



OFFICE OF
REGULATION REVIEW
INDUSTRY COMMISSION

The Migration Agents Registration Scheme:
effects and improvements

A submission to the Joint Standing Committee on Migration



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INTRODUCTION

The Joint Standing Committee on Migration is conducting an inquiry into the Migration Agents Registration Scheme. The scheme commenced in September 1992. It requires migration agents to register, pay a registration fee, and be subject to oversight by the Migration Agents Registration Board. The scheme prohibits anyone not registered as a migration agent from providing immigration assistance.

The Office of Regulation Review (ORR)—located within the Industry Commission—is responsible for administering the Commonwealth Government’s regulation review program. Amongst other functions, the ORR provides public advice on regulatory issues.

In this submission, the ORR comments on the effects of the current scheme and highlights some details of the scheme which may require amendment. It also discusses other approaches the government could take which may help overcome problems in the migration agents market.

IMPACT OF THE REGISTRATION SCHEME

Part (a) of the Committee’s terms of reference asks it to inquire into the scope and effectiveness of the scheme, including consumer protection.

To analyse the scheme, it is useful to break down its main effects into the following three categories:

- the effects of the registration fees;
- the effects of the ‘quality assurance’ aspects of the scheme; and
- the effects on consumers and producers of any barriers to entry, other than those associated with the fee, that may arise as a result of the scheme.

Registration fees

The registration fee for a migration agent dealing with more than 5 cases during the year-long registration period is \$1000. The registration fee for an agent dealing with no more than 5 cases is \$100³. The fee for renewal is the same as the fee for initial registration.

Price effects

In the first instance, the registration fee will increase the cost of doing business as an agent. Acting as a migration agent will become relatively less attractive. Those agents who were previously earning small profits from this aspect of their business may

¹ There are exceptions for government employees tendering advice in the course of their duties and individuals giving advice without charging fees.

² This submission does not deal with the funding of free migrant advisory centres.

³ The corresponding figures for an employee of a registered agent are \$500 and \$50 respectively. *Migrations Agents Registration (Application) Levy Act 1992*.

⁴ Or were earning only slightly more than they could earn in their next most preferred occupation.

choose to exit the industry as a result of the registration fee. The agents that remain will seek to charge higher prices but, to the extent that they are unable to pass on the full fee to consumers, they will have suffered a reduction in their net income⁵.

Given the nature of the migration advice market, the ORR expects that the majority of the fee will in fact be passed on to consumers in the form of increased price⁶.

An estimate of the price increase can be made based on the registration fee. If, for example, an agent processes 5 applications and the customers effectively pay all the fee, the charge per customer would rise by \$20. The increase in price would be higher for any agent processing less than 5 applications per year, or more than 5 but less than 50 applications. For example, for an agent processing 20 applications, the price increase, were the agent able to pass on the full costs, would be \$50 per application. Without empirical evidence, however, the ORR cannot be certain of the exact impact on prices. In its deliberations, the Committee may wish to collect information on price changes since the scheme's introduction.

Structure of registration fees

The structure of registration fees causes additional complications. As noted above, registration fees are set at \$100 for agents who deal with no more than 5 immigration cases during the period of registration, but \$1000 for those dealing with more than 5. This means that the marginal cost of making a sixth application is \$900. In practice, it will not be in the interests of a potential agent to make more than 5 applications unless she/he intends to significantly exceed this number. Many agents who may have efficiently processed intermediate numbers of applications will be forced to either process only 5 applications or take on more migration clients than they would otherwise choose. As at 1 August 1994, 63 percent of registered agents who paid fees were processing 5 applications or less. To the extent that the structure of the registration fees has caused this pattern of processing, it will have introduced inefficiencies into the migration agents market—an excessive proportion of agents each handling too few applications on average.

Structure of application fees and renewal fees

The current application fee structure is the same as the renewal fee structure⁷. The original justification for the fees was that they were required for cost recovery.

⁵ Any part of the scheme that restricts the behaviour of the migration agents is likely to have a similar effect to a higher fee. It may discourage entry to the occupation, stimulate exit by existing practitioners, or induce increased fees and charges to compensate for inconvenience. The minimum eight week waiting period after gazetting and the requirement to maintain an immigration library both would fall into this category. See *Migration Agents Registration Scheme: What can you do without being registered as a migration agent*, Department of Immigration and Ethnic Affairs, 25 January 1994 and *Migration Agents Regulations*, Statutory Rules 1992 No. 292

⁶ The migration advice market is characterised by consumers who may have few viable alternatives to seeking migration advice, and a large proportion of lawyers who have good opportunities to work in other fields. As consumers have fewer opportunities to substitute away from the activity, they are likely to bear the highest proportion of the fee.

⁷ *Migration Agents Registration (Application) Levy Act 1992* and *Migration Agents Registration (Renewal) Levy Act 1992*.

However, it seems likely that the administrative requirements of processing a renewal would be significantly less onerous than those associated with processing an initial registration. Renewals should therefore take fewer resources to process. Hence, even if the scheme were to successfully recover its administration costs in aggregate,⁸ it will under-recover the costs of processing applications and over-recover on renewals. This implies that initial applicants will be cross-subsidised by those renewing their registration.

In the ORR's view, this cross-subsidy is economically inefficient as it biases the composition of agents towards those who practice for a single year — that is, new entrants just trying the market. This bias is in itself undesirable and also increases the likelihood of “hit and run” operators who will be less concerned about building and protecting a reputation as a reliable agent. It could also be viewed as inequitable as existing agents pay a fee that is greater than the costs they impose on the public purse whilst new agents pay a fee that is less than the costs to the public purse.

Quality assurance aspects

A feature of the migration advice market is the possibility that consumers may be overcharged or purchase poor, faulty or dishonest advice. Poor or faulty advice may have serious consequences for consumers, such as failure to achieve the desired migration status for a close relative. Dishonest advice, such as an agent claiming falsely to be able to exert influence on an official from the Department of Immigration and Ethnic Affairs, would result in the applicant being defrauded.

The risk of consumers of migration advice selecting an inappropriate agent depends largely on the consumer's information about the qualities of agents. If a potential consumer has contact with others who have used migration agents, they will be able to gather information that reduces the risk of hiring an inappropriate agent. Ethnic communities are likely to have extensive networks for transmitting information. However, some potential consumers will have little information about the quality⁹ of the service provided by a migration agent. There is thus a possibility that the migration agent may “overcharge” the consumer for the service provided or “underprovide” the service paid for.

The Migration Agents Registration Scheme is like a quality assurance scheme. Consumers may believe that the scheme guarantees them a given quality of service. If the scheme is effective in screening out inappropriate agents, then consumers face a reduced risk of receiving poor quality service. The scheme's effect on the welfare of consumers will depend on how highly they value this quality assurance aspect.

⁸ Cost recovery has not occurred in either of the first two years of operation and is not projected to occur in the 1994-5 financial year. The aggregate projected deficit for the three years is \$209 000, of which \$182 000 was accumulated in 1993-4. This implies that the scheme involves a transfer from tax-payers, as well as some consumers, to those consumers and agents who benefit from the scheme.

⁹ In general it will also be biased in favour of those agents wishing to practice for shorter periods of time compared with those wishing to practice for longer periods — for example, two years versus three years.

¹⁰ Quality as used here refers to the benefits that the consumer receives from the service. This may have a number of dimensions including: competent administration; ability to meet deadlines; accuracy of advice; and assumed influence with Government officials.

The impact of the scheme will not be the same for all consumers. For analytical purposes, it is useful to break down the consumers into two main groups:

- consumers who, prior to the scheme, expended effort in acquiring information about the qualities of agents, or had access to networks that allowed them to form reasonable assessments of the qualities of individual agents; and
- consumers who previously expended little effort in acquiring information, and did not have access to information networks.

Consumers in the first group will not be made significantly better off by the introduction of the scheme. The major benefit to them will be some reduction in the amount of effort they will need to expend in acquiring information about the quality of service provided by a particular migration agent.

Against this, the registration scheme has two drawbacks for consumers in this group. Firstly, they are likely to be paying higher prices due, amongst other things, to the registration fee. Second, these consumers previously acquired information because they knew the quality of service was variable. However, on seeing an agent's registration certificate, they may now believe that quality is assured. This will reduce their incentive to inform themselves. However, if the scheme is not fully effective in ensuring quality, their chances of purchasing a service of lower quality than they sought will increase.

Overall, these consumers are likely to be worse-off, even if the scheme successfully screens unscrupulous operators out of the industry, as they receive a similar service to the one they previously received but pay a higher price.

Consumers in the second group— those who previously had little information— may face a lower likelihood of receiving poor quality service as a result of the scheme. They will also pay a higher initial price for the services they purchase. Within this group, some consumers would have received quality service anyway, while some proportion of the group would have received poor service. The former will be worse off by the amount of the increased prices resulting from the administration fee, while the latter will be better off (provided that the price increase is less than the loss they would have experienced without the registration scheme).

In summary, only a subset of consumers is made better off by the scheme— mainly those who had little information and received poor service. The effort to protect these consumers imposes costs on, among others, the other consumers in the market. If the scheme is not effective in significantly reducing the proportion of inappropriate agents, the group that benefits will be correspondingly smaller. Clearly, some inappropriate agents have become registered as one agent has been successfully prosecuted and 20 agents have cases pending. In addition, there is concern that some prices charged by some registered agents may be excessive!¹¹

The ORR does not have any detailed information on these relative magnitudes. However, a rough estimate of the cost of excluding potential agents can be made. Up until 1 August 1994, 1411 commercial migration agents have been registered, while 164 applicants were refused registration. The cost of administering the scheme up until

30 June 1994 was

¹¹ One example provided by the Migration Agents Registration Section of the Department of Immigration and Ethnic Affairs is an agent charging \$2500 for the routine completion of a permission to work form.

\$982 000.¹² Therefore, if all those excluded would have been inappropriate agents, the cost imposed on others by their exclusion is approximately \$6000 per exclusion.³

This figure would be correspondingly higher if some of those excluded would have been appropriate agents. The desirability of the scheme is clearly very sensitive to this issue and to the number of inappropriate agents who are not excluded by the screening process. Hence, the Committee may wish to seek information on the number of consumers who previously purchased poor services compared with the number purchasing poor services under the current scheme.

Barriers to entry

Registration erects a barrier to entry!⁴ Whenever a group is conferred exclusive rights to provide a service, competition from newcomers is reduced and prices may rise.

Causes

There are three possible ways in which the scheme could act as a barrier to (legitimate) entry.

First, were the decisions of the Migration Agents Registration Board to be influenced by migration agents, the Board could advertently or inadvertently use its discretion in applying the screening criteria to exclude some number of appropriate applicants for registration. To minimise this risk, the Committee should recommend that the criteria for membership of the Board should exclude registered agents and require those serving on the Board to not practise subsequently as migration agents!⁵

Second, administrative overload can lead to entry barriers in the form of waiting lists or processing delays. After the first year of the scheme's operation, a backlog of more than 800 registration applications had built up!⁶ However, at present, there are 91

¹² Expenditure on administering the registration scheme was \$480 000 and \$402 000 in 1992-3 and 1993-4 respectively. Information supplied by the Migration Agents Registration Section, Department of Immigration and Ethnic Affairs.

¹³ The calculation requires the following assumptions: the agents refused registration would have offered their services in the absence of the scheme; potential agents are not deterred from applying as a result of the registration scheme; no account is taken of the adverse effects of a waiting list; detection of inappropriate behaviour occurs at the same speed with and without the scheme; and the scheme does not result in reduced administrative costs for the Government due to easier to process applications.

¹⁴ In this section, barriers to entry refer to barriers other than those associated with the registration fee.

¹⁵ Under the *Migration Act 1958*, s.114ZV, the Board currently consists of 5 members comprising: the chairperson; a member of the Immigration Review Tribunal; a lawyer; a member associated with ethnic community organisations; and a registered agent.

The *Migration Act 1958* (s.114ZZF(2)) also states that a member has a conflict of interest "...if the member has any interest, pecuniary or otherwise, that could conflict with the proper performance of the member's function." However, any decision related to allowing entry, or exit from the occupation is likely to influence the profitability of existing agents in the industry. This is particularly so when it is realised that the Board's decisions have a demonstration effect. Single decisions may signal to the wider community the stance of the Board, and thus have restrictive implications far broader than that encompassed in the matter under discussion.

¹⁶ This figure is based on a total of 2100 applications being lodged, of which 1200 lead to registration and 60 were refused registration. *Fact Sheet No. 17, Migration Agents Registration Scheme*, Department of Immigration and Ethnic Affairs, 24 November 1993.

cases pending decision by the Board. This suggests that the greater processing requirements for original applications, relative to renewals, caused an initial overload on administrative resources which has now largely been overcome. That said, potential agents seeking registration still face a minimum eight week waiting period, with those whose applications are referred to the Board for adjudication facing further delays.

Third, barriers to entry may be created if the criteria used for screening are too restrictive or imperfectly targeted at inappropriate agents. For example, evidence of bankruptcy is grounds for rejection of an application for registration, but this may not indicate that someone would act inappropriately as a migration agent.

Effects

To 1 August 1994, the Board has cancelled the applications of 164 agents. This is more than 10 percent of the agents currently practising in the fee-paying sector of the market.

There are two classes of potential agents who may be excluded by the Migration Agents Registration Scheme:

- those who would have practiced in an inappropriate manner; and
- those who would have practiced in an appropriate manner but were screened out or deterred from applying.

The first category should be screened out of the occupation. However, screening is not a costless exercise. Many of the inappropriate agents would only be detected once they undertake inappropriate behaviour. This is because the registration criteria are not very rigorous and are therefore unlikely to exclude all the potential incompetent or dishonest practitioners from the industry. As noted above, 21 registered agents have been charged with offences since the introduction of the scheme. That said, the screening process will still be worthwhile if the costs of screening are less than any other feasible alternative for ensuring appropriate quality in the industry.

The second category should not be excluded from the industry. The result of their exclusion will be to reduce supply and increase the price of the service¹⁷. In a similar manner to the effects of the registration fee, consumers will be worse off as a result of this barrier to entry. However, unlike the fee, those producers that remain will receive the full benefit of any increased charges in the industry.

The exclusion of this group may be justified on the grounds that a perfect screening process is not attainable. Broad rules may be the only feasible method of screening. This may be true, but any assessment of the registration scheme should recognise the costs of inappropriately screening out potential agents.

¹⁷ The size of any price increase will depend upon the extent to which migration agents' services are rationed. Even if there are a large number of agents, as long as the time of these agents is scarce, there will be upward pressure on prices resulting from a reduction in the total number of agents. The relative scarcity of agents' time will depend, in part, on the number of applications that agents process or could potentially process. To determine the potential demand for agents' services, the ORR sought information from the Department of Immigration and Ethnic Affairs on the number of migration applications lodged each year in Australia. However, this data was unavailable.

Summary

The ORR is concerned that the scheme appears to exhibit the potential for barriers to (legitimate) entry. To the extent that such barriers arise, the principal beneficiaries would be incumbent agents who would benefit at the expense of potential agents and consumers. While there is no clear evidence that entry barriers are a significant problem at present, the ORR considers that actions to minimise the risk of entry barriers are justified.

OTHER MEASURES

Part (b) of the Committee's terms of reference asks it to examine the need for and desirability of changes to the scheme.

The previous discussion has highlighted problems with some of the details of the current scheme. The fee structure does not promote efficiency and the scheme exhibits the potential for barriers to entry. If the scheme is retained, these problems should be addressed.

Beyond detailed changes to the scheme, the overall cost and effectiveness of the present scheme should also be considered. In addition to the foregoing problems, the costs involved in excluding agents under the scheme are not insignificant and the success of the screening process is unclear!¹⁸ It appears possible that the scheme in its present form may be a costly and yet imperfect solution to problems in the migration agents market.

Were the weight of evidence before the Committee to confirm this view, the issue would arise as to whether the registration scheme should be retained (perhaps with modifications) or whether it should either be augmented with other measures or abandoned altogether in favour of less costly and administratively complex alternatives. There are two general types of alternative measures: those that provide information to consumers; and those that operate by excluding migration agents!¹⁹

In comparing alternative measures, assessments need to be made against several criteria. An important criterion will be how effective a measure is in minimising the number of consumers harmed by inappropriate agents. Other considerations include administrative simplicity, the costs placed on other consumers, agents and government, and the nature of any barriers to entry.

In the following sections, the ORR describes how the various measures would work and sets out their main advantages and disadvantages.

¹⁸ A measure of the success of the screening process is the difference between the rate of inappropriate behaviour before and after the introduction of the scheme. The ORR recognises the inherent practical difficulties in obtaining evidence on the extent of inappropriate behaviour before the scheme. However, were the Committee able to gather information on this matter, it would help shed light on the success of the scheme.

¹⁹ In addition to these, other measures which could in theory be used include: reliance on the common law to constrain the inappropriate practices of agents; price surveillance to overcome concerns about potential over-charging; or increased government provision of migration agent services.

Provision of information to consumers

There are three main ways government can provide information to consumers of migration advice about the services on offer: consumer warnings, listing and certification schemes. Broadly speaking, the aim of these measures is to augment consumers' decisions about which agent, if any, they should choose. As these measures do not seek to exclude persons from acting as migration agents, if implemented by themselves the measures leave the major onus of determining the appropriate qualities of agents with consumers, rather than seeking to transfer it to government agencies.

Consumer warnings and information

Consumer warnings could be used to inform consumers of the potential dangers of employing migration agents. This may include media campaigns, warnings on immigration forms, warnings posted at immigration offices, or any other activity that would increase the information available to consumers. Consumer warnings of this nature would provide an incentive for consumers to better inform themselves about agents and services they may potentially hire. However, for these consumer warnings to be effective, consumers need to be able to comprehend and utilise the information provided. There are also costs involved with disseminating information.

The provision of general information about services offered by migration agents may also help overcome problems in the market place. For example, overcharging may be a concern if consumers have little experience in hiring migration advice and therefore little to compare with the prices charged for particular services. Indicative pricing schedules may be a low cost way of informing consumers of the prices they should expect to pay .

Listing

Under this approach, migration agents could choose to be listed as agents. Alternatively, listing could be made mandatory. Listing could require information such as the name, address, and business organisation of the agent to be recorded. Agents could choose to volunteer additional information, such as their qualifications. No prohibitions would be placed on those listing themselves as an agent. The listing authority would not vouch for the accuracy of the information, and would include a disclaimer to this effect on the lists. Information provided would nevertheless be subject to false and misleading advertising provisions.

The main benefit of this approach is that consumers would have access to a list of agents and this may reduce the amount of time or effort required to find an agent. Dissatisfied consumers would also be able to easily find another agent. Interested parties would be better able to trace agents if necessary— for example, when an agent has breached the law.

One cost of the scheme is that it may impose some administrative burden on the government and the agents, although the magnitude of the costs involved is unlikely to be significant. The system is also of limited strength as it is unlikely to deter a significant proportion of inappropriate agents from practicing.

Certification

A stronger option is to implement a certification process. Agents could list themselves and volunteer any additional information that they feel will assist them. For example, they may declare that they are a qualified lawyer, that they have practiced in the industry for a certain period, or that they have processed a certain number of previous applications. The administering body would have the responsibility for verifying the accuracy of any claims made by an agent.

A certification scheme would have the advantage of supplying the market with independently verified information. It would also avoid the problem of having to determine and administer appropriate entrance standards²⁰ and would thereby allow consumers a greater range of choice.

Against this, the process of verification would place some administrative costs on the Government. A verification fee would thus need to be considered. Another possible concern is that consumers may be led into a false sense of security if the government is unable to faultlessly verify all claims. However, the extent of this problem is unlikely to be large.

Exclusion of agents

As well as assisting with the provision of information, government may have a role in the policing of inappropriate practice by agents. The goal of policing will be to minimise the number of consumers adversely affected by inappropriate agents in a cost-effective manner. This role can be carried out, as it is under the current registration scheme, by attempting to screen out agents likely to cause harm to consumers. Alternatively, a 'negative licensing' approach can be used in which agents would only be prohibited from practising if they committed some form of offence deemed serious enough to warrant their exclusion from the industry. This could either be a violation of general consumer protection legislation, or of specific regulation that may be written for the industry.²¹ The following section compares the two approaches.

Negative licensing versus registration

Which approach is most effective in reducing the harm to consumers caused by inappropriate agents?

The registration scheme operates by pre-screening potential agents. However, in practice, not all inappropriate agents will be excluded from the industry. This is partly because the screening process relies on objective evidence of qualifications and/or experience as judgments about individual character, but these will not always be reliable predictors of future inappropriate behaviour, particularly dishonesty. Some

²⁰ As discussed earlier, the determination of the entrance standards is of particular concern if the determining body is dominated by the interests of incumbent producers. The incumbent producers may seek to bias the entry criteria to unduly limit entry into the occupation.

²¹ General consumer protection legislation has the advantage of being less open to influence from concentrated producer groups, and more likely to promote efficient resource allocation between different industries. General consumer protection legislation would include laws such as those banning false or misleading advertising.

inappropriate agents will thus be able to operate for some time without being detected, and during this time will harm some consumers. The total number of consumers harmed will depend on the number of inappropriate agents let through the screening procedure and the time taken to detect their behaviour.

With negative licensing, no screening is conducted before agents enter the industry. The number of inappropriate agents entering the industry will therefore be higher than under a registration scheme. However, since negative licensing focuses on pursuing and excluding agents who actually operate inappropriately, inappropriate agents may be detected sooner under negative licensing than under a registration scheme²²

Consequently, it is uncertain which scheme would result in the least number of consumers being harmed by inappropriate agents. The outcome will depend on the success of the screening process and the relative speeds of detection²³. While the ORR's inclination is that an effective registration scheme would be at least slightly superior to a negative licensing scheme at reducing the problems associated with inappropriate service, this is ultimately an empirical matter.

Against other criteria, negative licensing is superior to registration:

- negative licensing is administratively simpler than a registration scheme. Entry standards and registration fees do not need to be determined, and the time consuming task of vetting applications is unnecessary.
- negative licensing imposes fewer costs on consumers who are not harmed by inappropriate agents. The absence of a registration fee means that prices should be lower. In addition, free entry to the industry will allow consumers to choose from a greater variety of sources of migration advice.
- negative licensing does not erect a barrier to enter the migration advice market. As noted earlier, registration does as it imposes a registration fee and stipulates minimum requirements of agents. These barriers to entry may be particularly harmful if the body setting the entry requirements is dominated by the interests of incumbent agents.

Combinations of measures

These measures are not mutually exclusive — various combinations could be implemented. In particular, different methods of information provision could be combined with different methods of excluding agents.

One possibility is to implement either compulsory listing or certification in conjunction with a negative licensing scheme. This would provide reasonable information to consumers about different migration agents and would allow for the exclusion of

²² Enforcement can be upgraded by pro-active monitoring in the industry. This could include spot-surveying clients of migration agents to determine if they received reasonable service. A more vigorous form of monitoring that the Committee may wish to consider, subject to legal concerns of entrapment, is the possibility of officials, acting as migration clients, purchasing the services of individual migration agents and therefore testing the quality of service.

²³ Technically, negative licensing will reduce the probability of receiving a poor service if the proportionate reduction in detection time exceeds the proportionate increase in the initial number of inappropriate agents.

inappropriate agents. However, it would avoid some of the downsides of the existing registration scheme. The Committee may wish to consider this approach in its inquiry.