, 2009 meeting of the MIA/MARA Board that the Board has already made up its mind to introduce a compulsory English language test for RMA's wanting re-registration. This was decided arbitrarily, without consultation with the MIA membership or the profession. From the same minutes it is clear that several Board members were unconvinced about the appropriateness or value of the IELTS. At the 28 October, 2009 meeting, the Board is appropriately more circumspect and, in deciding it should seek expert opinion before recommending the IELTS test for existing RMA's, admits that it has no concrete evidence to warrant the move and only "some anecdotal evidence".

We therefore query the Board's apparent determination to implement the IELTS 7 requirement for re-registration.

On January 14, 2009 a senior officer of the former MARA, Vee Moser, invited an International Education Consultant (the consultant) to recommend "how and when" a new English language standard could apply so that it "ensured that existing agents had demonstrated that they had met the comparable standard required of new entrants".

Two months later, in March 2009, the MARA's "Discussion Paper for Public Comment – English Language Competency Levels for Migration Advice Professionals" – as prepared by the Consultant - proposed "that updated English language standards apply to both new entrants to the profession and to existing agents who are seeking re-registration".

Our view: We are interested in the process which led to the Consultant's retention by the MARA, as there is no information in the papers we accessed under FOI that clarifies this process. Transparency is crucial in the awarding of government contracts, and we are concerned that we were not allowed access to papers that would confirm this transparency in the case of the Consultant's appointment. It is also of significant interest to us that in commissioning the MARA Discussion Paper, Ms Moser directs the Consultant to recommend "when and how" a new English language requirement could apply both to new entrants to the profession and to existing RMA's, rather than assessing "if" or "whether" it should happen. Two months later, the Discussion Paper presents the new English language requirement as a proposal, but it is obvious that the alleged "proposal" was an identified outcome.

4.2 MARA Discussion Paper for Public Comment: English Language Competency Levels for Migration Advice Professionals, March 2009 (Published by the Migration Institute of Australia): (*Folios 18-24*)

The Executive Summary of the Discussion Paper of March 2009 begins by stating that: "the English language level of those working in professional service sectors in Australia is under increasing scrutiny. It is argued by some that the level of English of some migration advice professionals is not high enough for them to discharge their duty in a fully professional manner. The Migration Agents Registration Authority is seeking to address this concern by raising its benchmarks for measuring the English language level of Registered Migration Agents across the four skill areas of speaking, listening, reading and writing.

"Other professional organisations in Australia and New Zealand, such as those covering nurses, engineers and radiographers, have already reviewed their English language levels for professional registration and have adopted as their benchmark level 7.0 on the Academic module of the International English Language Testing System (IELTS).

Our view: The statement that "It is argued by some that the level of English of some migration advice professionals is not high enough (etcetera)", is, again, very vague. We are concerned that the then MARA could allow the case for such a significant change to the regulatory system to be led in such a manner, particularly since public moneys were spent on the report and would be spent on aspects of the implementation, were it to proceed. Also, the attempt to compare RMA's with the other professions is irrelevant, since the other professions have only raised their benchmarks for initial registration, whereas the Discussion Paper advises the MARA is proposing to raise its English-language benchmarks for migration agents as well as initial-registration applicants.

The Executive Summary continues: "MARA recognises that registered migration professionals can benefit from communication skills in languages other than English. However, migration agents have an essential need to communicate effectively in English with key stakeholders including with professional colleagues, business organisations, government authorities and community bodies.

"The current MARA-listed English language requirements were introduced in May 2001 and offer a number of equivalencies that are difficult to check for validity, transparency and security. MARA proposes that there be stricter and high-level English language benchmarks for Registered Migration Agents.

"MARA is mindful of the need to retain its world best practice reputation and to maintain, as a minimum, parity with the English language standards that apply to migration advice professionals in New Zealand and Canada. Once finalised, the arrangements anticipated under the Trans-Tasman Mutual Recognition Act 1997 will lead to automatic recognition of Australian registered agents by New Zealand and vice versa, as refelected in ***Folio 19***.

"Mara proposes that updated English language standards apply to both new entrants to the profession and existing registered Migration Agents who are seeking re-registration. This requirement applies in both Canada and New Zealand. When applied in Australia it will help harmonise migration services' quality assurance provisions across the three countries under the Asia-Pacific Economic Cooperation protocols …. It is possible that non-introduction by MARA of more stringent English language standards of registration could lead to a diminution of the reputation of the migration advice profession as a whole and of migration advice professionals." ***Folio 19***

Our view: We recognise the importance of RMA's being able to communicate effectively in English but motherhood statements do not warrant major reform; nor does the mere inference of a problem, or an unsubstantiated allusion to one. If the current English-language test equivalencies are difficult to check, that is the responsibility of those in authority who adopted them in 2001. RMA's who legitimately met the formal, entry benchmarks at the time of their achievement of registration, should not now have careers and client interests placed in jeopardy because of it. We do believe, however, that any agents who struggle significantly with the English-language should be directed to

undertake remedial action. The power for that to happen exists under the current, regulatory system. The statement about a possible diminution of the reputation of the profession as a whole, and of the RMA's themselves, is purely speculative and frankly, unsustainable, as MARA has already advised that Australian migration agents are amongst the most professional in the world.

The Executive Summary also says that: "(The) MARA is mindful of the need to retain its world best practice reputation and to maintain, as a minimum, parity with the English language standards that apply to migration advice professionals in New Zealand and Canada. Once finalised, the arrangements anticipated under the Trans-Tasman Mutual Recognition Act 1997 will lead to automatic recognition of Australian registration by New Zealand authorities and vice versa.
MARA proposes that updated English language standards apply to both entrants to the profession and existing Registered Migration Agents who are seeking registration. This requirement applies in both Canada and New Zealand.

"(The) MARA proposes that updated English language standards apply to both new entrants to the profession and existing registered Migration Agents who are seeking re-registration. This requirement applies in both Canada and New Zealand."

On the following page, in the Introduction, the Discussion paper continues in the same vein, saying:

"Both MIA and MARA are determined to ensure that Australia adopts international best practice benchmarks in measuring the English language level of Registered Migration Agents. This requires that Australia compare favourably with other key English speaking migration destination countries, specifically New Zealand, Canada and the United Kingdom."

Our view: If Australia's RMA's already have "world best practice", why would we want to change to meet the standards of New Zealand, which did not have a registration system for their "immigration advisers' until May 2009? And contrary to the rhetoric of the former MIA/MARA, the imposition of IELTS academic level 7 for Australia's RMA's will not bring them into parity with New Zealand's immigration advisers, in accordance with the Trans- Tasman Mutual Recognition Act 1997. The Discussion Paper itself acknowledges that New Zealand's registration system does not insist that all people wanting to become "advisers" should pass an IELTS test, Folios 28&29. The Consultant notes there are equivalencies but states they would not be satisfactory for Australia and there was also an "undesirable element of discretion".

On the following page (2), the introduction says; "This Discussion paper provides an opportunity for stakeholders in the migration advice sector to understand the context of the recent proposal by MARA to introduce stricter and higher level English language benchmarks for Registered Migration Agents."

Paraphrasing, it continues that RMA's need to be able to understand complex and changing legislation; prepare detailed submissions; and communicate effectively in English with clients, colleagues, government organisations and industry bodies, as well as with professional and business organisations and therefore need "appropriate and measurable" English skills in speaking, listening, reading and writing.

It adds: "Over the past five years there has been increasing concern about the English language level of some migration agents."

Our view: We have already agreed that migration agents, like all other professionals in Australia, need a reasonable level of English language competency to perform their tasks. However, it is important for this to not be confused with knowledge and understanding of migration law.

We do acknowledge that in recent years the number of migration agents of ethnic background has rapidly increased but if there are any concerns about their English skills, the remedy is not the blanket imposition of a mandatory IELTS test as a condition of re-registration. We prefer a mechanism that can identify any agents who are struggling in this regard, and refer them for appropriate remedial action, under the principle of natural justice, rather than automatic refusal of re- registrations.

The Discussion Paper notes that the MARA received 125 submissions from RMA's regarding the proposed introduction, by mid-2010, of level 7.0 IELTS or its equivalent by for existing agents wanting to re-register; 40 supported the idea and 58 disagreed. The Paper says: "Some thought that it was not necessary at all as agents were practising in the profession. Others thought it was discriminatory towards agents who were themselves migrants from multicultural backgrounds."

Our view: We agree with the majority view and would appreciate clarification as to why the MARA allowed this view to be over-ridden in the paper's recommendations. We also point out that 125 submissions represented only 3.4% of a profession that numbered approximately 3700 practitioners at the time the survey was undertaken. This suggests that the membership itself did not see a major problem within its ranks.

The Discussion Paper also states (Page 3) that, as of 8 July, 2008 there were 3784 Registered Migration, 70.4 of whom had met the MARA's existing English-language requirement, while another 10 per cent held a legal practising certificate, meaning that about 80 per cent were compliant. The remainder had never been required to demonstrate English-language ability.

Our view: The standards of the day were met by a majority of registered agents and this should be respected, as happens with qualifications for other professions. It is certainly not customary in administrative law or any other forms of Australia law to impose new benchmarks on people who have already earned the right to practice in a regulated work environment.

Finally, to a matter that causes us particular unease. It concerns the March 2009 Discussion paper and earlier "Stage 1 Report for MARA" on the same paper. Both documents were prepared by the Consultant**.**

*The first paragraph of the Executive Summary in the January 27, 2009 Stage 1 Report – a copy of which we obtained under FOI – states**:***

"The English language level of those working in professional services sectors in Australia is under increasing scrutiny. There is now evidence that the level of English in some migration advice professionals is not high enough for them to discharge their duty in a fully

professional manner. The Migration Agents Registration Authority (MARA) is seeking to address this concern by raising its benchmarks for measuring the English language communicative levels of registered migration agents across the four skill areas of speaking, listening, reading and writing.

*However, the Executive Summary in the March 2009 Discussion Paper – the version which was published for public release – shows the first paragraph has been changed to say: "*The English language of those working in professional service sectors in Australia is under increasing scrutiny. It is argued by some that the level of English of some migration advice professionals is not high enough for them to discharge their duty in a fully professional manner."

Similarly, the final paragraph of the Executive Summary in the January 27, 2009 Stage 1 Report, states: "MARA proposes that new agents and those existing agents seeking registration be required to show evidence that they have reached the new standards prior to January 1st 2010. In the transition phase MARA proposes that a system of provisional registration apply for those who achieve 7.0 overall on IELTS and a minimum of 6.0 in each subtest be given 12 months to achieve 6.5 in each subtest on IELTS or an equivalent international test."

In the Executive Summary in the March 2009 version of the Discussion Paper that final paragraph has been changed to say: "MARA has advised that initial registration applicants will be required to show evidence that they have reached the new standards from 1 January 2010. MARA has not decided on when an what standards would apply to existing agents"

Our view: The consultant retained by the MARA to draft its Discussion Paper, was obviously well briefed by MARA executive staff when setting out on his project, as $12,000 of public monies was invested in his commission.

Why, then did he claim in the first paragraph of the January 2009 version of the Executive Summary the existence of "evidence that the level of English of some migration advice professionals is not high enough …" and later have to replace it with the statement with "It is argued by some that the level of English of some migration advice professionals is not high enough…?"; similarly, with the obvious discrepancies in the two versions of the final paragraph.

All sorts of documents can require re-writing, but the Discussion Paper changes were due to mistakes that a specialist consultant, working closely with the MARA staff, would normally not have made.

Accordingly, we can only assume that the Consultant was briefed incorrectly by MARA executive staff at the commencement of his contract, with the aim of progressing a specific agenda. This is a serious breach on the part of the then MARA, as the adoption of the paper's recommendations will affect an entire profession and its clients.

A further change of some significance relates to paragraph seven of the Introduction in the January 2009 version of the Discussion Paper.

*The paragraph then states: "*In the recently released 2007-2008 Final Report on the Review of the Statutory Regulation of the Migration Advice Profession, DIAC clearly states that it

seeks new and re-registering migration agents to prove that they have an IELTS proficiency of at least IELTS 7."

In the March 2009 version of the Discussion Paper, the paragraph has been corrected to say: "In the recently released 2007-08 Final Report of the Review of Statutory Self-Regulation of the Migration Advice profession, the External Reference group recommended that new and reregistering (sic) migration agents be required to prove that they have an English language proficiency of at least IELTS 7.0"

Our view: It was the External Reference group and not the DIAC that recommended the test requiring RMA's to pass an IELTS 7 test as a condition of re-registration. Accordingly, particularly in light of the error highlighted above during the consultancy briefing process, we can not discount the possibility that an eagerness to satisfy the MARA's then wish for an IELTS 7 test for existing RMA's was not only a contributing factor to both incorrect briefings, but had a flow-on effect with regard to the framing of the final report.

4.4. Final Report: English Language Competency Levels for Migration Advice Professionals; May 2009. Published by the Migration Institute of Australia

The Final Report recommends that: "From January 1st 2010 existing RMA's who are applying for re-registration and who need to submit an English language score or equivalent will be required to present an IELTS overall band score of 7.0 on the Academic Module with a minimum 6.5 in the writing subtest." ***Folio 31***. They would have three years to achieve the required score.

The report says: "In addition to the domestic operating environment it is becoming critical that then profession builds on its international reputation. Once finalised the arrangements anticipated under the Trans-Tasman Mutual recognition Act 1997 will lead to automatic recognition of Australian agents by New Zealand and vice versa. It is vital that work continues on harmonisation of the academic qualification and English language requirements in both countries." ***Folios 32***

The Report also refers to the134 submissions received after the release for public comment of the 3 April 2009 Discussion paper on English Language Competency Levels for Migration Advice Professionals. Of these submissions, 129 came from RMA's and five from industry stakeholders.

On whether the current English standard needed to change for existing RMA's, the report says that 44 respondents answered "Yes" and 87 answered "No". When the question was put another way, and asked whether a new standard should be linked to re-registration, 34 respondents said "Yes" and 60 said "No".

The Consultant's final report also cites a "one-minute poll" conducted by the MIA in April 2009. The poll involved 229 respondents, more than 80 per cent of whom believed that all RMA's should have a high level of competency in the English language. 70 per cent believed that RMA's should not have to complete the IELTS test whilst registered.

The Final Report also draws on a February 2009 "Community Survey", ***Folios 32-34***, conducted by Think and Insight Pty Ltd and involving 52 one-on-one interviews with "key stakeholders" including educators, advocates, parliamentarians, media, courts, departmental and community representatives, the latter including lawyers, RMA's and administrators employed by community legal clinics and migrants resource centres.

Extracts of the survey results were emailed to the Consultant by Vee Moser, then Executive Officer of the MARA and Kathryn Purvis, Education and Professional Development Manager.
One extract says, in part: "While many current RMA's share a language with new arrivals, the vast majority of stakeholders believed that the need to speak and write English effectively outweighs the need to communicate in a foreign language … A higher standard of English is urgently required among all RMA's, new and existing, according to virtually all of the people participating in this study. Most suggested a higher standard is needed and that it also needs to be tested earlier on in the registration process."

Our view: The assertion arising from the Community Survey that "A higher standard of English is urgently required among <u>all</u> RMA's, new and existing", can not be justified. There would have been around 3700 RMA's in ~~an~~ Australia at the time, making it impossible for the interviewees to have intimate knowledge of the work standards of all of the RMA's. Therefore, the statement that a "higher standard of English is <u>urgently</u> required among <u>all</u> RMA's, new and existing," is a gross exaggeration and one which has no evidentiary basis – particularly as almost all currently practising RMA's have already passed a timed entry examination that involves the interpretation and application of migration law to test questions.

The same extract quotes an anonymous Departmental officer as saying of existing RMA's: *"Some of them would not pass an IELTS test of the minimum requirement of a skilled migrant. In fact, you often think it must be the client who is writing it because it's so poor. You can't understand what they are trying to say to you and these are the people who are* registered agents."

Our view: Yet again, a vague reference to "<u>some</u>" agents and no statistical measurement of the alleged problem.

The Community Survey report further argues that it is not sufficient for RMA's to simply share a language with new arrivals (clients); and that because of the stakes involved in migration, the need to speak and write English effectively outweighs the need to communicate in a foreign language. It says that the requirement to work with legislation meant that an agent's English skills needed to be equal to or better than those of a native speaker.

The two more anonymous comments are then cited from the survey:

(Educator): *"Well, language proficiency of some agents certainly yeah, it has been a worry with <u>some</u> and their argument is 'I only work for my community, so I communicate with my community in a common first language'.*

The problem is, the legislation, the policy and everything is written in English and you have to communicate with the department with the department. So there's a need for fluency in English."

(Educator): *"One of the things that concerns me is the poor level of English in some migration agents. Because they're going to have to prepare complex legal submissions, and somebody who's going to a migration review has to prepare complex statements, especially in the refuge law area, and then to argue reasons for refusal or inconsistencies, they need to be able to write well."*

Our view: We disagree that the need to speak and write English outweighs the need to communicate in a foreign language. While sound English language skills are necessary, it is equally important in a multicultural society to have agents who can speak the native languages of their ethnic clients, and understand their particular, cultural nuances.

The final report advised that 134 submissions were received in response to the Discussion paper and from these listed the arguments (by respondents) for and against increasing the English language requirements for both new registration and re-registration.

In the preamble to the recommendations, ***Folio 32***, Clause 6, the Final Report acknowledges that many stakeholders recognise the benefits from agents being skilled in languages other than English. Then it says that a majority of internal and external stakeholders believe professional migration agents in Australia and New Zealand need effective English language communications skills and that it is becoming critical for the profession to build on its international reputation.

It notes that the Trans-Tasman Mutual Recognition Act 1997 will give automatic recognition of Australian registered agents by New Zealand authorities and vice versa and emphasises the need to harmonise academic qualifications and English language requirements in both countries (folio).

Our view: the statement that* "a majority of internal and external stakeholders believe professional migration agents in Australia and New Zealand need effective English language communications skills and that it is becoming critical for the profession …" ***is yet another motherhood statement and does not imply concerns with the current English language standards with the profession. The statement does not say that the majority of internal and external stakeholders have evidence of ineffective English language skills among RMA's. And, yet, the above statement is clearly used to imply or infer there is a problem of some magnitude, when in fact the statement does not say that explicitly and there is no mention of any evidence to support the notion of a serious problem.***

The report then recommends (6.2) that the MARA considers requiring "an overall IELTS score of 7.0 on the Academic module with a minimum of 6.5 in the writing subtest as the measure for those who are required by MARA to submit an English language score".

After discussing other tests of English (Pearson and TOEFL), the report recommends Clause 6.4, ***Folio 35***, that "New applicants and RMA's who have completed a 3 year bachelor degree or higher at an Australian, New Zealand, UK or Canadian university and have completed Matriculation level including a pass in English Literature (not ESL) in a country

where English was the language of instruction, are not required to submit a current IELTS score or equivalent test."

Our view, re 6.4: The recommendation is discriminatory and is based on a false premise. We do not accept the argument that being a native speaker in the English language gives a person automatic competency in the language to the extent that they have the ability and skills to work in the field of migration law.

In fact, it is a classic example of ethnocentricism, particularly when there is no requirement in these countries to sit for en IELTS in order to enter university.

The Final Report also recommends (6.6): "That from January 1st 2010 existing RMA's who are applying for re-registration and who need to submit an English language score or equivalent will be required to present an IELTS overall band score of 7.0 on the Academic module with a minimum of 6.5 in the writing sub-test."

And, (6.7): "That existing agents who are applying for re-registration but fail to present the required IELTS score would have three years inn which to do so, while operating on a restricted practice certificate which would require them to function under the supervision of a registered migration agent.

Our view: Recommendations in 6.6 and 6.7 reflect a failure to distinguish between competency in the English language and knowledge of migration law. A migration agent who has successfully practised without any problem should not be required to sit for an IELTS test and even if such a person did sit for the IELTS and failed, that score would not necessarily reflect his/her skills as a migration agent.

Again, as mentioned previously, the different situations in New Zealand and Australia do not equate with the Consultant's assertion of "parity" and "harmonisation" in the two systems, to meet the intent of the Trans Tasman Mutual Recognition Act 1997.

4.5 *Changing Together*: Perceptions and proposals for reform from stakeholders in the migration advice community; Prepared by Think and Insight Pty Ltd for the MARA, June 2009.

Think and Insight Pty Ltd conducted a Community Survey (folio) in which it claims to have qualitatively and quantitatively gathered the "perceptions of 52 stakeholders who have a line of sight of RMA's, their clients and their work".

Those interviewed for the survey were from eight groups of key stakeholders: Educators, assessors, community (including lawyers and MRA's), advocates, Parliamentarians, Media and courts and that the exercise was "a proxy of sorts for measuring the quality of advice provided by Registered Migration Agents to their clients".

On page 6, the Changing Together report says that many respondents were quick to point out that most agents regularly perform to a high standard (but), unfortunately, "a troublesome minority make a disproportionately negative impact on the image of all migration agents".

Our comment: The statement that "most agents regularly perform to a high standard" supports the statement in the MIA's submission to the 2007-8 Hodges Review that Australia's RMA's are among the best in the world. As earlier argued by us, Australia's RMA's could not perform so well unless they had effective English language skills.

On page 36, ***Folio 39***, under *Detailed Findings* the report tells us that, while improving, the overall perceptions of migration agents are "mixed" at best and: "The challenge is to reform the system to allow good migration agents to continue to practice while weeding out unscrupulous operators"

And that: "Many participants (in the survey) began their comments with a caveat, 'there are plenty of good ones; but then went on to catalogue a litany of complaints from minor lapses in professional knowledge and competence, to questionable or indefensible business practices, to ethical breaches and conflicts of interest to outright fraudulent behaviour".

Our comment: The "litany" of complaints referred to above appears did not include any client grievances concerning the English language proficiency of RMA's.

Meanwhile, back on Page 13, ***Folio 40***, the Changing Together report says some stakeholders argued quite forcefully that any attempt to lift the standards for new entrants to the profession should be matched by an equally stringent re-qualification requirement for all existing RMA's (because) "it is only by drawing a line under its past that the migration profession will regain the trust of the community and move forward into the future".

Then there follows, on Page 20, ***Folio 41***, under the heading of "Key Initiatives (1.5), a recommendation to: "Require all current RMA's to satisfy bridging requirements to the new higher standard of professional competence within two years.
The report says the initiative itself would: "Require all current RMA's (including holders of legal practising certificates) to pass an assessable short course or exam; unsuccessful candidates after two attempts must take the Graduate Diploma and pass IELTS with score of 7.0+ or equivalent."

And on Page 51, ***Folio 42,*** the statement: "While many current agents became agents because they were immigrants themselves and they share a language with new arrivals, the job of the agent is to be the link between the migrant and the Australian government. Given the stakes involved in migration, the need to speak and write English effectively outweighs the need to communicate in a foreign language, according to several participants. The fact that agents are also working with legislation means their English skills have to be equal to or better than those of a native speaker. A higher standard of English is urgently required among all RMA's, new and existing, according to virtually all of the people participating in this study…"

Our comment: Like the previous studies, Think and Insight's 80-page document provides no evidence to quantify the alleged problem of poor English language proficiency among RMA's, making the reported need for "urgent" action anomalous. The only quantitative survey quoted by the report is on page 47 and relates to interviews with federal electorate officers. The report admits "the sample size is too small to analyse with any statistical accuracy". No statistical or quantitatively reliable assessment of the alleged English language problem within the profession has been carried out, even by the DIAC. By its own description, the* Changing Together *report gathered the "perceptions" of the stakeholders who were interviewed, and evidence that it cites is "essentially qualitative and anecdotal".

The *Changing Together* report further states in Page 34, ***Folio 43***, that: "All participants were guaranteed anonymity in order to encourage full and frank disclosure of views. Comments have been edited for brevity, clarity and to hide the identity of the respondents".

Our comment: Provided there is no invasion of client confidentiality, secrecy is unwarranted in debates of such professional, public and political importance. Indeed, it presents an opportunity for participants to make malicious or self-serving allegations without the risk of being called to account. In addition, the fact that comments were edited detracts from both their credibility and the integrity of the report.

On Page 68, para 5.3, ***Folio 44***, The Changing Together report says that "Some stakeholders believe that any new qualification standards need to be applied retrospectively, if the profession is to draw a line under its past and restore confidence in the competency of Registered Migration Agents.

"One stakeholder raised the precedent of the recent re-regulation of financial planners. In 2005, with more generous superannuation policies on the horizon, the government (through ASIC) felt that only by requiring all existing Certified Financial Planners to attend a short course and pass an exam, could they be certain that the industry was ready to advise Australians on these important investments.

"This stakeholder was not alone in wishing for some decisive action to deal with not just new entrants but also existing practitioners. According to them, competent advisors would have no difficulty meeting the new standards. Those who struggle would be given the option to retrain or to exit the industry."

Our comment: The above quotation highlights another example of undue weight being given to the views of an anonymous agent. Again, why choose this agent's views to highlight, when their opinion represented only one thirtieth of one percent of the agent population? In this and other reports commissioned to inform this issue, there is a lack of objectivity, with significant prominence given to those who advocate for the introduction of IELTS testing for re-registration, and downplaying or ignoring those who are against it, even in the case of profession-wide surveys.

4.6 Document containing recommendations of the MARA to the incoming Office of the MARA. *Folio 45*

Our FOI search brought to light a list of recommendations from the former MARA to the new Office of the MARA.

The first recommendation is unsurprising; it is that from 1 January 2010, everyone applying for their initial registration as a migration agent should have to pass an IELTS, academic module test, with an overall band score of 7.0.

But in Recommendation 2, the document departs from the MARA's previously held position that existing RMA's should also be IELTS tested in order to obtain re-registration.

Recommendation 2 states that: "The MARA retain the discretion to require an applicant (whether initial or repeat) to sit an IELTS test or other equivalent test at MARA's cost to confirm (that) an applicant meets the minimum English language standard".

Then, in recommendation 4, the MARA says recommendations 6.6 and 6.7 in the Final Report (referred to above) "were not endorsed" and further states: It is recommended that existing RMA's are not required to demonstrate their English language proficiency. However, MARA should retain the discretion to require an RMA applying for repeat registration to complete an IELTS test or other equivalent test in accordance with (Recommendation) 2 above".

While we endorse the actions of the former MARA in rescinding its earlier position in the event that the new recommendation is accepted by the OMARA, we would appreciate confirmation that guidelines and processes will be implemented to ensure the integrity of the process.

That discretion should be exercised only where a registered agent's English language proficiency is formally reported, by due process, in the rare event where it is to be so poor it affects the agent's ability to perform their duties professionally.

5.0 Conclusion

This paper has provided a range of arguments to support the recommendation that IELTS testing should not be imposed on registered migration agents seeking re-registration.

It is our view that all existing RMA's have properly won the right to practice and, provided they have not committed any form of malpractice, their registration status should be respected.

In the rare event that an agent is unable to maintain their practice to a professional standard because of their lack of English proficiency, the OMARA already has the regulatory power to deal with the situation, thereby making it unnecessary to impose universal IELTS testing on all re-registering agents with a non-English speaking background.

We are confident that the Office of the MARA will excercise its discretion with fairness, transparency, and substantial natural justice.

Thanking you

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