



Law Council
OF AUSTRALIA

Efficacy of current regulation of Australian migration agents

Joint Standing Committee on Migration

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

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Executive Summary

1. The Law Council of Australia welcomes the opportunity to provide a submission to the Joint Standing Committee on Migration regarding the efficacy of current regulation of Australian migration agents.
2. Australia is an economically and culturally diverse nation which has, since the end of World War II, encouraged and supported a large migration program. This is reflected in the range of permanent migration opportunities presently available within the broad migration policy categories of skilled, family, special eligibility migration and humanitarian migration.
3. In addition to permanent migration, Australia also provides significant opportunities for temporary entry to Australia under many specific visa categories, in broad areas such as: studying and training; family and spousal; and working and skilled visa programs.
4. The size, diversity, and economic and social objectives of Australia's migration program are underpinned by a necessarily detailed legal and administrative framework. By its very nature, immigration predominantly involves people with a limited knowledge of Australian law, and of administrative and legal procedure, (often) limited financial resources and (often) limited proficiency in the English language. There is a very high degree of information asymmetry in migration matters. Because of this, users of immigration assistance services have high vulnerability to the adverse consequences of unscrupulous, incompetent and unprofessional migration services providers.
5. The Law Council therefore supports strong and effective regulation of the migration advice sector to maintain the integrity of the migration system and to protect the interests of users of migration agent services.
6. Regulatory reforms since at least 1989 have been progressively moving migration agents toward a regulatory framework broadly equivalent to regulation of professions — in particular a framework approaching that which comprehensively regulates the legal profession.
7. The elements of the current regulatory framework for migration agents are: mandatory academic qualifications in migration law and practice; fit and proper person and person of integrity requirements; a registration regime to confer legal authority to act as a migration agent; a dedicated regulatory authority; services and charges disclosure, professional indemnity insurance; control of client monies held in trust, a mandatory code of conduct, and a discipline regime.
8. The Law Council supports the continuing development of a strong, professionally-focused and effective regulatory framework governing migration agents, the provision of immigration assistance, and the protection of consumers of immigration assistance services.

Areas of inquiry

9. The Law Council offers the following observations and recommendations on three of the areas of interest identified by the Joint Standing Committee on Migration. These observations and recommendations have been framed against the background that legal practitioners will be excluded from the migration agent registration regime, as envisaged by the Migration Amendment (Regulation of Migration Agents) Bill 2017.

Registration and regulation of migration agents in Australia

Education and practical training prerequisites for registration

10. The Law Council reiterates the support expressed in its Submission dated 5 September 2017 to the Legal and Constitutional Affairs Legislation Committee on the Migration Amendment (Regulation of Migration Agents) Bill 2017 of the requirement that a registered migration agent must hold an academic qualification in migration law and practice, as an important means for demonstrating competence in migration matters where the person has not undertaken the more extensive academic studies and practical training required for admission to the legal profession.
11. The Law Council notes the Graduate Certificate in Migration Law and Practice has been replaced, with effect from 1 January 2018, by the (expanded) Graduate Diploma in Australian Migration Law and Practice as the mandatory educational prerequisite for initial registration as a migration agent. Also, a Migration Agents Capstone Assessment is being introduced as a mandatory (competency) prerequisite.
12. The Law Council supports these developments. They provide a stronger basis for the acquisition and assessment of whether person has a body of knowledge, practical skills and values necessary for effective and ethical practise as an entry-level migration agent.

English language proficiency

13. The current requirement for migration agents under the International English Language Proficiency Test (**IELTS**) is a score of at least 6.5 in each Band, and an overall Band Score of 7. An overall Band Score of 7 denotes a *good user* of the English language, but still having “occasional inaccuracies, inappropriate usage and misunderstanding in some situations.” The current requirements mean a person who could not achieve 7.0 within in each Band, would experience some inaccuracies, inappropriate usage and misunderstandings.
14. The Law Council notes that the work undertaken by migration agents can be linguistically demanding. They work within a very complex area of law and administrative policy and practice, with potentially significant consequences for clients if errors are made. Although communicating with clients from non-English speaking backgrounds may form a proportion of a migration agent’s workload, it is very important that the migration agent themselves have sufficient English language proficiency to:
 - understand and interpret complex legislation;
 - explain documentation or correspondence that is in English;
 - draft documents in English, including completing forms and statements; and
 - speak, listen, read, write and otherwise communicate effectively with the Department of Home Affairs and other relevant authorities.

15. The Law Council view is that a migration agent should be required to demonstrate the same level of English language proficiency as a lawyer. This would require a migration agent to achieve an English language proficiency Band Score at an average of 7.5 under the Academic version of the IELTS, which denotes an *acceptable*, rather than *probably acceptable* level of English language proficiency. We note, by way of additional context, that foreign lawyers seeking admission to the Australian legal profession are required to achieve minimum IELTS scores of 8.0 for writing, 7.5 for speaking and 7.0 for reading and listening.

Recommendation 1

That all entry-level migration agents who are required to demonstrate English language proficiency, be required to achieve an average Band Score of at least 7.5 under the Academic version of the IELTS.

Supervision of entry-level migration agents

16. There is presently no mandatory requirement that newly qualified and registered migration agents participate in any form of supervision following their initial registration. The *Migration Institute of Australia* and other providers run a “Practice Ready Program” for migration agents intending to lodge their first repeat registration. However, the Law Council is concerned that the current regulatory framework is not sufficient to ensure that migration agents demonstrate sufficient experience, before venturing out on their own as a sole trader or as a principal migration agent.
17. The Law Council notes that supervised practice is an ordinary and accepted element of learning and development in professions such as the legal profession.
18. A mandatory period of supervised practice would enhance consumer protection by providing a structured setting in which an entry-level migration agent can acquire, develop and consolidate the knowledge, skills and experience thought necessary for future unrestricted work as a migration agent. The supervised practice could be at a legal or migration firm for a defined period. The supervision might be provided by a supervisor or mentor with at least 5 years of experience. The training supervisor or mentor should be required to complete a statutory declaration confirming the supervision and detailing evidence of completed work during the period of supervision (such as details of the types of visas worked on).

Recommendation 2

That all entry-level migration agents be required to satisfactorily complete a period of supervised practice before being permitted to practise on their own account or as a principal of a migration agency.

Provisional registration

19. The Law Council also notes that most professional registration bodies have a two-stage registration process, beginning with provisional registration that involves at least satisfactorily completing a period of supervised practice, and may include satisfactory completion of additional training in specific areas such as, for example, trust accounting (for legal practitioners) before moving conditional to unconditional registration, which allows for unrestricted practice.
20. The Law Council recommends the adoption of a two-stage registration process for migration agents. As indicated in our comments above, a two-stage registration process

will ensure that migration agents have an appropriate level of training and practical experience working with clients and others prior to being permitted to work on an unconditional basis as sole trader, or principal, or unrestricted employee of a migration agency.

Recommendation 3

That a two-stage registration system apply to migration agents such that all entry-level migration agents be subject to conditional registration during which they must undergo supervision and obtain additional knowledge and practical experience required for unconditional practice as a migration agent.

Advocacy work – review authorities

21. Section 276 of the *Migration Act 1958* (Cth) (**the Act**) defines immigration assistance as including:
 - preparing for proceedings before a court or review authority (the Administrative Appeals Tribunal (**AAT**) or the Immigration Assessment Authority) in relation to a visa application or cancellation review application; and
 - representing a visa applicant or cancellation review applicant in proceedings before a court or review authority in relation to the application.
22. The Law Council is particularly concerned about ensuring that migration agents who engage in matters related to reviewable decisions have the competency to undertake this work effectively. The risk to be considered is that migration agents who are ill-equipped to handle work at the AAT may not be acting in the best interests of their clients.
23. Decision making in migration law (a subset of administrative law) starts at the primary level, goes through to merits review and ends, subject to a jurisdictional breach or error, at judicial review. The review process is overwhelmingly presided over by a legally trained member bound by case law and judicial precedent. This legal setting is alien to many migration agents, most of whom have no knowledge of rapidly changing case law, binding precedent and related areas of law that impact on the decision at issue.
24. Further, the procedures and processes at the AAT are very complex and require a deeper understanding of the law. Immigration law overlaps with company law, family law, employment and criminal law. Only lawyers are trained in core and elective fields of law.
25. The competency of the advocate and the submissions made at the merits review stage have a direct bearing on the capacity of the applicant to seek judicial review, as new evidence cannot be adduced at judicial review. There is a significant risk that migration agents who are not legally qualified and trained will fail to identify an error of law, in particular jurisdictional error, and therefore may fail to consider issues that could have been resolved at the AAT that relate to merits review.
26. Preparation, arguments and competency are critical at this stage so as not to close a possible judicial review option. Once the AAT makes an unfavourable decision, many visa applicants or review applicants are then unable to seek recourse at the courts, as their issues may be only merits related. The Law Council's general concern is that migration agents are not adequately trained in theory and practice for merits review for these reasons. It is unlikely that expanding the required course to a Diploma level, without requiring mandatory training and supervision, would make an agent more competent at the merits review stage.

27. These concerns are brought into particularly stark relief when matters before the General Division of the AAT are considered, these most commonly being character cases related to section 501 of the Act and citizenship cases pursuant to the *Citizenship Act 2007* (Cth). In these matters the Australian Government is always legally represented by a solicitor, and often also by a barrister. These matters run akin to a Federal Court trial with evidence in chief, cross-examination and re-examination, at times with complex arguments on the admissibility of evidence and contested legal debate.

Recommendation 4

To protect the interests of visa applicants and review applicants, only Australian legal practitioners should be authorised to represent applicants before a court or review authority.

Migration litigation

28. Once the AAT makes an unfavourable decision, many visa applicants or review applicants are then unable to seek recourse at the courts, as their issues may be only merits related. The grounds for judicial review are very limited and migration agents who are non-lawyers should not be seeking to provide advice on judicial review prospects.
29. The Law Council notes that section 486E of the Act provides that a person must not encourage a litigant to commence or continue migration litigation in a court without properly considering the prospects of success of the litigation or whether the purpose in commencing or continuing the migration litigation is related to the objectives which the court process is designed to achieve. Further, subsection 486I(1) of the Act provides that a lawyer must not file a document commencing migration litigation unless the lawyer certifies in writing that there are reasonable grounds for believing that the litigation has reasonable prospects of success.
30. Contributors to this Submission have also reported that migration agents who are non-lawyers have been providing legal advice to clients on how to prepare and complete an application to the Federal Circuit Court, and that they request that the clients apply to the court as a self-represented litigant. The reason for advising clients to self-represent is that the right to appear before a court as an advocate is only given, pursuant to the inherent power of a court to control its own processes, to legal practitioners.
31. In the Law Council's view, there is a need to review the policy and legislation relating to the role of migration agents in the litigation process. While it would be appropriate for a migration agent to provide information to a client about the judicial review process and alert the client to potential issues, there is a significant risk where an applicant, not properly informed, undertakes unrepresented litigation.

Recommendation 5

The provision of advice about the commencement or continuation of migration litigation, certification of reasonable prospects of success and representation before the court are matters that should be undertaken only by Australian legal practitioners.

Protection of consumers from false and misleading advertising

32. As mentioned in the Executive Summary, the Law Council notes that the very high degree of information asymmetry between the users of immigration assistance services

and migration agents, means that users of these services have high vulnerability to the adverse consequences of unscrupulous, incompetent and unprofessional migration services providers.

33. It is important that migration agents are clear to their clients and potential clients about their level of experience, expertise and the scope of work they can undertake, particularly to ensure that consumers are protected. The Code of Conduct for migration agents requires a registered migration agent to not engage in false and misleading advertising.

Specialist accreditation

34. Contributors to this submission have reported that a large number of registered migration agents commonly use terminology such as 'specialist' or 'expert'. The Law Council considers the use of this terminology could be viewed as misleading if the migration agent does not in fact have knowledge and expertise in migration law matters over and above the level of knowledge and expertise of migration agents generally.

35. The Law Council notes that accredited specialisation for a legal practitioner is conferred by the relevant professional association and requires:

- membership of the association;
- a current legal practising certificate;
- at least five years post-admission experience;
- a substantial involvement in the particular area of legal practice over the past three years;
- a structured peer assessment program that includes examinations, assignments and other actions to demonstrate a sufficient level of expertise and standing to justify the entitlement to use the words "accredited Specialist".
- an ongoing requirement to undertake additional Continuing Professional Development (CPD) in the area of specialisation, over and above the CPD requirements for practising certificate renewal.

36. Specialist accreditation, once conferred, enables a legal practitioner to promote and highlight expert legal knowledge, skills and services for the public and for the profession.

37. Further, the Australian Solicitors' Conduct Rules provide:

Rule 36 – advertising

36.1 A solicitor or principal of a law practice must ensure that any advertising, marketing, or promotion in connection with the solicitor or law practice is not:

36.1.1 false;

36.1.2 misleading or deceptive or likely to mislead or deceive;

36.1.3 offensive; or

36.1.4 prohibited by law.

36.2 *A solicitor must not convey a false, misleading or deceptive impression of specialist expertise and must not advertise or authorise advertising in a manner that uses the words “accredited specialist” or a derivative of those words (including post-nominals), unless the solicitor is a specialist accredited by the relevant professional association.*

38. The Law Council considers that migration agents should be subject to the same standard of conduct by not being entitled to use words such as ‘specialist’ or ‘expert’ in advertising unless they hold a specialist accreditation through a structured assessment program from the relevant professional association.

Recommendation 6

That the use of words such as “specialist” or “expert” in advertising or promotional activities by migration agents only be permitted where the migration agent has completed a structured, peer assessed specialist accreditation program through a recognised professional association.

Practising certificates

39. An additional concern raised with the Law Council is that some migration agents have been using the term “practising certificate” when referring to a “certificate” issued by a particular migration association.
40. The term “practising certificate” is clearly associated in the public’s mind with legal practitioners. Practising certificates are issued only by the relevant regulatory authority to eligible lawyers. It is the grant or renewal of a practising certificate that confers legal entitlement on the holder to engage in legal practice, according to the conditions, if any, attached to the grant or renewal of the certificate. In contrast, the “practising certificates” being marketed to migration agents do not confer any legal entitlements to practise as a migration agent – those entitlements are conferred by registration with the Office of the Migration Agents Registration Authority (**OMARA**).
41. The Law Council’s concern is that “practising certificates” purchased by migration agents can, if referred to in advertising or displayed to the public, create a misleading impression among consumers that the person referred to in the “certificate” might be a legal practitioner.

Recommendation 7

That the use of the term “practising certificate” by a migration agent be prohibited unless the person holds a practising certificate issued by a legal profession regulatory authority pursuant to legislation.

Unregistered migration agents and education agents providing unlawful immigration services

Education agents

42. The Law Council considers the present self-regulation regime covering education agents should be strengthened to mitigate the risk of education agents engaging in incompetent and fraudulent practices, and the provision of immigration assistance when not registered as a migration agent.

43. Presently, education agents are regulated (pursuant to the *Education Services for Overseas Students Act 2000* (Cth)) by the registered provider of courses for overseas students.
44. Standard 4 in the *National Code of Practice for Providers of Education and Training to Overseas Students 2018* requires a written agreement between a registered provider of courses and each education agent the provider engages. The agreement must include a requirement that the agent:
- declares in writing and takes reasonable steps to avoid conflicts of interests with its duties as an education agent of the registered provider;
 - observes appropriate levels of confidentiality and transparency in their dealings with overseas students or intending overseas students;
 - acts honestly and in good faith, and in the best interests of the student; and
 - has appropriate knowledge and understanding of the international education system in Australia, including the Australian International Education and Training Agent Code of Ethics.
45. Standard 4 also requires a registered provider to take immediate corrective action where it becomes aware that an education agent has not complied with the agent's responsibilities under the Standard. What that corrective might be is not set out in the Standard, however the Standard does require a registered provider to:
- immediately terminate the services of an education agent (or require the agent to terminate its relationship with an employee or subcontractor) where the registered provider becomes aware or has reason to believe that the agent (or an employee or subcontractor of the agent) is engaging in false or misleading recruitment practices; and
 - not accept students from an education agent if the registered provider knows or reasonably suspects the education agent to be, among other things, providing migration advice, unless the agent is authorised to do so under the Act.
46. The *Education Services for Overseas Students Act 2000* (Cth), contemplates a degree of oversight of registered providers and provides that a breach of the Act or the national code by a registered provider can lead to the provider's registration being suspended, cancelled or made subject to conditions, one of which is to not deal with a specified agent in relation to overseas students or intending overseas students.
47. Legal practitioners with experience in dealing with migration law, visas and students have reported a range of inappropriate conduct by education agents who are not registered migration agents:
- advising/promising students that certain courses of study have permanent migration pathways but in fact do not. These courses also tend to be long in duration and financially lucrative for the education agent;
 - advising applicants to apply for student visas with the sole intention of 'buying time' to find a work or family sponsor;
 - advising applicants how to bolster or create stronger Genuine Temporary Entrant (GTE) claims when, in fact, these claims do not exist or are marginal;

- failing to advise applicants that more beneficial visas may be available in the circumstances that better suit the student's needs – for example, Work and Holiday or Working Holiday visas; and
 - deliberately advising students who are in genuine and ongoing partner relationships that they do not have enough evidence to prove the relationship, the consequence of which is that each applicant then has to apply for a student visa separately to enable them to travel together to Australia, which, in turn, doubles the commission income for the education agent.
48. The practice of providing immigration assistance when not a registered migration agent is generally undetected, as education agents generally do not directly charge a fee for these services, or do not act as authorised recipients, and the applications are completed as though the student had completed the application themselves, by generating new emails and ImmiAccount logins.

Recommendation 8

Education agents must be prevented from providing migration advice and assistance by increased oversight and enforcement of penalties for giving immigration assistance without being a registered migration agent.

Unregistered migration agents

49. Legal practitioners have reported that there are a number of immigration and education service providers that have a large staff base, but only have one or two registered migration agents. These agencies operate in Australia and may have an office located overseas. These agencies employ a number of staff in Australia and overseas to provide advice on educational courses for visa applicants who want to apply for study in Australia.
50. Often these unregistered agents will also assist with preparing documentation to support a student visa application (for example a Genuine Temporary Entrant letter, or a Statement of Purpose) and complete the visa application form on the student's behalf. The student is often unaware of what is submitted and/or follows the advice of the agent in terms of what should and should not be disclosed, such as the student's marital status and existence of immediate family members.
51. The overseas agency often uses the name and Migration Agent Registration Number of the registered agent in Australia to promote the credentials of the business, however it is clear in most cases that the registered agent in Australia is not supervising the work of the overseas agent.
52. A further concern raised is the trend of unregistered agents operating in remote or regional areas in Australia and assisting visa applicants in applying for unmeritorious visas to remain in Australia. Many of these visa applicants speak little English and pay large sums of cash to the unregistered agents, not knowing that they are unregistered. These unregistered agents then assist with applications to extend a visa that is then subsequently refused. The applicants may then apply for protection visas to remain in Australia.
53. The Law Council considers there is a need for stronger regulatory oversight by the OMARA.

Recommendation 9

That there be stronger regulatory oversight by the OMARA of the management of migration agencies, and an enhanced program to detect and deter unregistered agents operating in regional and remote areas.

Providing advice on citizenship law

54. The Law Council is also concerned about migration agents giving legal advice on citizenship law. The citizenship laws are outside the scope of the Act. Migration agents are unfamiliar with many issues pertaining to citizenship, such as how and when visas cease, character concerns and Ministerial discretions. There is a significant for clients that they will receive incorrect and contrary advice from a migration agent that is unfamiliar with citizenship laws. The Law Council's view is that legal advice on citizenship law should only be provided by legal practitioners.

Recommendation 10

That migration agents be prohibited from providing advice to clients on citizenship law.

The appropriateness of migration agents providing other services to clients

55. The Law Council does not in-principle oppose migration agencies providing clients with services in addition to immigration assistance services, subject to appropriate consumer protection and integrity safeguards.

56. In the legal profession context, services other than legal services may be provided by a law firm operating another business, or by an incorporated legal practice or and multi-disciplinary partnership (a partnership with legal practitioner and non-legal practitioner partners - also referred to as "unincorporated legal practices"). Also, there is no general prohibition on legal practitioners in relation to conducting another business or to referral fee arrangements between practitioners and providers of other services. However, the risks to consumers and to the integrity of the provision of legal services are recognised and regulated in several ways, including:

- notification is required to be given to the regulatory authority before commencing to engage in legal practice as an incorporated legal practice or in a multidisciplinary partnership;
- prohibitions in relation to conducting managed investment schemes (with limited exceptions), or other prescribed services and business;
- a statutory duty on a legal practitioner director or partner to ensure appropriate management systems are implemented and maintained to:
 - enable legal services to be provided in accordance with the statutory and professional obligations of legal practitioners; and
 - to ensure that those obligations are not affected by other officers or employees.
- a prohibition on a person causing or inducing a legal practitioner or employee to contravene legal profession laws and other professional obligations;

- written disclosure to clients about the services to provided, which services are to be provided as legal services, which services are to be provided as other services (together with the status and qualifications of the providers of those other services)
- written disclosure must also state that the legal profession laws apply to the provision of legal services, but not to the provision of non-legal services:
 - it is especially important to disclose to the client that professional indemnity insurance and other consumer protections and remedies available under the legal profession laws do not apply to non-legal services;
- a rule of professional conduct (for example Australian Solicitors' Conduct Rule 12) that a solicitor must not act for a client where there is a conflict of interest between the duty to serve the best interests of the client and the interests of the solicitor or an associate of the solicitor:
 - an exception to this general principle is that a solicitor may receive a commission or financial benefit (a 'referral fee') from a third party provided the client is: advised that a referral fee may be payable (and its nature); that the client may refuse the referral; and that the client has given informed consent to the referral fee which may be payable.
- A rule of professional conduct regarding sharing of premises - for example Australian Solicitors' Conduct Rule 39.1 provides:

Where a solicitor or law practice shares an office with any other entity or business engaged in another calling, and a client is receiving services concurrently from both the law practice and the other entity, the solicitor, or law practice (as the case requires) must take all reasonable steps to ensure that the client is clearly informed about the nature and the terms of the services being provided to the client by the law practice, including (if applicable) that the services provided by the other entity are not provided by the law practice.

57. The Law Council is particularly concerned with the conflicts of interest that arise where a migration agent is also an education agent or has a referral fee arrangement. Our view is that these situations require written disclosure to the client of the arrangements, that clients have the ability to refuse the referral and that they be required to give informed consent before a migration agent can accept fees or commissions in relation to education assistance.

58. As noted earlier in this Submission, there is a high degree of vulnerability for clients of migration agents to the adverse consequences of unscrupulous, incompetent and unprofessional migration services providers, which warrants strong and effective regulation of the migration advice sector.

Recommendation 11

That migration agents should only be permitted to provide other services where there are strong and effective regulatory safeguards to protect the interest of the clients of the migration agent or agency.