Australian Government
Department of Home Affairs

Australian
BORDER FORCE

Inquiry into the efficacy of current regulation of Australian migration agents

Joint Standing Committee on Migration

1. Introduction

1.1 Scope

1.1.1 The Department of Home Affairs (the Department) and the Australian Border Force (ABF) welcomes the opportunity to make a submission to the Joint Standing Committee on Migration inquiry into the efficacy of current regulation of Australian migration agents.

1.1.2 This submission addresses all five of the Committee's terms of reference for the inquiry plus the addendum on Electronic Travel Authority (subclass 601) visa. Given the diverse information involved with each of the terms of reference and the addendum, this submission addresses each term of reference separately. The information has been sourced from across the Department and the ABF. Information regarding the Electronic Travel Authority (ETA) is at **Attachment A**.

1.1.3 This submission discusses the regulation of migration agents by the Office of the Migration Agents Registration Authority (OMARA) which is within the Department. The regulatory functions of OMARA are legislated in Part 3 of the *Migration Act 1958* (the Migration Act). The submission also notes the distinction with **un**registered migration agents who provide advice to visa applicants, in breach of the Migration Act which prohibits the provision of immigration assistance by a migration agent who is not registered (section 280).

1.1.4 This submission also acknowledges that the threats posed by corrupt migration agents (both registered and unregistered) are assessed by Government crime intelligence agencies as high risk due to their potential enabling of organised crime groups and related unlawful activities. Such threats include facilitating the entry and stay of non-genuine visa applicants, potential illegal labour hire arrangements and other criminality.

1.1.5 Allegations against migration agents are often resource and time-intensive for law enforcement and regulatory agencies to investigate and prosecute. This is due to the (often-complicit) nature of the witnesses whose evidence may lead to their own visa implications including possible cancellation and/or removal

1.1.6 This submission seeks to inform the Committee on the current mechanisms and powers used by the Department, ABF and broader Home Affairs portfolio agencies to respond to migration advice sector integrity threats.

2. Examining the registration and regulation of migration agents in Australia including: education, English proficiency, payment, fee-scheduling as well as the suitability and stringency of the accreditation process and evidence of deficiencies

2.1 The OMARA and the registration and regulation of migration agents in Australia

2.1.1 The OMARA seeks to protect consumers of migration assistance and the integrity (proper use) of the Australian visa system through regulating registered migration agents (RMAs). It is unlawful to give immigration assistance in Australia unless registered with the OMARA.

2.1.2 The regulatory framework which OMARA implements includes legislated functions set out in S316 of the Migration Act as follows:

- Considering and deciding applications for registration as a migration agent
- Monitoring the conduct of RMAs
- Investigating complaints made in relation to the provision of immigration assistance by RMAs and where appropriate, taking disciplinary action against RMAs or former RMAs
- Referring investigated complaints about lawyers in relation to their provision of immigration legal assistance to the relevant professional regulatory bodies for possible disciplinary action.
- Informing the appropriate prosecuting authorities about apparent offences against Part 3 or Part 4 of the Migration Act.

2.1.3 The Department is committed to ensuring the integrity of the migration advice profession and taking action against people who undermine the standards expected of the sector.

2.2 History of Reviews of the OMARA and the migration advice sector

2.2.1 The migration advice sector has been the subject of five reviews over the past 20 years, the most recent of which commenced in 2014 and several of the recommendations accepted by Government are still in the implementation stages. A summary of the review history is set out below:

- In 1997 the then Migration Agents Registration Scheme (MARS) was reviewed resulting in the Migration Institute of Australia (MIA) being

appointed by the then Minister for Immigration as the Migration Agents Registration Authority (the MARA), a statutory, self-regulating body.

- In 1999 and 2002 two separate reviews of the statutory self-regulation of the migration assistance industry resulted in delaying the move to full self-regulation.
- In 2008 a further review (the Hodges Review) of the statutory self-regulation of the migration assistance industry was finalised and found that the profession should not move to self-regulation, that an independent statutory body with greater powers to protect consumers be established and that the regulatory framework be strengthened and clarified, including raising the entry requirements. As a result the OMARA, a discrete office attached to the then Department of Immigration and Citizenship was established in 2009.
- In 2014 the then Assistant Minister announced a further independent review of the OMARA which was conducted by Dr Christopher N Kendall. The Kendall Review noted the continued linkage between the:
    - Potential vulnerability of prospective immigration clients who may face language barriers and lack information about Australian laws and regulation
    - The complexity of Australia's visa framework and visa requirements
    - The need for a "sound and trusted (migration assistance) profession that is efficiently and effectively regulated".

2.2.2 As a result the OMARA was integrated into the Department in 2015.

2.2.3 A detailed summary of each review and its recommendations is at **Attachment B**.

2.3 Implementation and review timeframes for the Kendall Review recommendations

2.3.1 Details of the implementation and proposed review/evaluation timeframes for each of the key Kendall Review recommendations are set out below:

- **The integration of the OMARA within the Department**. The integration of the OMARA within the Department occurred in 2015 and has seen an increase in the numbers of RMAs which have been the subject of disciplinary action. In financial years 2015/16 and 2016/17 combined, there were 34 RMAs against whom formal disciplinary action was taken (including publication of decisions on the OMARA's website) compared to a total of 11 for financial years 2013/14 and 2014/15 combined. OMARA is currently undertaking data analysis to inform decisions about areas of monitoring to best address integrity issues. The OMARA has also collaborated with the Australian Criminal Intelligence Commission (ACIC) which is now part of the Home Affairs portfolio through their work on organised crime and its relationship to facilitators. It is expected there will be meaningful data on the outcomes delivered through the OMARA's integration with the Department towards the middle of 2019. An evaluation could be undertaken at that time.

- **The introduction of a Graduate Diploma in Migration Law and Practice to replace the Graduate Certificate.** A requirement to complete a Graduate Diploma was introduced on 1 January 2018. It is not expected that the OMARA will start to receive any volume of applications for registration from Graduate Diploma holders until early 2019. We also expect to see the impact on improving the professional standards of RMAs in late 2019 as newer agents join the profession and have an opportunity to practice. At this time, we will also be able to assess the impact of the higher tertiary qualifications on the numbers of new registration applications.

- **The introduction of an independent Capstone assessment.** The Department entered into an agreement with the College of Law at the end of 2017 to develop and deliver the Capstone assessment from July 2018. We expect the numbers sitting the Capstone assessment in mid-2018 to be low with higher numbers flowing through in 2019. Similar to the introduction of the Graduate Diploma, we expect to see the impact of the Capstone assessment's introduction on the professional standards of the migration advice sector in late 2019 after the new agents have had an opportunity to practice.

- **The introduction of a more open and competitive market-based framework for Continuing Professional Development (CPD)**. The new CPD arrangements commenced on 1 January 2018. As a part of developing a Compliance Strategy, plans are underway to review these arrangements progressively over the next two years by undertaking audits of the CPD providers' operations. There will be data available on complaints and monitoring outcomes to measure the impact of this measure from the beginning of 2020.

- **The removal of lawyers from the regulatory scheme.** The Migration Amendment (Regulation of Migration Agents) Bill 2017 was introduced into Parliament on 21 June 2017. On 27 March 2018, the Assistant Minister for Home Affairs, the Hon Alex Hawke MP, introduced Government amendments to the Bill providing transitional arrangements for lawyers with restricted practicing certificates, who are registered migration agents. This would allow OMARA registration to continue for an additional two years to allow a restricted practising certificate holder to obtain an unrestricted practising certificate. The Bill, as amended, passed the House of Representatives on 28 March 2018 and is currently awaiting Senate debate. Pending the Parliamentary passage the proposed implementation date for removal of Australian Legal Practitioners with unrestricted practising certificates from the OMARA regulatory scheme is 19 November 2018. We anticipate that data will be available to evaluate this measure at the end of 2021, as the transitional arrangements will allow lawyers with restricted practicing certificates to continue to register as RMAs for two years.

- **A Review of the Code of Conduct for RMAs (the Code)**. A review of the Code is underway. Consultation has taken place by inviting comment via the OMARA website and through a series of focus groups with RMAs across Australia. It is planned that implementation of a revised Code coincide with the removal of lawyers from migration agents regulation.

2.3.2 In summary, a number of the key recommendations made by the Kendall Review are currently being progressed over the next 12 months. An evaluation of the impact of these implemented changes will occur once they are finalised. We note that all aspects of the regulatory framework were covered by the Kendall Review.

2.4 Registration

2.4.1 The OMARA registers individuals, not businesses or incorporated entities. Agents are required to register annually.

2.4.2 Since 1 January 2018 individuals seeking registration either for the first time or more than 12 months after their previous registration has ended are required to meet the following requirements:

- Technical proficiency through education:
  - Either hold an Australian legal practising certificate or
  - Hold a graduate diploma in (Australian) migration law and practice and pass a national Capstone assessment (offered by the College of Law Ltd)
- English proficiency (IELTS 7 Academic or TOEFL result of 94)
- Payment of registration fee – $1760 AUD ($160 for not-for-profit)
- Must be assessed as a person of integrity and “fit and proper” – must undergo a National Police Check with the Australian Federal Police
- Be over the age of 18
- Hold professional indemnity insurance
- Have access to a suitable professional library
- Hold Australian citizenship or be a permanent resident of Australia or a New Zealand citizen holding a special category visa
- Not have had their registration application refused in the past 12 months
- Not have had their registration cancelled in the past 5 years.

2.4.3 On receipt, an initial application goes into a 30 day period called “Notice of Intention’ (section 288A of the Migration Act). During this time

- the applicant’s intention to apply for registration is published on the OMARA website under all the names the applicant has been known by
- anyone may provide the OMARA a written objection to the applicant’s registration and
- the OMARA cannot consider the application.

2.4.4 On expiry of the Notice of Intention period, the application may be assessed. Initial assessment of the application involves a review of the documents provided in support of the application relevant to the requirements set out above. Evidence provided by applicants include an Australian Federal Police (AFP) check, identity documents such as passports, birth certificates, evidence of schooling and tertiary qualifications, English language results. Identity documents and English language result documents are independently verified.

2.4.5 Internal checks are undertaken in a variety of departmental systems to establish whether the Department has any adverse information about the applicant.

2.4.6 In the event of an objection being received or adverse information being found, the applicant is afforded an opportunity to comment before a decision is made.

2.4.7 For annual renewal of registration, agents are required to:

- Pay $1595 registration fee ($105 for not-for-profit)
- Continue to be a person of integrity and "fit and proper"
- Hold professional indemnity insurance
- Have access to a suitable professional library and
- Complete CPD (must undertake 10 points worth of CPD with ethics or Code of Conduct for RMAs (the Code) as a mandatory subject.

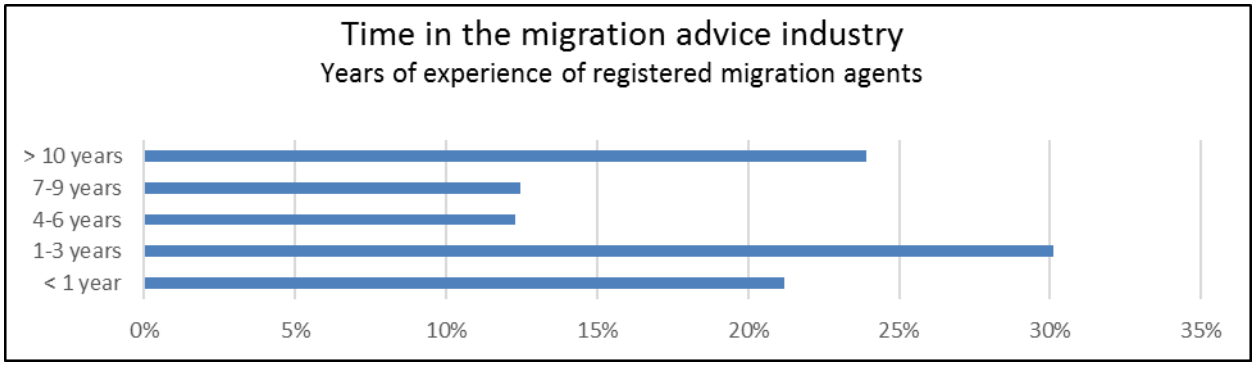
2.4.8 The requirement to be a person of integrity and fit and proper to provide immigration assistance is set out in s290 of the Migration Act. Under this provision, a person related by employment to an individual who is not a person of integrity is precluded from being registered due to that relationship. The considerations in coming to a finding that a person is not fit and proper or not a person of integrity are set out in this provision and include:

Section 290(2) of the Act

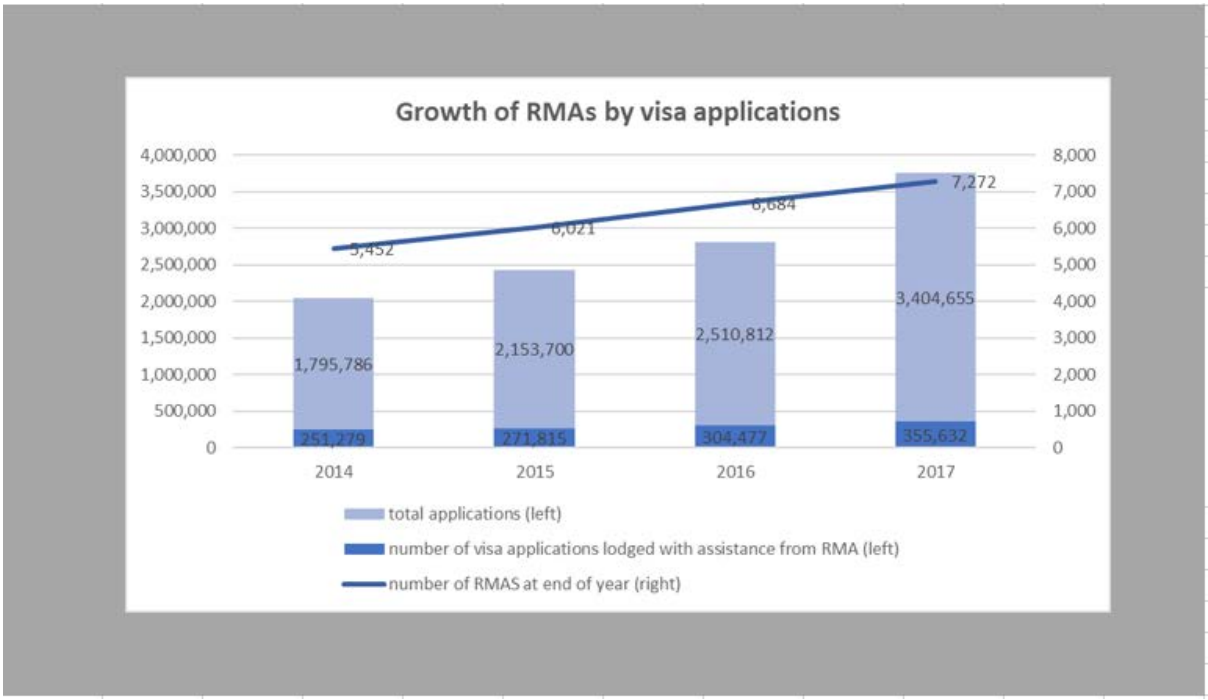
a) the extent of the applicant's knowledge of migration procedure; and
c) any conviction of the applicant of a criminal offence relevant to the question whether the applicant is not:
    i. a fit and proper person to give immigration assistance;
    ii. a person of integrity; and
d) any criminal proceedings that the applicant is the subject of and that the Authority considers relevant to the application; and
e) any inquiry or investigation that the applicant is or has been the subject of and that the Authority considers relevant to the application; and
f) any disciplinary action that is being taken, or has been taken, against the application that the Authority considers relevant to the application; and
g) any bankruptcy (present or past) of the applicant; and
h) any other matter relevant to the applicant's fitness to give immigration assistance

2.4.9 One of the Kendall Review recommendations was to raise the level of technical proficiency required for registration from completion of a Graduate Certificate in Australian Migration Law and Practice and passing an integrated common assessment items exam, to completion of a Graduate Diploma and passing a separate Capstone assessment. The Capstone assessment is an assessment delivered by the College of Law designed to assess candidates' ability to demonstrate the Occupational Competency Standards for Registered Migration Agents (the OCS). The higher level requirement came into effect on 1 January 2018 with transitional arrangements for those who completed a Graduate Certificate prior to this date.

2.4.10 At 31 December 2017, approximately 1,542 (21%) migration agents were continuously registered for less than one year and 2191 (30%) had been registered between one and three years. There were approximately 1738 (24%) agents registered for more than 10 years. This is shown in the graph below.



2.4.11 At 31 December 2017, there were 7,272 RMAs. The below graph shows that growth in the number of RMAs is tracking consistently with growth in RMA business (the volume of applications lodged with the assistance of RMAs).



2.5 Fee scheduling

2.5.1 The OMARA does not regulate the fees charged by RMAs. There are good reasons for this as fees can vary considerably based on:

- The visa application type
- The amount of time needed to prepare the application and the amount of supporting documentation required
- The level of service needed based on the complexity of the case
- The experience and qualifications of the agent

2.5.2 Prior to 1 July 2017, RMAs were required under regulation 3XA of the Migration Agents Regulations 1998 (the Regulations) to submit with their registration application, information identifying the average fees they charged as a registered agent during the preceding 12 months. This legislative requirement was introduced during the MIA's time operating as the MARA at the request of the then Minister responsible for the MARA. The legislative requirement was intended to provide consumer protection by assisting the understanding of whether fees charged by RMAs were reasonable and comparative.

2.5.3 There were a number of issues with the provision and collection of this data including:

- the regulatory burden on RMAs (small business) in compiling and providing this information

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

2.5.4 Regulation 3XA was repealed in April 2017 and the OMARA has not been collecting fee information since 1 July 2017 (when regulation 3XA ceased), significantly reducing the regulatory burden at re-registration. In order to support consumer protection, from 1 July 2018 when the current fee information becomes out of date, the OMARA will be replacing average fee information with advice to potential clients to ensure they are being charged fair prices by seeking three quotes for the services they require. Furthermore, in order to protect against "price creep", they should ensure that the full services they require are set out in their signed service agreement with their RMA. Information will be provided on the OMARA website and communicated more broadly at that time to raise consumer awareness.

2.5.5 Some clients decide to complain about their RMA after their visa has been refused. In many cases, the RMA has acted appropriately and in accordance with the Code of Conduct and charged the fees that were agreed in the contract with the client. In these instances, the OMARA advises the client they may seek a refund through the consumer tribunal in their State.

2.5.6 These tribunals have the power to order an agent to make a refund should they determine that there were unnecessary services provided. These orders can be enforced in local courts.

- NSW Civil and Administrative Tribunal
- Victorian Civil and Administrative Tribunal
- Queensland Civil and Administrative Tribunal
- Australian Capital Territory Civil and Administrative Tribunal

2.5.7 In the States without separate Tribunals, clients can approach the Magistrate's Court to seek an order for a refund.

2.5.8 There is no publicly available information about the success rates of immigration cases at the respective tribunals. Anecdotally, while some clients have advised the OMARA that they were successful at the tribunal, it relies on the agent, registered or not, to willingly make a refund. Otherwise the matter needs to be taken through the courts.

2.6 Monitoring non-compliance

2.6.1 The OMARA ceased being a discrete office attached to the Department in 2015 in line with the Government's deregulation agenda and as a result of one of the recommendations made in the Kendall Review. Improved access to departmental data and intelligence was part of the rationale for the recommendation.

2.6.2 Prior to the OMARA's consolidation within the Department, its monitoring activities were largely educative in nature, aimed at identifying systemic issues and providing feedback and guidance to improve overall compliance with the Code and to raise the standard of professionalism within the industry. Activities included:

- targeted self-audits (web-based surveys)
- self-audit checklists
- desktop audits of both registration documentation and agent websites
- a small number of targeted monitoring visits.

2.6.3 A risk management approach based upon the number of years of registration and number of complaints underpinned this plan.

2.6.4 Since the OMARA's consolidation with the Department, the monitoring of RMAs has moved away from the previous risk-based model to be campaign-based, capitalising on improved access to departmental information, including intelligence reports. In 2017 there was a shift in focus to known issues identified by the visa processing areas and Risk Assurance Officer (RAO) Network. The issues include suspected fraud in various visa caseloads, applications containing template statements of claims and involvement in non-genuine employment sponsorship or nominations.

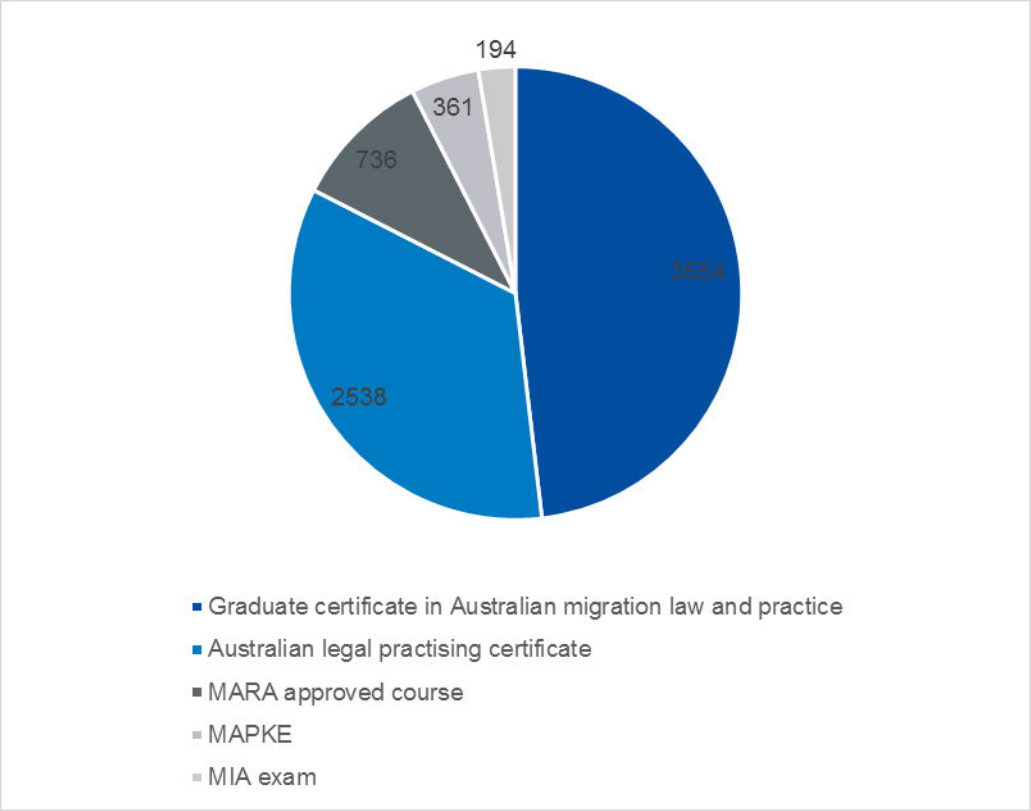
2.6.5 The OMARA is currently recalibrating its monitoring program. As part of this work, the Department is currently undertaking an extensive data mining and analysis exercise with respect to RMAs to inform a risk based approach to its future monitoring targets and activities. The main risk indicators underpinning this analysis are high immigration application refusal rates and/or high complaint rates. We are seeking to identify any agent attributes that correlate with these indicators, for targeting purposes.

2.6.6 The Department is also aware of academic research in this field and has made contact with the Melbourne School of Population and Global Health in the University of Melbourne. Their academics have undertaken extensive research into identifying risk factors within the legal and medical professions. Their research into both professions has revealed that a small number of professionals accounted for the bulk of the complaints. After the departmental data mining is complete we may consider whether there is value in pursuing an independent evaluation of the findings.

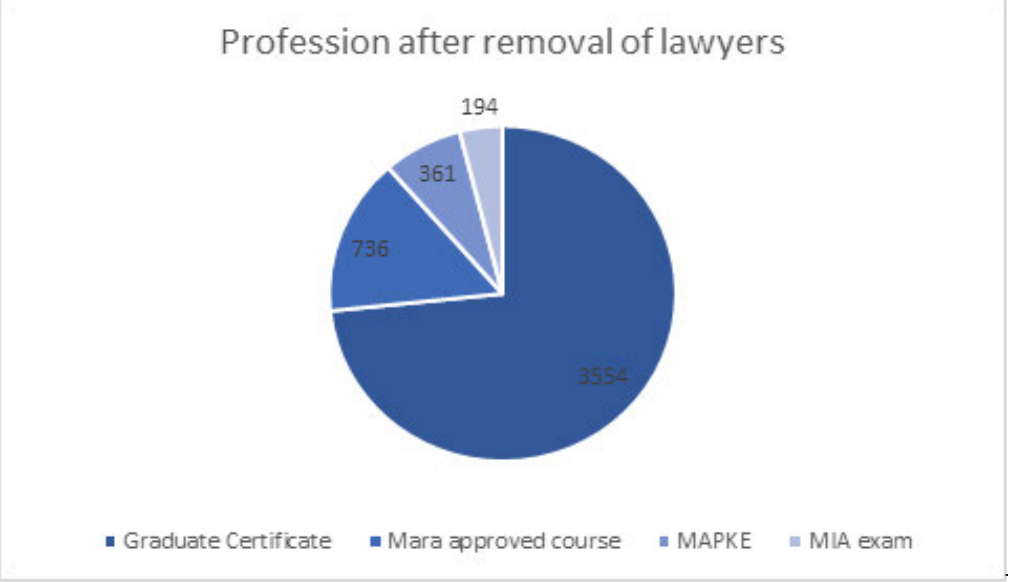
2.7 Evidence of Deficiencies

Assessment of competency and knowledge

2.7.1 Data indicates that the majority of non-lawyer agents completed a Graduate Certificate in Migration Law and Practice (3,554) with another 1,291 completing either a Migration Agents Registration Authority approved course, the Migration Advice Professional Knowledge Entrance Examination (MAPKE) or the MIA exam many years ago. This is illustrated in the following graph.



2.7.2 Once Australian lawyers with unrestricted certificates are removed from the OMARA's regulation, this number is anticipated to be around 4,800 as shown in the below graph. The result of the introduction of the new higher level entry arrangements is that there will continue to be a hybrid of entry qualifications in the migration advice sector.



Expanding regulation to businesses

2.7.3 The regulatory framework is currently structured to hold individual RMAs to account and consequently disciplinary decisions published on the OMARA's website only relate to and name the relevant RMA and not the business or directors of the business who employed them.

2.7.4 The Kendall Review recommended "in order to ensure that the clients of all businesses are protected, the relevant legislation, practices and policies that govern migration agents should apply to all business structures". This recommendation was not progressed. Businesses are regulated by the Australian Securities and Investments Commission (ASIC), so not only would considerable legislative change be required to expand the migration agent regulatory framework to allow for the registration and sanctioning of business entities, it would also introduce dual regulation.

2.7.5 It is currently possible for the OMARA to identify 'businesses of concern' where a previously sanctioned agent may have been the owner or director. Disruption letters can be sent to any agents who later notify that they are working for such a business. If they choose not to leave, action can be taken under s303 of the Migration Act to discipline any agent who is related by employment to a person who is not a person of integrity.

2.7.6 In cases where RMAs are known to be involved in serious misconduct and potentially fraud, several businesses are often involved. A key risk indicator in these cases is likely to be where the RMA owns several businesses, such as a training business, a restaurant, an employment agency or a real estate agency. The more businesses they are involved in, the greater the potential for fraud in the visa applications. There is currently no requirement to declare to the OMARA any business other than a migration business connection.

2.7.7 The issue of RMAs being able to provide other services is a consideration presently being undertaken in the OMARA's work to strengthen the Code of Conduct.

3. The nature and prevalence of fraud, professional misconduct and other breaches by registered migration agents, the current review mechanisms for migration agents and the adequacy of penalties

3.1 Investigating and assessing complaints of professional misconduct

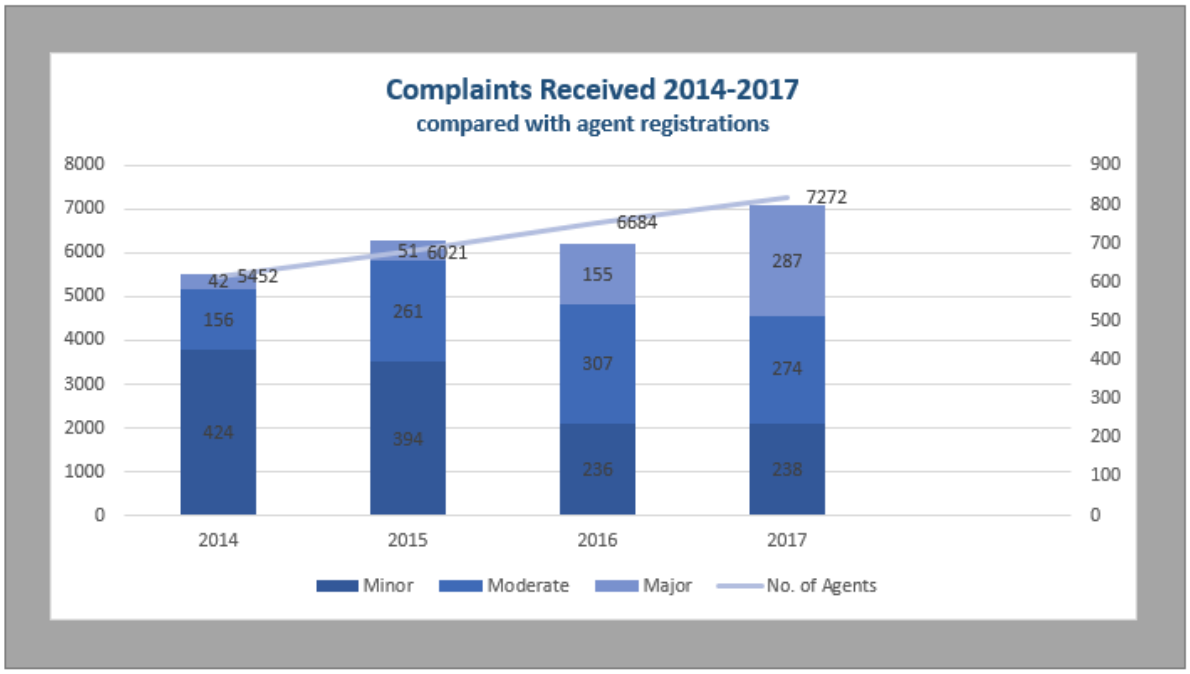
3.1.1 Consumer complaints about the conduct of RMAs are lodged online through the OMARA's website. There is information on the OMARA website: https://www.mara.gov.au/ to guide clients who wish to lodge a complaint.

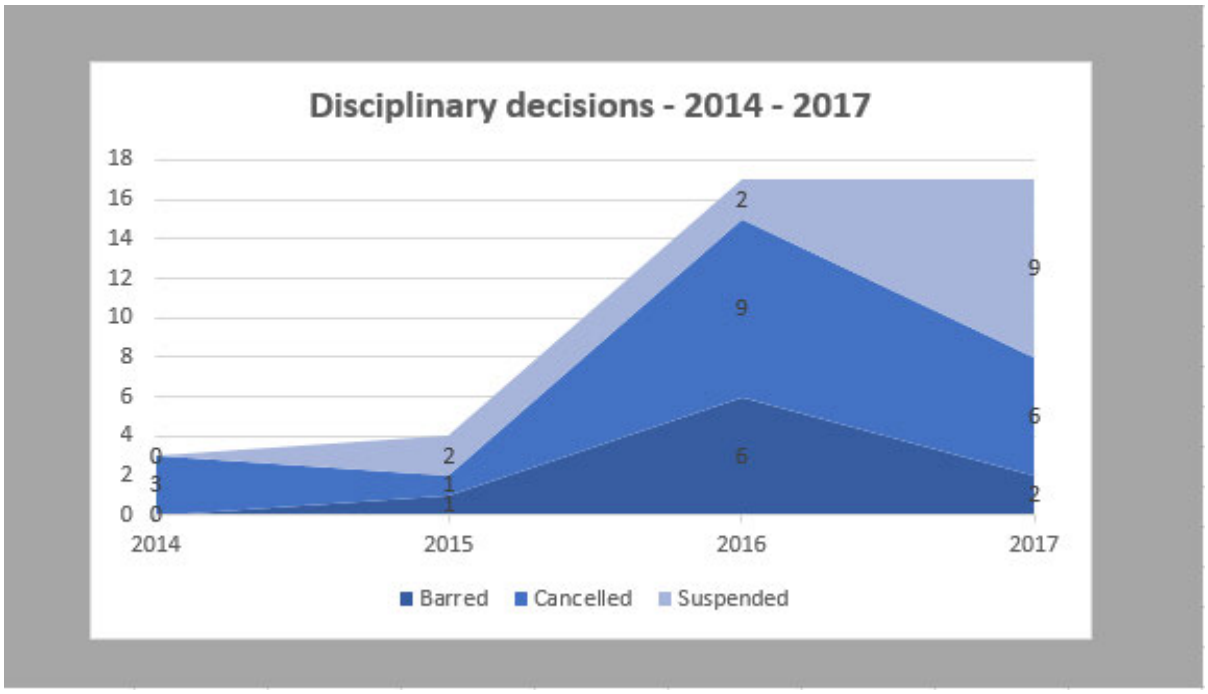
3.1.2 Allegations of RMA misconduct from departmental officers are referred to the OMARA via the Departments Border Watch Allegations and Referral Team (BWART). Additionally, consumer complaints and community allegations about registered or unregistered practice can be lodged through the Home Affairs website. BWART then record and refer the allegations to appropriate areas of the Department for investigation. If an RMA is involved, it will be referred to the OMARA for administrative investigation.

3.1.3 Disciplinary decisions are made pursuant to s303 of the Migration Act. The decisions that a delegated officer can take are to cancel or suspend a RMAs registration or to issue a caution. Disciplinary decisions based on misconduct can be made where the delegated officer is satisfied that the RMA is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance or the RMA has not complied with the Code.

3.1.4 Current review mechanisms for migration agents provide for a review of any OMARA sanction decisions by the Administrative Appeals Tribunal (AAT). The OMARA has a strong success rate with only one decision being overturned by the AAT in recent years.

3.1.5 Whilst the growth in the number of complaints received in the years 2014 to 2017 has tracked in line with the growth in the number of RMAs there has been an increase in the proportion of major complaints in the last two years as shown in the below graph.





3.1.6 In line with the increase in major complaints there has been a significant increase in the number of disciplinary decisions made against RMAs as shown in the above graph.

3.1.7 A recommendation made in the Kendall Review relating to strengthening the framework under which disciplinary action can be taken, was to undertake consultation on the Code of Conduct and then amend it as deemed feasible and appropriate. This body of work is currently being progressed. Timing of its completion is subject to the passage of the Bill seeking the removal of lawyers from

the migration agents regulatory framework. The Code will be strengthened and will include obligations to the Department as well as to the client.

3.1.8 It should be noted that 75% of registered migration agents have never had a complaint lodged against them throughout their career. RMAs note the unfair playing field whereby student agents/offshore agents and others who misuse channels for vulnerable communities seem to do so without impunity whilst they are required to meet stringent requirements on an annual basis, and pay the associated costs.

3.2 Adequacy of penalties

3.2.1 Recent media reporting has included commentary on insufficient penalties for registered migration agents who have taken clients' money for applications that have not had merit and who clog up Australia's legal system seeking review of unmeritorious cases. The comment has been made that the outcome for such agents has been the cancellation or suspension of the agents' registration but no further action. The OMARA's powers are administrative only. Where potential fraud or other Migration Act offences are identified, these are referred to the Australian Border Force and any action taken is subject to their priorities.

4. Deficiencies and barriers to relevant authorities' investigation of fraudulent behaviour by registered migration agents in visa applications, including the adequacy of information and evidence sharing between such authorities

4.1.1 The Department and ABF seek to deliver—to the highest standard—our mission of protecting Australia's border and managing the movement of people and goods across it. However, as the complexity and sophistication of organised crime and fraud emerge, it is essential for the Department and ABF to change to respond appropriately.

4.1.2 The Department and ABF work well with other law enforcement agencies to target, disrupt and prosecute criminal activities. However, there is evidence that:

- lack of appropriate information sharing and evidence sharing powers and
- lack of appropriate search and seize warrant executing powers, in portfolio legislation, especially the Migration Act and the Australian Border Force Act 2015 (ABF Act),

are a significant impediment to Commonwealth investigation of fraudulent behaviour by migration agents (both registered and unregistered).

4.1.3 In addition to the difficulties with sharing information and evidence, Migration Act offences are difficult to prosecute due to the onus on a burden of proof, which requires significant resources to detect and investigate.

4.2 Current ABF Approach to unregistered immigration assistance

4.2.1 The ABF are able to use limited administrative actions to address identified unregistered immigration assistance. This includes issuing educational letters to entities suspected of providing unregistered immigration assistance and warning letters to entities where there is evidence they have provided unregistered immigration assistance.

4.2.2 In limited instances, ABF Officers may also elect to:

- issue infringement notices,
- cease communications with the person
- and/or pursue civil penalty or criminal prosecution action.

- The Migration Act provides criminal offences relating to unregistered migration advice which attract penalties of up to 10 years imprisonment including:
  - s280 – giving immigration assistance if not registered
  - s281 – charging fees for immigration assistance if not registered
  - s282- charging fees for making immigration representations if not registered
  - s283 – a person representing themselves as a registered agent if not registered
  - s284 – advertising the provision of immigration assistance if not registered.

4.2.3 Where evidence of unregistered migration agent activity is difficult to obtain, and the offending is low-level, the preferred option is disruption through administrative action via the issuing of a warning or infringement notice under s280 of the Migration Act, and the cancellation of the fraudulent visa. This is a timely, efficient and effective response to minor non-compliance.

4.2.4 Intimidation and threats from migration agents combined with a precarious visa status, deter some witnesses from testifying, further preventing efforts by the Department and ABF to successfully impose sanctions and/or criminally prosecute these agents. This is also because without the support of the critical witnesses it is difficult to meet the threshold for establishing offences under the Migration Act (including offences relating to unregistered assistance).

4.3 Current preferred ABF Approach to migration agents involved in criminal or inappropriate activity

4.3.1 The ABF may accept a referral for formal investigation if:

- there is sufficient evidence of fraudulent activity;
- if the allegation is related to an ongoing investigation; or
- where the allegations relate to large-scale organised crime.

4.3.2 When such investigations occur, criminal prosecution under the relevant State or Territory Crimes Act, the Commonwealth Criminal Code Act 1995 and the Australian Consumer Law are preferred. This requires assistance and reliance upon other Commonwealth and State/Territory law enforcement agencies to assist with evidence gathering (warrants) and legislative criminal prosecution powers. The Department and ABF do not have adequate legislative powers to investigate appropriately suspected instances of unregistered immigration assistance. Legislative change would be required to provide the necessary powers to investigate and prosecute this activity.

4.4 Difficulties with current search warrants available to Department and ABF regarding Migration Agents involved in criminal or inappropriate activity

4.4.1 The restricted search warrant provisions exist under Part 8E of the Migration Act. The Migration Act provides that if the Secretary or ABF Commissioner has reason to believe that a person has information or a document that is relevant to:
(a) a possible sponsorship-related offence; or
(b) a possible contravention of a sponsorship-related provision; or
(c) a possible work-related offence; or
(d) a possible contravention of a work-related provision;

the Secretary or ABF Commissioner may, by written notice given to the person, require the person to give the information, or to produce the document, to an authorised officer (s487B(1)).

4.4.2 Section 487D provides that, if an authorised officer reasonably suspects that there may be evidential material on any premises, the authorised officer may enter the premises and exercise the search powers. However the authorised officer is not authorised to enter the premises unless the occupier has consented and the authorised officer has shown his or her identity card if required by the occupier or the entry is made under a search warrant.

4.4.3 The issuing of search warrants is found at s487ZC of the Migration Act. Evidence seized under a s487ZC warrant may only be used in the prosecution of sponsorship-related offences or sponsorship-related provisions or work-related offences or work-related provisions. These offences and provisions are defined in s487A of the Migration Act. The reason for the limited nature of s487ZC warrants is that they were enacted in 2013 to support the former Department of Immigration's efforts to investigate work related offences and were not envisaged to be wide evidence sourcing search warrant.

4.5 Other Migration Act section 487 Search Warrant restrictions

4.5.1 The restricted search warrant provisions under Part 8E of the Migration Act provide that authorised powers are limited under the execution of this warrant. For example, force can only be used against 'things', not 'persons'. ABF officers need to rely on State or Australian Federal Police to attend and consider action pursuant to a 'hinder commonwealth official' offence for occupants who fail to comply with instructions from authorised officers (i.e. the ABF officer). The practical effect of this limitation regarding *force* is that while ABF officers have the authority to enter and seize evidence - there are limited options preventing persons blocking ABF officers or destroying evidence or simply leaving the premises during warrant execution.

4.5.2 Section 487 search warrant provisions do not include the search of a person. This is significant for both evidentiary and safety considerations of our officers when executing warrants of this nature.

4.5.3 Retention periods exist for evidence seized under section 487. The provisions allow a retention period of 60 days. This 60 day period is too short in an operational setting and potentially requires applications for significant extensions in criminal investigations undertaken under related provisions of the Migration Act.

4.6 Reliance on Section 3E Crimes Act Search Warrants

4.6.1 Given the limited nature of search warrants under the Migration Act, in order to seize evidence for other serious offences, which the ABF seeks to disrupt or investigate, a section 3E Crimes Act search warrant is required. Australian Federal Police (AFP) are only authorised to execute section 3E Crimes Act search warrant. ABF investigators cannot execute section 3E Crimes Act search warrants.

4.6.2 In cases where the AFP are unavailable to assist the ABF and execute section 3E Crimes Act search warrants due to resource constraints, the ABF can only execute s487ZC warrants. The effect of such reliance on AFP assistance to provide appropriate warrant powers, situations have arisen where investigations have been compromised. For example, a case has occurred where, despite the ABF having reasonable grounds to believe the main person of interest had committed indictable offences under the Migration Act, ABF officers had no power of arrest under that legislation and were unable to prevent his departure from the country.

Limitations on Section 3E Crimes Act Search Warrants in relation to Migration Integrity Investigations

4.6.3 A section 3E Crimes Act search warrant can only be used for integrity-related activities of the Department or the ABF. Rather section 3E Crimes Act search warrants material *may only be used* for investigations relating to visa (and citizenship) decisions. This appears to be an apparent oversight of legislative amendments made to s488AA of Migration Act in 2015.

- An example of this limitation is that s488AA of the Migration Act does not permit the disclosure of warrant material sourced under a section 3E Crimes Act search warrant to the OMARA. This is because the OMARA does not make decisions relating to visas – as prescribed in s488AA of the Migration Act. The practical effect of this is that the warrant information cannot be considered by the OMARA when determining a migration agent's application or considering the possible imposition of sanctions or cancellation of a migration agent's registration.
- Another example of this limitation is that s488AA of the Migration Act does not permit the disclosure of warrant material sourced under a section 3E Crimes Act to be used when considering an application for business sponsorship or visa nomination applications lodged by a business. This is because such decisions do not relate to visas – as prescribed in s488AA of the Migration Act. The practical effect is when considering whether to bar a company from lodging future sponsorships or cancelling a company's ability to sponsor foreign workers, the warrant information cannot be considered by the ABF.

4.7 Other Department and ABF investigative restrictions

4.7.1 In October 2015, the Telecommunications (Interceptions and Access) Act 1979 (TIA Act) introduced section 110A, which listed the former Department of Immigration and Border Protection (DIBP) as a criminal law enforcement agency with limitations. Those limitations were by reference to an investigation of a contravention of a law in the Customs Act, Crimes Act, Criminal Code, the Environmental Protection and Biodiversity Conversation Act 1999 and Part 6 of the ABF Act. However, the Migration Act 1958 and Australian Citizenship Act 2007 do not appear in the provision, limiting the ability to access historical telecommunications, which was possible prior to the changes. The inability to receive valuable telecommunication evidence presents a significant hindrance to the ABF's ability to collect evidence ordinarily available to other Commonwealth investigators and law enforcement officers.

4.7.2 The absence of any access to call charge records, data stored on phones, subscriber details or the inability to triangulate and 'ping' phones presents obvious difficulties to investigators and enhances risk during warrant and surveillance phases.

4.7.3 Potential legislative changes to the ABF Act 2015 and Migration Act (including but not limited to Part 8E, s2488AA and s280 to s284) will enhance the ABF's ability to disrupt and dismantle criminal networks looking to exploit Australia's migration system and assist with a Whole of Government approach to compliance.

5 Evidence of the volumes and patterns of unregistered migration agents and education agents providing unlawful immigration services in Australia.

5.1 Border Watch is the Department's and ABF's single collection point for community and industry information related to customs, border protection, visa or immigration offences. The program receives more than 52,000 reports each year that help to protect our border and keep our community safe. The ABF is responsible for the management and investigation of most, but not all, allegations received through Border Watch. Within the ABF, the Border Watch Team are responsible for managing community and industry allegations made in relation to unregistered immigration assistance across all departmental visa programmes. The exception for ABF investigation responsibility is if the complaint received relates to a registered migration agent and comes within Part 3 of the Migration Act, then the Border Watch Team refers the complaint internally to the OMARA.

5.2 While the prevalence of unregistered migration agents providing unlawful immigration services in Australia is recognised, it is notoriously difficult to provide accurate evidence and quantifiable figures regarding the extent and effect. As noted earlier in the submission, this is due to the (often-complicit) nature of the witnesses.

5.3 The effect of:

- reporting the required information to Border Watch and
- providing evidence and verified statements to the Department or ABF

will often lead to the witness themselves receiving cancellation of their visa (for example due to their visa grant being granted based bogus documents or fraudulent information), potential immigration detention and/or removal from Australia as an unlawful non-citizen.

5.4 The difficulty of accurately identifying the patterns of unregistered migration agents are evidenced by the tables below, which demonstrate the low percentage of allegations that Border Watch receives on the issue.

Period	*All Allegations	Allegations Migration Agents	% of All Allegations
FY 2016/2017	52,455	351	0.66%
01/07/2017 to 31/03/2018	32,813	158	0.48%

Period	*All Allegations	Allegations Unregistered Migration Agents	% of All Allegations
FY 2016/2017	52,455	442	0.84%
01/07/2017 to 31/03/2018	32,813	242	0.73%

Education Agents

5.5 The Department and ABF has no portfolio responsibility for education agents. Education agents are not regulated under the Migration Act or any Home Affairs portfolio legislation. The Department of Education and Training is responsible for administering the Education Services for Overseas Students Act 2000 (ESOS Act) and legislative framework which places requirements on international education providers in relation to their education agents.

5.6 It is against the law for education agents who are based in Australia to provide migration advice to students if they are not registered migration agents under the Migration Act. There is anecdotal evidence from registered migration agents to the Department through the OMARA, that some education agents are providing immigration assistance unlawfully, and registered migration agents find it difficult to compete in this market.

6 Reviewing the appropriateness of migration agents providing other services to clients

6.1 The Department acknowledges the competitive commercial environment within which registered migration agents operate. The tight economic market and desire for larger income streams often leads registered migration agents to undertake other paid work in addition to providing immigration advice to supplement their income. This is also considered against the exponential growth in the migration agent industry over the past decade. Other paid work that registered agents may engage in include travel agents and potentially, education agents.

6.2 The Department and ABF acknowledge that there are corrupt migration agents (both registered and unregistered), however they make up the minority. Such corrupt migration agents potentially operate in company structures that may maintain a broader culture of corruption and misconduct. This may include operating as unscrupulous labour hire intermediaries and even facilitating visa fraud and foreign work exploitation.

Attachment A

Addendum:
Integrity issues associated with the Electronic Travel Authority (subclass 601) visa

General Information

Role of the Electronic Travel Authority

The Electronic Travel Authority (ETA) provides a simple, easy to complete visa product for traditionally low immigration risk cohorts (based on nationality). The ETA is limited to 34 countries/jurisdictions (refer to Attachment A), many of which are our largest source countries for visitors.

Approximately 2.7 million ETAs were issued during the 2016-17 year, accounting for just under 50 per cent of all visitor visas.

The ETA supports Australia's universal visa system, whereby all non-citizens travelling to Australia must have a valid visa.

The ETA is a key element in bilateral arrangements as Australia's visa free/visa waiver facilitation option. A number of countries accept the ETA as affording their nationals the equivalent of 'visa-free' entry to Australia. In this way the ETA has led to reciprocal visa-free arrangements for Australians.

Under the Migration Act, the Australian Government manages the entry and stay of foreign nationals in Australia and reserves the right to cancel all visas upon a range of grounds. This includes ETAs.

ETA Platform

The ETA platform (ETAS) is managed by an external service provider, Société Internationale de Télécommunications Aéronautiques (SITA) Group, which also provides the Department with the critical Advance Passenger Processing (APP) service and other related border systems services.

ETA applicants can apply for an ETA through a network of over 300,000 travel agents, at check-in at more than 85 airlines and at departmental overseas posts. Nationals from eight of the 34 ETA eligible countries/jurisdictions can also apply individually online using WebETAS. Approximately 71 per cent of all ETA applications are submitted by travel agents or airlines and 29 per cent a submitted by individuals using WebETAS.

ETA Integrity

Compliance Rates for ETAs

The vast majority of ETA holders are compliant with the conditions of their ETA. In 2017, 0.463 per cent of the 2,659,492 ETA holders were non-compliant; with non-compliance being measured by those who lodged a Protection visa (PV) application, were Refused Immigration Clearance (RIC) at the border or had their ETA cancelled.

Risk Controls

The ETA application requires a range of biographical data (name and date of birth), detailed passport information (including number, and date of issue) and declarations (alias, criminal history and acceptance of ETA conditions).

When submitted, ETAs are subject to a range of risk assessments. The ETA applicant may be required to provide additional information before a decision is made on the application.

When an ETA is granted, the ETA holder is sent an email that includes the rights and obligations of the ETA. Specifically

> **"What your ETA allows you to do**
>
> It is your responsibility to know what your visa allows you to do while you are in Australia.
>
> - After your ETA is granted, you will be able to enter and leave Australia as many times as you need to during the 12 month period from the date your ETA is granted or until the expiry date of your passport, whichever occurs first.
> - You can stay in Australia for a maximum of three months on each visit.
> - You must not study for more than three months in total, during the duration of this ETA.
> - You must be free from tuberculosis.
> - You must not have any criminal convictions for which you have been sentenced for a total combined period of 12 months or more, whether or not you served the sentence(s).
> - It is illegal to work on an ETA while you are in Australia.
> - You can only undertake business visitor activities such as undertaking business enquiries and contractual negotiations or attending conferences."

After an ETA is granted to an applicant the ETA holder can be Refused Immigration Clearance or have their ETA cancelled either before or after their travel.

ETA Cancellation

The primary purpose of visa cancellation is to ensure the protection of the Australian community and the integrity of Australia's borders and visa programs. This extends to ETAs, which can be cancelled when the holder is offshore, in immigration clearance or onshore in Australia. All non-citizens including ETA holders, who do not comply or who do not intend to comply with their visa conditions or who may pose a risk to the health and safety of the Australian community can have their visas considered for cancellation. In addition to the character provisions of the *Migration Act 1958*, that a person applying for an ETA must declare they meet, there are a number of general powers that the Department or Minister can use to cancel visas. The Department chooses the most appropriate power to suit the circumstances. There are four main reasons why visas, including ETAs, are cancelled:

- the visa holder's circumstances have changed;
- fraudulent or incorrect information or documents were provided;

- the visa holder has failed to comply with a condition of their visa; or
- the visa holder may pose a risk to the health or safety of the community

ETA Eligible Countries/Jurisdictions

Nationality					
1	Andorra	13	Ireland, The Republic of	25	South Korea
2	Austria	14	Italy	26	Spain
3	Belgium	15	Japan	27	Sweden
4	Brunei	16	Liechtenstein	28	Switzerland
5	Canada	17	Luxembourg	29	Taiwan
6	Denmark	18	Malaysia	30	The Netherlands
7	Finland	19	Malta	31	United Kingdom – British Citizen
8	France	20	Monaco	32	United Kingdom – British National (Overseas)
9	Germany	21	Norway	33	USA
10	Greece	22	Portugal	34	Vatican
11	Hong Kong	23	San Marino		
12	Iceland	24	Singapore		

Attachment B

The Migration Advice Sector

The regulation of the migration advice sector has a long history and had been the subject of numerous reviews.

Pre-September 1992: Departmental registration scheme

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

Issues of concern raised about this scheme were:

- There was evidence of unscrupulous conduct and incompetent advice being given by persons holding themselves out as experts in migration.
- Culturally and linguistically vulnerable consumers were being exploited and asked to pay enormous costs for services that were inappropriate.
- There was a perceived imbalance of power between the adviser and the client.
- Many clients whose primary language was not English were unaware of avenues of redress when poor or unethical services was rendered to them.

September 1992 - 1998: Migration Agents Registration Scheme (MARS)

In September 1992, the Migration Agents Registration Scheme (the MARS) was established. Its principal objective was to protect consumers of immigration advice against professional misconduct and to ensure that consumers had access to affordable and quality advice.

The MARS also created the Migration Agents' Registration Board, charged with regulating the migration advice sector. The Boards was administered by the then Department of Immigration, Local Government and Ethnic Affairs.

March 1998 to June 2009: Migration Agents Registration Authority (MARA)

In March 1998, following a review of the MARS that was handed down in March 1997, the then Minister for Immigration appointed the Migration Institute of Australia (the MIA) to assume the role of the Migration Agents Registration Authority (the MARA) as a statutory, self-regulating body.

The aim of the MARA was to "reduce the red tape burden on small business while maintaining consumer protection for people in the community vulnerable to exploitation."

Key issues that led to the establishment of the MARA included:

- Support from the sector to move towards self-regulation.
- General agreement that sector members needed to meet competency and ethical standards as set by a regulatory body.
- The need for the regulatory body to be able to discipline members who breached the Code of Conduct for registered migration agents.

The MIA was appointed as the MARA to administer the relevant provisions of the *Migration Agents Regulations 1998* (Cth) (Regulations) and to undertake the role of regulator. Amongst other things, the Regulations included a Code of Conduct.

Two reviews of the Statutory Self-Regulation of the Migration Advice Industry were conducted and reported in August 1999 and September 2002.

Key findings from the 1999 and 2002 reviews included:

- That the regulatory arrangements were yet to reach their full potential in terms of consumer protection and professionalism within the industry.
- That the profession was not ready to move to full self-regulation and that the period of statutory self-regulation be extended.
- That the Department and the regulatory body work together to increase the level of consumer confidence and to decrease the number of complaints.

A third Review of Statutory Self-Regulation of the Migration Advice Profession (Hodges Review) was commenced in 2007 and reported to the government in May 2008.

The Hodges Review spanned a period of 14 months. It was conducted by the Department of Immigration under the guidance of an External Reference Group (ERG). The ERG was chaired by the Hon. John Hodges, with the assistance of three others: Mr Glenn Ferguson, Ms Helen Friedman and Mr Len Holt.

As part of the inquiry process for the Hodges Review, a Discussion Paper was released in September 2007 inviting stakeholders to make submissions on the profession's readiness to move from statutory self-regulation and other issues in relation to the migration advice profession.

Overall, the Hodges Review found that:

- There was overwhelming opposition to the profession moving to self-regulation.
- The arrangement whereby the MIA operated the MARA had created perceived and potential conflicts of interest resulting in a lack of consumer confidence, such that the government should consider establishing a regulatory body separate to the MIA.

- There was dissatisfaction amongst stakeholders regarding the handling of complaints against migration agents. The Review found that the regulatory body needed additional powers and needed to work in closer co-operation with the Department and other bodies such as the Law Council of Australia (LCA) and the Australian Competition and Consumer Commission (ACCC) in order to address these issues.
- There needed to be significant changes made to the entry requirements in order to improve professional standards. Recommended changes included: 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.
- Legislation relating to migration agents needed to be substantially revised to remove confusion.
- To minimise consumer confusion, lawyer agents should continue to be included in the regulatory scheme, although revisions to the regulatory scheme would provide further concessions to lawyer agents.
- The Continuing Professional Development (CPD) requirements needed to be simplified and streamlined – especially for experienced migration agents with good track records.
- Priority processing should be provided to decision ready applications – whether they be submitted by a migration agent or an applicant directly.

The Hodges Review made 57 recommendations….Importantly, the Review recommended that an independent statutory body with greater powers to protect consumers be established to regulate the profession. It was also recommended that the regulatory framework be strengthened and clarified and that entry requirements be raised.[1]

July 2009 to September 2014: The Office of the Migration Agents Registration Authority (OMARA)

The OMARA operated as a discrete office attached to the then Department of Immigration and Border Protection (the Department), the structure was as a result of the recommendations of the 2007-08 Hodges Review. The disclosures and use of information were set out in a Memorandum of Understanding (MOU) dated 16 June 2010.

The OMARA was led by two SES Band 1 officers; a Chief Executive Officer (CEO) with primary responsibility for external stakeholder relationships and leading the reform agenda and a Deputy CEO with a primary focus on the internal governance and practice. In July 2009 the then Minister appointed an Advisory Board to the

[1] Reproduced from "2014 Independent Review of the Office of the Migration Agents Registration Authority Final Report" pp4-6

OMARA to provide advice and guidance to the CEO. The Board met four times a year to discuss and to advise on pertinent regulatory matters.

In 2012 the OMARA consolidated to one CEO who reported directly to the Secretary of the Department.

In June 2014 the then Assistant Minister announced a further independent review of the OMARA and appointed Dr Christopher Kendall as the independent reviewer with support by a secretariat of the Department (the Kendall Review). In September 2014 Dr Kendall made 24 recommendations, not all of which were accepted by the Government. Recommendation 23 “The inquiry recommends that the OMARA’s position within the Department be fully consolidated so that it is entirely and unequivocally part of the Department” was accepted by Government and in 2015 the OMARA consolidated into the NSW Regional Office reporting to the Regional Director NSW/ACT.