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## **A SHIELD OR A SWORD? MIGRATION LAW AND POLICY AND MODERN SLAVERY IN AUSTRALIA**

### **Abstract**

How might migration legislation and policies contribute to modern enslavement of migrants in Australia? Migration law and policy are a shield in the sense that they have been used and have the potential to be used to shield or protect trafficked individuals and those subject to modern slavery. Nevertheless, the state could be complicit in modern slavery through its migration law and policies exemplified by English language requirements for visas and for entering into certain professions. By placing the English language barrier between migrants and their economic and professional aspirations in obvious cases when a demand for proof of English language proficiency must not be made in the first place, the Australian Government and institutions create the environment conducive for excluding migrants from the professions and exposing them to economic abuse and exploitation. The stated basis of the English language requirements for Australian visas is that English language 'is critical to getting a job' and safely practising a profession and participating in Australian society. Yet migrants from non-exempt countries are required to sit for an English test when they apply for permanent resident visas (such as Subclass 186) and temporary visas (such as Subclass 485), even when they are present and already employed in Australia. Educational qualifications in English awarded by Australian and non-Australian tertiary educational institutions that satisfy the Australian study and qualification requirements are not the acceptable proof of competency in the English language. The effect of non-recognition of educational qualifications in English as proof of the English language ability is that visa applicants from non-exempt countries, even

those present and working in Australia and/or who have completed a course of study in Australia, have to sit for an English language test. The content of this test bears no connection whatsoever with the English language used in practice. The test has an expiry date thereby tying migrants' English language ability to the test expiry date, suggesting that once the test expires, so does their competency in English. Failing one component of the test requires resitting all the four components. Whereas an Australian educational qualification in English is required for admission to the legal, medical and nursing professions, the English language competence of migrants from non-exempt countries who hold the qualification is extracted from this qualification. Therefore, migrants cannot rely on the qualification as proof of their competency in English, even though the practice boards accept this same qualification as meeting the standards for admission to practise. The evidence disallowed or required to prove the English language capability both for Australian visas and to enter into the professions thus belies the stated purposes of the English language requirements. English is a global language that is spoken by different nationalities in different parts of the world. Therefore, taking a blanket approach that proficient speakers of English originate in the nations that are exempt from the English language requirements ignores the reality of English language usage. In these circumstances, the English language would seem a disguised legal and policy tool for gatekeeping, exclusion and nationality-based discrimination. The deliberate denial of the English language abilities of certain migrants and the stipulation of absurd and inexplicable evidentiary requirements as proof of the English language competency deprive such migrants of opportunity to enter into professions of their choice, ridicule and expose them to exploitation and modern slavery contrary to Australian values and legislation on equality and fair play.

### **KEYWORDS**

Australia, English, English language requirements, migration, modern slavery, slavery

### **SŁOWA KLUCZOWE**

Australia, język angielski, wymogi języka angielskiego, migracja, współczesne niewolnictwo, niewolnictwo

## 1. INTRODUCTION<sup>†</sup>

In their seminal paper, *The Weaponisation of Language: English Proficiency, Citizenship and the Politics of Belonging in Australia*, Rachel Burke, Nisha Thapliyal and Sally Baker argue powerfully that:<sup>1</sup>

Language has long been used as a gate-keeping device in Australia’s colonial and postcolonial history. The use of language to select ‘worthy’ immigrants was evident in the so-called ‘White Australia Policy’, which was a suite of legislation adopted in 1901 to ensure migrant intake contributed to the imagined British ‘national identity’. Under this policy, any potential entrant to Australia could be required to undertake a dictation test, administered at the discretion of immigration officers, in any European language. While the policy governing the implementation of the dictation test made no reference to ‘race’, it functioned as a means of exclusion for those deemed ‘unsuitable’ for migration, including for reasons of ethnicity. Proponents, including trade unionists and ministers from across the political spectrum, defended the dictation test and broader immigration platform as a means of maintaining ‘national identity’, economic growth, and social harmony.

The authors also state that English language proficiency ‘is being used to “weaponise” Australian citizenship discourse against more pluralistic and participatory conceptions of belonging and citizenship.’<sup>2</sup> In this paper, I argue that the English language requirements for visas and for entering into certain professions in Australia applicable solely to non-citizens of certain nationalities not only play the role of gate-keeping (excluding or including, depending on the nationality of the applicant involved), but these requirements also mask inequality of treatment, exploitation, nationality-based discrimination and modern slavery. I argue also that these English language requirements contravene or are inconsistent with the Racial Discrimination Act 1975 (No. 52, Cth) and Australian values of equality of treatment and fair play.

The Commonwealth of Australia’s commitment to address inequality and modern slavery is without doubt, at least in terms of legislation and policy. An example is the National Action Plan to Combat Human Trafficking and Slavery 2015–19 (NAPCHTS).<sup>3</sup> The NAPCHTS ‘recognises the dignity and worth of each person, and the obligation’ Australia has ‘to work against those who seek to ben-

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<sup>†</sup> I would like to express my sincere gratitude to Dr Rachel Burke of the University of Newcastle who generously reviewed and gave me an opinion on an earlier draft of this paper. I very much appreciate her generosity and expert opinion.

<sup>1</sup> R. Burke, N. Thapliyal, S. Baker, *The Weaponisation of Language: English Proficiency, Citizenship and the Politics of Belonging in Australia*, ‘Journal of Critical Thought and Praxis’ 2018, Vol. 7(1), p. 87.

<sup>2</sup> *Ibid.*, p. 85.

<sup>3</sup> National Action Plan to Combat Human Trafficking and Slavery 2015–19, Commonwealth of Australia 2014.

efit by restricting another's freedom.<sup>4</sup> It was a 'strategic framework for Australia's response to human trafficking and slavery.'<sup>5</sup> The NAPCHTS was a successor plan to numerous previous action plans to eradicate trafficking in persons.<sup>6</sup> This commitment is also reflected in the enactment of the Modern Slavery Act 2018 (No. 153, Cth). According to its long title, the Act requires defined entities 'to report on the risks of modern slavery in their operations and supply chains and actions to address those risks, and for related purposes'.

Australia's commitment to non-discrimination and equality of treatment regardless of nationality and race is also reflected in the Racial Discrimination Act 1975, Australian Human Rights Commission Act 1986 and international human rights conventions to which Australia is a party.<sup>7</sup> The Racial Discrimination Act makes racial discrimination unlawful stating in section 9(1) and (1A) respectively that:

It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

Where:

- (a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and
- (b) the other person does not or cannot comply with the term, condition or requirement; and

<sup>4</sup> *Ibid.*, p. 1, para. 1.2.

<sup>5</sup> *Ibid.*

<sup>6</sup> Interdepartmental Committee on Human Trafficking and Slavery, *Trafficking in Persons: The Australian Government Response, 1 July 2015–30 June 2016*, Commonwealth of Australia 2016; Interdepartmental Committee on Human Trafficking and Slavery, *Trafficking in Persons: The Australian Government Response, 1 July 2014–30 June 2015*, Commonwealth of Australia 2015; Interdepartmental Committee on Human Trafficking and Slavery, *Trafficking in Persons: The Australian Government Response, 1 July 2013–30 June 2014*, Commonwealth of Australia 2014; Interdepartmental Committee on Human Trafficking and Slavery, *Trafficking in Persons: The Australian Government Response, 1 July 2012–30 June 2013*, Commonwealth of Australia 2014; Anti-People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government Response, 1 July 2010–30 June 2011*, Commonwealth of Australia 2011; Anti-People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government Response, 1 May 2009–30 June 2010*, Commonwealth of Australia 2010; and Anti-People Trafficking Interdepartmental Committee, *Trafficking in Persons: The Australian Government Response, January 2004–April 2009*, Commonwealth of Australia 2009.

<sup>7</sup> For example, International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by the UN General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

(c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;

the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

By section 9(2) of the Racial Discrimination Act, the rights against which people should not be discriminated based on race, colour, descent or national or ethnic origin include those contained in International Convention on the Elimination of All Forms of Racial Discrimination, such as: (i) political rights, in particular the right 'to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service'<sup>8</sup>; and (ii) economic, social and cultural rights, in particular, the 'rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment'<sup>9</sup> and the 'right to public health, medical care, social security and social services'<sup>10</sup>. This essentially means that the Commonwealth of Australia has obligations under domestic law and international law to promote equal access to public service and non-discrimination.

The Racial Discrimination Act also strongly stands for equality of treatment before the law in Australia. It is stipulated in section 10(1):

If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

Thus, in the event of conflict between a provision of the Racial Discrimination Act and another enactment, whether primary or delegated legislation, the provisions of the Act on equality of treatment and non-discrimination shall prevail. By section 9(1) of the Act, a distinction, exclusion, restriction or preference based on race or nationality is prohibited if the purpose or effect of the distinction, exclusion, restriction or preference is the nullification or impairment of the recognition, enjoyment or exercise of a human right or fundamental freedom. Thus national, racial or ethnic background alone and presumed language capacity or

<sup>8</sup> International Convention on the Elimination of All Forms of Racial Discrimination, UN General Assembly Resolution 2106 (XX), adopted on 21 December 1965, Article 5(c).

<sup>9</sup> *Ibid.*, Article 5(e)(i).

<sup>10</sup> *Ibid.*, Article 5(e)(iv).

incapacity based on that national, racial or ethnic background are not sufficient in and of themselves to justify the distinction, exclusion, restriction or preference, when doing so would result in a denial of fundamental human rights and freedoms, including the right to work and the right to public service. By section 9(1A) of the Racial Discrimination Act, conditions and requirements imposed on persons of one race but not on another: must be reasonable having regard to 'the circumstances of the case', which would include the purpose of the condition or requirement; must be possible for such persons to comply with; and must not be designed to or have the effect of nullifying or impairing the recognition, enjoyment or exercise of a fundamental human right.

The preceding analysis of policy instruments and legislation supports the proposition stated earlier that there is a commitment to equality of treatment and combating modern slavery and human trafficking in Australia. In this paper, I explore the extent to which Australian migration law and employment requirements promote racism, inequality and modern slavery. Migration law and visas can be used to prevent and address the problems of inequality and modern slavery. However, it is possible that visa requirements can create conditions that put migrants at the risk of exploitation, abuse and unequal treatment by both the Commonwealth and non-Commonwealth entities. I address this issue with specific reference to temporary and permanent resident visas and corresponding English language requirements for the grant of visas and English language requirements for entry into certain professions in Australia.

Migration law can be a shield in the sense that it can be used to protect migrants who might be subject to unequal treatment and modern slavery in Australia or their home countries. At the same time, migration law could justify the maintenance of migrants on temporary visas through which they work at the risk of exploitation, unequal treatment, and exclusion from the protection of both the state and private businesses. Thus, migration law and policy are both a shield and a sword in the sense that they can protect and promote modern slavery in Australia. The commitment of the Commonwealth of Australia is to prevent and remove modern slavery. This objective cannot be effectively achieved if aspects of the law and policy on migration allow modern slavery to flourish behind formal requirements. Given the commitment of the Commonwealth of Australia to fight modern slavery, its migration law and policy must be a shield, not a sword.

Primarily, this task is accomplished by the review, interpretation and analysis of applicable legislation, regulations, and policy documents.

## 2. MIGRATION LAW, VISAS AND ENTRY INTO AUSTRALIA

### 2.1. THE POWER TO SET VISA CRITERIA AND GRANT VISAS

Every sovereign state has the inherent right to regulate the entry of foreign citizens into its territory. This is achieved usually through migration legislation that prescribes the criteria that must be met for a person to be granted the permit to enter into the country. Unless a country enters into an international migration treaty or agreement that limits its authority on the admission of aliens or non-citizens into the country, that authority would be limited only as provided for by domestic law and/or customary international law. Thus, each country has the freedom to determine the criteria for the grant of a permit to enter the country and the conditions for the continuous holding of that visa or permit.

In Australia, the primary legislation regulating the entry of non-citizens into the country is the Migration Act 1958 (Cth). The Act is supplemented by subsidiary legislation made under it, such as the Migration Regulations 1994 (Cth). Section 4(1) provides that the 'object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.' This object is achieved by the provision in the Act 'for visas permitting non-citizens to enter or remain in Australia.'<sup>11</sup> Non-citizens may travel to Australia only when they hold a valid visa.<sup>12</sup> According to sections 31, 40 and 41 of the Migration Act, the classes of, criteria and conditions for visas may be prescribed by regulations. Pursuant to these provisions, Division 2.1 of the Migration Regulations has provisions for the classes, criteria and conditions for visas. After considering a valid application for a visa, the Minister may grant the visa if the application meets the criteria or refuse to grant the visa if the application does not satisfy the criteria.<sup>13</sup>

These provisions of the Migration Act and Migration Regulations are central to the power to create classes of visas and to specify the criteria for the grant of or refusal to grant a visa as well as the conditions for the holding of the visa. The prescribed criteria for the grant of a visa of a particular class are grouped into primary criteria and secondary criteria.<sup>14</sup> The English language requirements as a criterion for a visa, which is the subject of this paper, may source its legal legitimacy in these provisions.

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<sup>11</sup> Migration Act 1958 (No. 62, Cth), s. 4(2).

<sup>12</sup> *Ibid.*, s. 42(2).

<sup>13</sup> *Ibid.*, s. 65.

<sup>14</sup> Migration Regulations 1994 (Cth), Reg 2.03(1).

## 2.2. ENGLISH LANGUAGE AND VISAS IN AUSTRALIA

### 2.2.1. THE PURPOSE OF ENGLISH LANGUAGE REQUIREMENTS

The Honourable Alan Tudge MP, then Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs explained the purposes of the English language requirements thus in a press release in October 2020:<sup>15</sup>

English is our [Australians'] national language and is critical to getting a job, fully participating in our democracy and for social cohesion. (...)

While the ability to speak multiple languages is a great asset for an individual and for Australia, a person will struggle to fully participate in our society and democracy without basic English.

In fact, the title of the press release speaks for itself: 'New requirement to learn English *to maximise job prospects*' (emphasis added). Similarly, according to the then Department of Immigration and Border Protection:<sup>16</sup>

The Department uses English language requirements to protect the integrity of Australia's visa programmes, and to ensure visa holders are able to safely participate in Australian society.

English language requirements generally apply across the Student and Skilled visa programmes and are prescribed in the *Migration Regulations 1994*. Required evidence of English language proficiency differs across visa subclasses to reflect the different objectives of respective visa programmes. For example, a Student visa applicant's English language ability should allow them to successfully complete a course of study in Australia; whereas a Skilled visa applicant must demonstrate that their general English ability will allow them to successfully participate in the labour market.

Thus, being able to get a job and participate in the Australian labour market and society are generally the central objectives of the Australian English language requirements. However, some employed migrants and students who successfully complete a course of study in Australia are still required to sit for an English test to prove their proficiency in English just because of their nationality. The disconnect between these stated purposes of English language requirements and evidence required to prove English language proficiency, and the implication for discrimination, inequality and modern slavery are discussed in the subsequent sections.

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<sup>15</sup> Australian Government Department of Home Affairs, *New Requirement to Learn English to Maximise Job Prospects*, 8 October 2020, <https://minister.homeaffairs.gov.au/alantudge/Pages/New-requirement-to-learn-English-to-maximise-job-prospects.aspx> (accessed 07.01.2021).

<sup>16</sup> Australian Government Department of Immigration and Border Protection, *Review of the Implementation of Alternative English Language Proficiency Tests in the Student Visa Programme*, 2013, p. 4, <https://www.homeaffairs.gov.au/reports-and-pubs/files/report-english-test.pdf> (accessed 13.02.2021).

### 2.2.2. THE ENGLISH LANGUAGE REQUIREMENTS FOR VISAS IN AUSTRALIA

The Migration Act 1958 itself has only one provision addressing the subject of *functional* English language proficiency for visa applicants in section 5(2):

For the purposes of this Act, a person has functional English at a particular time if: (a) the person passes a test that: (i) is approved in writing by the Minister for the purposes of this subsection; and (ii) is conducted by a person, or organisation, approved for the purposes of this subsection by the Minister by notice in the *Gazette*; or (b) the person provides the Minister with prescribed evidence of the person's English language proficiency.

Regulation 5.17 of the Migration Regulations 1994 made pursuant to and to give effect to section 5(2) of the Migration Act stipulates the following:

For the purposes of paragraph 5(2)(b) of the Act (dealing with whether a person has functional English), the evidence referred to in each of the following paragraphs is prescribed evidence of the English language proficiency of a person: (a) evidence specified by the Minister in an instrument in writing for this paragraph; (b) evidence that: (i) the person holds an award (being a degree, a higher degree, a diploma or a trade certificate) that required at least 2 years of full-time study or training; and (ii) all instruction (including instruction received in other courses for which the person was allowed credit) for that award was conducted in English.

The scope and operative effect of these provisions of the Migration Act and the Migration Regulations, and their limits to the power of the Governor-General or the Minister responsible for immigration to make regulations on English language proficiency as a criterion for a visa have been considered elsewhere.<sup>17</sup> The combined effect of section 5(2) of the Migration Act and Regulation 5.17 of the Migration Regulations is that a person must have functional English and that they satisfy the functional English requirements for purposes of the Migration Act, i.e. they produce an English test<sup>18</sup> result with the requisite score (the test having been conducted in three years before the day the application is made) or evidence of the specified educational qualification in English, or they are citizens of and hold the passport of Canada, the Republic of Ireland, New Zealand, the United King-

<sup>17</sup> D. Dagbanja, *The Invisible Border Wall in Australia*, 'UCLA Journal of International Law and Foreign Affairs' 2019, Vol. 23(2), p. 221; and D. Dagbanja, *A Gamble to Take? Visas and Delegated Legislative Power on English Language in Australia*, 'Statute Law Review' 2021, Vol. 42(2), p. 156.

<sup>18</sup> International English Language Testing System (IELTS) for which the average band score of at least 4.5 based on the four test components is required; Test of English as a Foreign Language internet-based Test (TOEFL iBT), for which a total band score of at least 32 based on the four test components of speaking, reading, writing and listening is required; Pearson Test of English Academic (PTE Academic), for which a total band score of at least 30 based on the four test components is required; Cambridge English: Advanced (CAE), for which a total band score of at least 147 based on the four test components is required.

dom or the United States of America.<sup>19</sup> Both the Migration Act and the Migration Regulations do not stipulate that these requirements apply to any specific visas, suggesting they were designed to apply to all visa classes and subclasses. The Migration Regulations specify functional English in relation to visas such as Subclass 407 (Training)<sup>20</sup> and Subclass 462 (Work and Holiday)<sup>21</sup>.

This is a reasonable, flexible and comprehensive regime of English language requirements because it accommodates the different situations of different visa applicants such that they may be required to produce an English test result (if they do not hold any educational qualifications in English and lack other evidence of functional English), be a citizen and hold a passport from any of the specified countries (based on the questionable assumption that everyone who holds a passport from any one of these countries has functional English), or provide evidence of educational qualifications in English. The purposes of requiring a person to prove their English language competence, namely, to be able to get a job and participate in Australian society, can effectively be served by using any of these mechanisms to prove functional English. Yet different classes and subclasses of visas come with different English language requirements without showing that the main and primary purposes of the Act are not served by the functional English language requirements.

Another type of English language requirement is *vocational* English, which is applicable to visas such as: Subclass 160 (Business Owner);<sup>22</sup> Subclass 161 (Senior Executive);<sup>23</sup> and Subclass 162 (Investor).<sup>24</sup> A person has *vocational* English if he/she holds a passport of a country specified above or if the person has undertaken a language test and obtained the required score within three years before the application for the visa.<sup>25</sup>

The third type of English language required of visa applicants depending on the visa involved is *competent* English. A person has competent English if he/she

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<sup>19</sup> Migration Regulations 1994 – Evidence of Functional English Language Proficiency 2015 – IMMI 15/004, dated 3 December 2014, commenced 1 January 2015. Australian Government Department of Home Affairs, *English Language: Functional English*, <https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/english-language/functional-english> (accessed 07.01.2020).

<sup>20</sup> Migration Regulations 1994 (Cth), clause 407.215 of Schedule 2.

<sup>21</sup> *Ibid.*, clause 462.215 of Schedule 2.

<sup>22</sup> *Ibid.*, clause 160.216 of Schedule 2.

<sup>23</sup> *Ibid.*, clause 161.215 of Schedule 2.

<sup>24</sup> *Ibid.*, clause 162.215 of Schedule 2.

<sup>25</sup> *Ibid.*, Reg 1.15B. The tests required are: IELTS, requiring at least 5 for each of the four test components; TOEFL iBT, requiring at least 4 for listening, 4 for reading, 14 for writing and 14 for speaking; PTE Academic, requiring at least 36 for each of the four test components; OET, requiring at least B for each of the four test components; Cambridge C1 Advanced test with at least 154 in each of the four test components. Australian Government Department of Home Affairs, *English Language: Vocational English*, <https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/english-language/vocational-english> (accessed 07.01.2021).

has undertaken a language test and obtained the required score or hold a passport of a specified country.<sup>26</sup> Competent English is required in the case of visas such as: Subclass 489 (Skilled-Regional-Provisional);<sup>27</sup> Subclass 491 (Skilled Work Regional-Provisional);<sup>28</sup> Subclass 494 (Skilled Employer Sponsored Regional);<sup>29</sup> Subclass 186 (Temporary Residence Transition stream);<sup>30</sup> Subclass 186 (Direct Entry stream);<sup>31</sup> and Subclass 187 (Temporary Residence Transition stream)<sup>32</sup>.

The Migration Regulations also provide for *proficient* English and *superior* English. Both require an applicant to undertake a test.<sup>33</sup> There is no requirement to hold a passport from the specified countries. The difference between them is in the test score required.<sup>34</sup>

Three things are common to all English language requirements. Firstly, all non-citizens from countries other than Canada, Ireland, New Zealand, the United States of America and the United Kingdom must sit for an English test and produce the required score specific to the visa type and level of English language proficiency for that visa, unless an exemption applies. Secondly, citizens of these specified countries are not required to produce evidence of English language proficiency; it is sufficient that they are citizens and hold passports of these countries. Thirdly, it is a common requirement for each of the different levels of English language standard that an English test must be conducted during three years immediately before the application for the visa is made. This literally suggests that as the test expires, so does a person's English language proficiency.

This paper focuses on the Subclass 186 (Direct Entry stream) visa and Subclass 186 (Temporary Residence Transition stream) and Subclass 485 (Temporary Graduate) visas because of the unnecessarily duplicitous nature of the English

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<sup>26</sup> Migration Regulations 1994 (Cth), Reg 1.15C; and Migration Regulations 1994 – Specification of Language Tests, Score and Passports 2015 – IMMI 15/005, dated 3 December 2014. The test scores required are: an IELTS test score of at least 6 in each of the four test components of speaking, reading, writing and listening; or an OET test score of at least B in each of the four test components of speaking, reading, writing and listening; or a TOEFL iBT test score with at least the following scores in the four test components: 18 for speaking, 13 for reading, 21 for writing and 12 for listening; a PTE Academic test score of at least 50 in each of the four test components of speaking, reading, writing and listening.

<sup>27</sup> Migration Regulations 1994 (Cth), clause 489.223 of Schedule 2.

<sup>28</sup> *Ibid.*, clause 491.215 of Schedule 2.

<sup>29</sup> *Ibid.*, clause 494.226 of Schedule 2.

<sup>30</sup> *Ibid.*, clause 186.222 of Schedule 2.

<sup>31</sup> *Ibid.*, clause 186.232 of Schedule 2.

<sup>32</sup> *Ibid.*, clause 187.222 of Schedule 2.

<sup>33</sup> *Ibid.*, Regs 1.15D and 1.15EA.

<sup>34</sup> For proficient English, an IELTS test score of at least 7 in each of the four test components of speaking, reading, writing and listening or a score of at least B in each of the four components of an OET is required. In the case of superior English, an IELTS score of at least 8 in each of the four test components of speaking, reading, writing and listening or a score of at least A in each of the four components of an OET is required. See note 26 above, Migration Regulations 1994 – IMMI 15/005, *op. cit.*, paras D, E, G and H.

language requirements. As shown in the following paragraphs, English language ability is an inherent or integral part of the qualification or eligibility to be nominated to apply for the 186 or to make a direct application for the 485 visa. Nevertheless, educational qualifications or evidence of employment in Australia does not exempt applicants for these visas from the English language requirements of either sitting for an English test or producing a passport from one of the specified countries.

The 186 visa is an employer-nominated visa. An applicant for the Subclass 186 (Direct Entry stream) visa must be nominated by a person or employer who will employ the applicant and the nomination must be approved by the Minister responsible for immigration and border protection.<sup>35</sup> The person nominated may be a prospective employee<sup>36</sup> or may already be employed in Australia.<sup>37</sup> An assessing authority specified by the Minister in an instrument in writing may assess the applicant's 'skills as suitable for the occupation' and whether the applicant has been 'employed in the occupation for at least 3 years on a full-time basis and at the level of skill required for the occupation.'<sup>38</sup> It follows that the processes for assessment of an applicant for Subclass 186 (Direct Entry stream) require satisfaction of the employer, the assessing authority (if required) and the Minister that the person nominated for the visa possesses skills required for the nominated position, and these skills must necessarily include the English language ability if the nomination job is to be performed in English. In other words, by the time the person is nominated for this category of visa, the employer would have already been satisfied of the nominated person's skills and English language ability to perform the job using English. The Minister's approval of the nomination affirms that the person possesses the skills, including the English language ability appropriate for the job.

While the Subclass 186 (Direct Entry stream) visa covers persons who are either already employed or are yet to be employed, Subclass 186 (Temporary Residence Transition stream) visa is available only to persons who are already employed in Australia and are nominated by their employer for this visa. To be nominated for Subclass 186 (Temporary Residence Transition stream), the person must have been employed in Australia under a temporary skill visa, which had been the Subclass 457 (Temporary Work (Skilled)) visa until it was replaced by the Subclass 482 (Temporary Skill Shortage) visa in 2018.<sup>39</sup>

Although English language is an integral part of an applicant's eligibility to be employed in the first place and then subsequently nominated for either of the 186 visas, it is still a criterion common to the primary criteria for these visas that

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<sup>35</sup> Migration Regulations 1994 (Cth), clause 186.233(1)–(3) of Schedule 2.

<sup>36</sup> *Ibid.*, clause 186.233(2) of Schedule 2.

<sup>37</sup> *Ibid.*, clause 186.234(2) of Schedule 2.

<sup>38</sup> *Ibid.*, clause 186.234(2)(a) and (b) of Schedule 2.

<sup>39</sup> *Ibid.*, clause 186.223 of Schedule 2, and Reg 5.19(5).

an applicant must be *competent in English* or be a person in the class of persons specified by the Minister in an instrument.<sup>40</sup> Applicants for these subclasses of visas who are not citizens and do not hold the passport of the United Kingdom, the United States, Canada, the Republic of Ireland or New Zealand can only meet the competent English language requirement by producing evidence of a test score, even when they are already employed in Australia. Their prior work experience in Australia and evidence of educational qualifications obtained in or outside Australia for which instruction was conducted in English do not meet the competent English requirements.<sup>41</sup> There is no exemption from the English language requirements for 186 visa applicants who are not citizens of and do not hold passports of the specified countries.<sup>42</sup>

In accordance with the criteria for the Subclass 485 (Temporary Graduate) visa, the applicant must hold a qualification or qualifications conferred or awarded by an educational institution specified by the Minister and satisfy the Australian study requirement.<sup>43</sup> Each degree, diploma or trade qualification used to satisfy the Australian study requirement must be closely related to the applicant's nominated skilled occupation.<sup>44</sup> According to Regulation 1.15F of the Migration Regulations, the Australian study requirement is satisfied if a person has completed a degree or more degrees, diplomas or trade qualifications awarded by an Australian educational institution for which all instruction was conducted in English. The qualification must be obtained while the applicant for the 485 visa held a student visa. A degree, according to Regulation 2.26AC(6) of the Migration Regulations, means 'a formal educational qualification, under the Australian Qualifications Framework, awarded by an Australian educational institution', including a bachelor's degree, a master's degree, a doctoral degree and a postgraduate diploma.<sup>45</sup> Holders of a student visa are required to provide evidence of an English test score with their student visa application, unless they are citizens and holders of a passport from the United Kingdom, the United States of America, Canada, New Zealand or the Republic of Ireland.<sup>46</sup>

<sup>40</sup> *Ibid.*, clauses 186.222 and 186.231 of Schedule 2.

<sup>41</sup> Migration Regulations 1994 – Specification of Language Tests, Score and Passports 2015 – IMMI 15/005, para. 2, 3(C)–(E), 4(D)–(F), 5(D)–and (F).

<sup>42</sup> Migration (LIN 19/216: Exemptions from Skill, Age and English Language Requirements for Subclass 186, 187 and 494 Visas) Instrument 2019, para. 7(2), which addresses exemption from English language requirements, covers only Subclass 187 (Regional Sponsored Migration Scheme).

<sup>43</sup> Migration Regulations 1994 (Cth), clause 485.231(1)–(3) of Schedule 2.

<sup>44</sup> *Ibid.*, clause 485.222 of Schedule 2.

<sup>45</sup> *Ibid.*, clause 500.111 of Schedule 1.

<sup>46</sup> Migration (IMMI 18/015: English Language Tests and Evidence Exemptions for Subclass 500 (Student) Visa) Instrument 2018, para. 6(1) and (2) and Schedule 1; Australian Government Department of Home Affairs, *Subclass 500: Student Visa*, <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/student-500#Eligibility> (accessed 16.01.2021).

Thus the English language ability of an applicant for the Subclass 485 (Temporary Graduate) visa can be established by the facts that they sat for an English test prior to gaining admission to their course of study in Australia and their completion of a course of study in Australia. In the case of those who pursue a postgraduate programme in Australia, they would usually hold an undergraduate degree for which instruction was conducted in English. In spite of these facts, clause 485.212 of Schedule 2 to the Migration Regulations requires that an application for the Subclass 485 (Temporary Graduate) visa be accompanied by evidence that the applicant has undertaken a language test and achieved the specified score.

### 3. ENGLISH LANGUAGE REQUIREMENTS FOR ENTERING INTO PROFESSIONS IN AUSTRALIA

This section focuses on English language requirements for entering into professions in Australia, with specific reference to the legal, medical and nursing professions. These professions are notorious for requiring local certification of eligibility to practice in Australia, including the requirement to undertake a local study in the relevant field. For example, the *Uniform Principles for Assessing Qualifications of Overseas Applicants for Admission to the Australian Legal Profession*<sup>47</sup> require an assessment of legal qualifications of foreign qualified lawyers. Upon assessment, they may be required to study all or some of the core units for an Australian law degree. There is also a requirement for completion of practical legal training before admission can be granted to practice in Australia.<sup>48</sup> Assessments in these programmes come in the form of written assignment and oral presentations. However, the legal qualification obtained in Australia and relied on for admission to practice which the legal practice board accepts does not automatically meet the English language requirements for admission. The Law Admissions Consultative Committee has set very stringent English language requirements that must be satisfied to be admitted to the profession, with very limited and skewed exceptions. The English Language Guidelines require applicants, except those from recognised countries, to sit for an English test with very

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<sup>47</sup> Law Admissions Consultative Committee, *Uniform Principles for Assessing Qualifications of Overseas Applicants for Admission to the Australian Legal Profession*, August 2015, revised 2017, [https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/202136163\\_30\\_Uniform%20Principles%20for%20assessing%20Overseas%20Qualifications.pdf](https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/202136163_30_Uniform%20Principles%20for%20assessing%20Overseas%20Qualifications.pdf) (accessed 16.01.2021).

<sup>48</sup> See, for example, section 21(2)(c) of the Legal Profession Act 2008.

limited scope for gaining an exemption after sitting for the test and obtaining the required score.<sup>49</sup>

To be registered as a medical doctor<sup>50</sup> the applicant must have ‘a combination of *secondary* education and *tertiary* qualifications,’ where the applicant has ‘undertaken and satisfactorily completed at least two years of (...) secondary education which was taught and assessed solely in English in a recognised country.’<sup>51</sup> (emphasis added). The applicant must also have tertiary qualifications in the relevant professional discipline, which the applicant is relying on to support their eligibility for registration under the applicable state legislation ‘which were taught and assessed solely in English in a recognised country.’<sup>52</sup> These must be satisfied in order to meet the English language requirements. In the absence of a *combination* of these qualifications from a *recognised country* the applicant must sit for an English test.

In the case of the nursing profession, applicants for initial registration must demonstrate their English language competence in one of the following ways. They may demonstrate that English is their primary language and they have attended and completed at least six years of primary and secondary education taught and assessed solely in English *in a recognised country*. Two years of this education must have been between years 7 and 12. The tertiary qualification relied on to support the applicants’ eligibility for registration must have been taught and assessed solely in English in a recognised country. A registered nurse or midwife must have successfully completed at least two years of a full-time pre-registration programme of study approved in a recognised country. An enrolled nurse must have successfully completed at least one-year full-time pre-registration programme of study approved in a recognised country. This standard focuses primarily on having English as the primary language and obtaining relevant educational qualifications relied on to register from a recognised country.<sup>53</sup>

Applicants who do not meet these requirements but seek to register as a registered nurse or midwife or both must have successfully completed at least five years full-time equivalent continuous education<sup>54</sup> which was taught and assessed in English in a recognised country, including the tertiary qualifications relied

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<sup>49</sup> Law Admissions Consultative Committee, *English Language Proficiency Guidelines*, October 2018.

<sup>50</sup> Medical Board of Australia, *Registration Standard: English Language Skills*, 1 July 2015, para. 1.

<sup>51</sup> *Ibid.*, p. 2, para. 2(a).

<sup>52</sup> *Ibid.*, p. 2, para. 2(b).

<sup>53</sup> Nursing and Midwifery Board of Australia, *Registration Standard: English Language Skills*, 1 March 2019, p. 2, para. 1.

<sup>54</sup> *Ibid.*, p. 5, where five years (full-time equivalent) continuous education is defined as ‘education over a period of five consecutive calendar years without a break from study apart from the education institution (e.g. school, university or vocation education provider) scheduled holidays.’

on to support the applicant's eligibility for registration. The education must be a combination of tertiary and secondary education; tertiary and vocational education; tertiary, secondary and vocational education; or tertiary education, all taught and assessed in English. The last period of education must be within five years prior to applying for registration.<sup>55</sup>

Those who apply for registration as an enrolled nurse but do not meet primary language and local education requirements must have successfully completed at least five years full-time equivalent continuous education which was taught and assessed in English in a recognised country. The five years include the period spent completing vocational qualifications relied on to support the applicant's eligibility for registration. The education must be continuous and a combination of vocational and secondary education; tertiary and vocational education; tertiary, secondary and vocational education; or tertiary education, all taught and assessed in English. The last period of education must be within five years prior to applying for registration.<sup>56</sup>

Applicants who do not meet these combinations of education from a recognised country are then left with no option but to sit for an English test.<sup>57</sup> As most migrants would have obtained their primary, secondary, vocational and tertiary educational qualifications outside of the recognised countries, they effectively do not qualify for the primary language and educational qualifications exemptions that could free them from the English language test. In effect, the rules on English language requirements are designed in a manner that effectively achieve the object of making sure nearly all migrants do not meet the recognised country requirements sit for an English test, even though they arrived in Australia with relevant combinations of educational qualifications in English from their home countries. The functional English language requirements under the Migration Act 1958 and the Migration Regulations 1994 allow these migrants to enter Australia without further prove of their English language ability once they hold relevant educational qualifications in English from their home countries. Yet these same qualifications neither satisfy the English language requirements for visa Subclasses 186 (both Direct Entry and Temporary Transition streams) and Subclass 485 (Temporary Graduate) nor do they meet the English language requirements for entering into the legal, medical and nursing professions. It is legitimate then to question exactly what the English language requirements for Australian visa and entering into the professions seek to achieve.

The effect of English language requirements is that years of legal, medical or nursing education in a recognised country, including Australia alone may not meet the English language requirements for registration as a legal practitioner, medical practitioner, an enrolled or registered nurse. In other words, for someone

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<sup>55</sup> *Ibid.*, p. 2, para. 2.

<sup>56</sup> *Ibid.*, p. 3, para. 3.

<sup>57</sup> *Ibid.*, p. 3, para. 4.

who does not have a combination of relevant primary, secondary and tertiary qualifications for a continuous period of five years from *a recognised country*, they must necessarily sit for an English test even if they obtained a nursing degree from Australia or any other recognised country, such as Canada, New Zealand, the Republic of Ireland, South Africa, the United Kingdom and the United States of America.<sup>58</sup>

The English language requirements for admission to the legal and medical professions and for registration as an enrolled or registered nurse evidence the fact that while the qualifications relied on for admission to the respective professions obtained even from Australia and other recognised countries are acceptable for admission, the qualifications per se do not evidence the applicant's English language competence. In effect, it means a person's English language ability is severed or extracted from the very qualifications which the respective professional bodies find acceptable for admission. No explanation has been provided as to why that level of educational qualification can be obtained in Australia without acquiring the requisite level of English language competency required for practice in the respective professions. It is less clear why educational qualifications are acceptable for registration to practice the profession yet the person who has obtained or attained that qualification must sit for a separate English test to prove their English language ability. It is less clear why completion of units required for admission to a profession in Australia, instruction for which is conducted in English, would not evidence a person's English language competency. In the case of a non-citizen seeking to register as a registered nurse, they would have been registered as an enrolled nurse in Australia after satisfying the educational and English language requirements. However, such prior evidence does not always satisfy the English language requirements for the next level of a registered nurse. Separating or severing a person's English language competency from the qualifications they hold, instruction for which was conducted in English, without showing that the level of English language competency used for the instruction falls short of that required for practice is anomalous and incongruous. This artificial separation of the English language ability from the qualification obtained by the same person supports the argument that these English language requirements may well be aimed primarily at precluding some opportunities for certain migrants rather than at determining their English language proficiency.

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<sup>58</sup> Nursing and Midwifery Board of Australia, *Registration Standard: English Language Skills*, 1 March 2019; Law Admissions Consultative Committee, *English Language Proficiency Guidelines*, October 2018; and Medical Board of Australia, *Registration Standard: English Language Skills*, 1 July 2015.

## 4. THE ENGLISH LANGUAGE REQUIREMENTS AND MODERN SLAVERY

### 4.1. MODERN SLAVERY IN THE AUSTRALIAN CONTEXT

The very migrants who are required to sit for an English test when they seek to apply for visa Subclasses 186 (Direct Entry stream) and 186 (Temporary Transition stream) and other permanent visas requiring only an English test as proof of competency in English would have been assessed for functional English based on their educational qualifications in English or based on a previous English test when they were granted temporary visas. These migrants could literally remain in Australia for the rest of their working lives if they choose to remain in Australia on temporary visas without being questioned on their English language ability. If ever they are granted permanent visas, they may remain on the same job and operate at the same level or standard of English language usage they did when they were on temporary visas. Indeed, permanent visa holders and those granted citizenship are never required to operate in practice, carry out their duties or participate in Australian society at a different level of English language ability than they did when they held temporary visas. This means that a visa category or subclass alone cannot reasonably and objectively justify the rejection of educational qualifications in English as proof of competence in English. It equally cannot justify setting different levels of English language proficiency for different visa subclasses. Again, a visa category or subclass cannot justify subsequent English language tests required of someone who has already sat for the test and obtained the required score.

The question is then: what does the English language requirement other than proof of functional English seek to achieve and to what extent does it put migrants at risk of modern slavery? Migration is about the national interest of the host country too, not just about the interest of a migrant alone. The Migration Act provides in section 4(1) that the object of this Act ‘is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens’. Could the pursuit of the national interest through migration law and policy lead to exploitation and abuse of migrants by the state?

Addressing these issues requires an answer to the question of what modern slavery is. When moving the motion for the second reading of the Modern Slavery Bill 2018, now the Modern Slavery Act 2018 (No. 153, Cth), Alex Hawke, Assistant Minister for Home Affairs, noted that nearly two centuries since William Wilberforce promoted legislation for the abolition of the slave trade in the United Kingdom, there were an estimated 25 million modern slavery victims who ‘are exploited in global supply chains’<sup>59</sup> in 2018. This number includes ‘over 4,000

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<sup>59</sup> House of Representatives, *Parliamentary Debates: Official Hansard*, No. 9, Commonwealth of Australia, 28 June 2018, p. 6754.

people in Australia estimated to be enduring slavery or slave-like conditions'.<sup>60</sup> For Senator Linda Reynolds of Western Australia, modern slavery is not about unfair labour practices and lack of fair pay for fair work. It is about 'the most serious deprivation of individual liberty and individual freedoms – servitude. Modern slavery today encompasses human trafficking, slavery and slavery-like practices, servitude, forced marriage and forced labour' each of which 'on its own is a serious exploitative practice and a grave violation of human rights'.<sup>61</sup> Those who 'exploit others (...) typically use more subtle forms of coercion, such as threats and deception, to maintain power over their victims, who are some of the most vulnerable and powerless in the world today'.<sup>62</sup> To Senator Reynolds, Australians contribute to slavery unknowingly when they buy from those who exploit others, but she also noted that slavery 'exists here in Australia'.<sup>63</sup> Senator Nicholas McKim of Tasmania says modern slavery 'includes slavery, servitude, forced labour, deceptive recruiting, trafficking in persons, debt bondage and organ trafficking'.<sup>64</sup> Modern slavery can also 'include being forced to work for low wages in sectors like construction, in sweatshops or in food supply chains, including in the agriculture sector'.<sup>65</sup> Thus core to the definition of modern slavery in Australia is the idea that it covers 'a range of exploitative practices'.<sup>66</sup>

The theme of exploitation is also reflected in academic definitions of modern slavery. Justine Nolan and Martijn Boersma stated in *Addressing Modern Slavery* (emphasis added):<sup>67</sup>

Several exploitative practices are associated with modern slavery: forced labour, which refers to work that people must perform against their will under the threat of punishment; bonded or indebted labour, when individuals work to pay off a debt while losing control over working conditions and repayments; human trafficking, which concerns the recruitment and movement of people (usually for forced labour or sexual exploitation); and child slavery, which is distinct from child labour as it involves not only children working but also their exploitation for someone else's gain. *Other exploitative practices include deceptive recruitment for labour; domestic ser-*

<sup>60</sup> *Ibid.*, p. 6755.

<sup>61</sup> The Senate, *Parliamentary Debates: Modern Slavery Bill 2018*, Commonwealth of Australia, Second Reading, 28 November 2018, p. 8813.

<sup>62</sup> *Ibid.*, p. 8814.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*, p. 8799.

<sup>65</sup> *Ibid.*

<sup>66</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia*, Commonwealth of Australia, December 2017, p. 29. For a classic definition of slavery, see United Nations Convention to Suppress the Slave Trade and Slavery, Geneva 1926, Article 1; Supplementary Convention to the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Geneva 1956, Article 1.

<sup>67</sup> J. Nolan, M. Boersma, *Addressing Modern Slavery*, New South Publishing 2019, pp. 7–8 and 8–9.

vitude; and forced marriage. Unlike the general term ‘modern slavery’, each of these the practices are crimes that do have individual definitions in national and international laws [emphasis added]. (..)

Two fundamental changes are the move away from the straightforward purchase of slave labour, and the existence of slaves as an employment category. While the statistics suggest that the ‘market’ for exploitative labour is booming, the notion that humans are purposefully sold and bought from an existing pool is outdated. *While such basic transactions do still occur, in contemporary cases people become trapped in slavery-like conditions in various ways.* Understanding how this happens is of crucial importance if we are to bring modern slavery further into our realm of understanding [emphasis added].

It follows that the forms and contexts in which modern slavery takes place differ. The themes of exploitation, human trafficking and deceptive recruitment for labour are crucial to the understanding of modern slavery for the purposes of this paper. Under section 271.2(1) and (1B) of the Criminal Code Act 1995 (No. 135, Cth), the use of deception by a person to organise or facilitate the entry or proposed entry of another person into Australia with intent or being reckless as to whether the person would be exploited constitutes the offence of trafficking in persons.

#### 4.2. THE INTERSECTION OF ENGLISH LANGUAGE REQUIREMENTS AND MODERN SLAVERY IN AUSTRALIA

The above definitions of modern slavery tend to focus on the actions or inactions of individuals and organisations. They hardly focus on states and state actors and their actions and inactions which directly or indirectly enslave people by the states or create the conditions for their enslavement by others. In this paper, I argue that the state could directly and indirectly be complicit in the modern slavery project through its migration law and policy. For example, temporary visas in every country, including in Australia, expose migrants to exploitation by the state and private employers. Arguably, there is no distinction between citizens and resident non-citizens when it comes to tax. Yet the same state does not extend public services available to citizens and permanent visa holders to temporary visa holders, for example, in relation to a basic human right such as the right to national health insurance. The Australia Medicare is available only to its citizens and permanent visa holders.<sup>68</sup> Temporary visa holders are generally required to maintain their own health insurance. For example, it is a requirement for Subclass 482 (Temporary Skill Shortage) that an applicant ‘has adequate arrangements for

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<sup>68</sup> Health Insurance Act 1973 (No. 42, 1974, Cth), s. 3(1) defines ‘eligible person’ as ‘an Australian resident or an eligible overseas representative’.

health insurance during the period of the applicant's intended stay in Australia.<sup>69</sup> A temporary visa holder or a class of temporary visa holders may only enjoy the health insurance if the Minister for Health so prescribes by regulations.<sup>70</sup>

Labour exploitation in Australia has been linked to the Australian visa system. For example, the Joint Standing Committee on Foreign Affairs, Defence and Trade found labour exploitation of migrants in terms of low pay and the trafficking of individuals into Australia and concluded the Committee was 'particularly concerned to hear the experience of victims of exploitation and modern slavery in the horticultural industry.'<sup>71</sup> The Australian Government has acknowledged that:<sup>72</sup>

Migrant workers can be particularly vulnerable to exploitation, either by those who facilitate their journey to Australia or by employers once they arrive. This may be because of cultural and language barriers, a lack of knowledge of local workplace laws and standards, and in some cases, their reliance on their employer for their immigration status.

The Parliamentary Joint Committee on Law Enforcement also found that:<sup>73</sup>

[W]ithout adequate visa support and protection, some victims of human trafficking, slavery and slavery-like practices may 'experience great hardship and uncertainty about their future.' (...) [S]upport and protection offered through the visa program is contingent upon victims contributing to police investigations.

3.23 Submitters and witnesses identified this as a particular problem faced by migrant workers, who may have been coerced into working illegally by their employer and therefore need such protection, but may be unwilling to engage with authorities for fear of visa cancellation.

3.25 Some submitters raised the issue of the power of the Minister for Immigration and Border Protection to cancel visas, and the adverse impact that this may have on victims of trafficking, slavery and slavery-like offences.

3.31 (...) [T]here are significant concerns that victims of human trafficking, slavery and slavery-like offences may be subject to visa cancellation, potentially preventing these victims from assisting police with their investigations, but also placing these victims in an increased position of vulnerability, including in respect of recovering entitlements.

The artificial and baseless nature of the English language requirements for permanent visas to Australia raises the question whether these requirements could be used as tools to deceptively recruit migrants for cheap labour and other exploit-

<sup>69</sup> Migration Regulations 1994 (Cth), clause 482.214 of Schedule 2.

<sup>70</sup> Health Insurance Act 1973 (Cth), s. 6A.

<sup>71</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight*, *op. cit.*, p. 272.

<sup>72</sup> *Ibid.*, p. 276.

<sup>73</sup> Parliamentary Joint Committee on Law Enforcement, *An Inquiry into Human Trafficking, Slavery and Slavery-like Practices*, Commonwealth of Australia, July 2017, pp. 47 and 50.

ative practices. The same person who can live and work in Australia on temporary visas without their English language ability being an issue because they satisfy the functional English language for which educational qualifications are acceptable as proof, will be required to sit for an English test, should the same person apply for permanent visas such as Subclasses 186 (Direct Entry stream) and 186 (Temporary Transition stream). Holders of temporary visas such as Subclass 462 (Work and Holiday) and Subclass 482 (Temporary Skill Shortage)<sup>74</sup> are required to have functional English, which could be satisfied by evidence of educational qualification in English.<sup>75</sup> The Subclass 482 visa allows individuals to whom they are granted to work from two years to about five years in Australia<sup>76</sup> and serves as a transitional visa to permanent residency in Australia for some applicants. The holders of this temporary visa are required to sit for an English test if they apply for Subclass 186 (Direct Entry stream) and Subclass 186 (Temporary Transition stream) and are not citizens and do not hold a passport of the specified countries, even though they were exempted from the test required based on their educational qualifications in English when they applied for the Subclass 482 visa.

By the stated purposes of the English language requirements, a student who successfully completes a course of study in Australia would have demonstrated that he/she has English language ability to participate in Australian society. Similarly, a person who is employed in Australia would also have demonstrated that he/she has the level of English language ability allowing him/her to participate in the Australian labour market. However, completing a course of study or evidence of employment in Australia does not necessarily satisfy the English language requirements for a post-study visa, such as Subclass 482 (Temporary Graduate) and 186 (Direct Entry stream) and Subclass 186 (Temporary Transition stream).

The problem then is that there is a dissonance, disconnect, absurdity, abnormality, anomaly or incongruity between the stated purposes of the English language requirements and resulting evidentiary requirements to prove the English language ability. The Australian English language requirements for these visas do not respect or recognise the facts that a person may have already been assessed for

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<sup>74</sup> 'This visa enables employers to address labour shortages by bringing in skilled workers where employers can't source an appropriately skilled Australian worker,' Australian Government Department of Home Affairs, *Subclass 482: Temporary Skill Shortage Visa*, <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-skill-shortage-482> (accessed 18.01.2021).

<sup>75</sup> Migration Regulations 1994 (Cth), clause 462.215 of Schedule 2; and Australian Government Department of Home Affairs, *English Proficiency (Subclass 482)*, <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-skill-shortage-482/sufficient-english> (accessed 08.03.2023).

<sup>76</sup> Australian Government Department of Home Affairs, *Temporary Skill Shortage Visa (Subclass 482): Short-term Stream*, <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-skill-shortage-482/short-term-stream> (accessed 18.01.2021).

English language competence, that the visa applicant is already present in Australia and that they hold relevant educational qualifications in English whether from Australia or another English-speaking country or that they are already employed in Australia. The English test requirements specify expiry dates for test results even for individuals who are already present in Australia and may actually be employed. The English assessment process also requires a person to resit all components of the English language test if they fail one of the four components of speaking, reading, writing and listening even if they have excelled in the other three components.

In the Australian professions, such as the legal, medical and nursing professions, migrants have to meet local education requirements and sit for an English test or produce other evidence of English language proficiency before they can be registered in Australia. To begin the local education programme in Australia, migrants may be required to sit for an English test. Then, upon completing their studies and seeking to enter the profession of their choice, they must meet the English language requirements again if the test result obtained previously has expired. The educational qualification from Australia does not automatically meet the English language requirements to enter into professions such as legal practice, medical practice and nursing, even though the same substantive professional qualification is acceptable for admission to the profession.

Given that the purposes of the English language requirements are to ensure that a person can get a job, practise their chosen profession and participate in Australian society, these stated purposes cannot reasonably be in consonance with the claim that educational qualifications in English, even if obtained from Australia or the recognised countries, cannot prove competency in the English language for visas or for entering into the legal, medical, nursing and other professions in Australia. It is also absurd that an English test result is subject to an expiry date, even for someone living in Australia or in another English-speaking country, or that a person should have to resit all four components of such test, including those they have passed, instead of the one or ones for which they have not achieved the required score.

A system of this kind characteristic of the English language requirements not only creates an English language industry or business where institutions responsible are justified and sustained by English tests they organize and the fees charged, but it also enables the Australian Government and professional and employment bodies to keep certain unwanted migrants out of the permanent resident status or out of certain professions and institutions. Even if it is conceded that the English language requirements are a temporary bar, it cannot be denied that the fees charged for tests sustain the industry that runs the tests. In these circumstances, the English language requirements could lead to exploitation and abuse of migrants because they have to remain on temporary visas, sit for tests, and pay taxes perhaps at the same rate as citizens and permanent visa holders but

without the corresponding right of access to public services such as Medicare and subsidised public education.

Migration and policy may thus promote modern slavery in at least three ways. Firstly, migration law and policy, exemplified by the English language requirements, lead to extortion of money from applicants who have to pay fees to sit for an English test that they should not sit for in the first place. For a migrant already present and working in Australia, this not only contradicts the purposes of the English language requirements, it also exposes the person to exploitation and abuse in the workplace due to the necessity of taking such test. Secondly, while they give the semblance or appearance of formality, legality and the rule of law, temporary visas could be described as tools for exploitation and modern slavery. Through these visas, migrants can be used to satisfy the labour needs of the host country and secure the payment of taxes without or with limited corresponding state obligations towards those migrants because of their temporary visa status, that is, because they are not citizens or permanent residents. Migrants on temporary visas are more likely to be exploited by their private employers as some of the analysis above demonstrates. Thirdly, artificial visa criteria, such as the English language requirements, involve a financial and psychological burden on migrants, which could have further implications for family relations.

The Department of Home Affairs visa pricing estimator shows the Subclass 186 visa cost a family of five USD 11,390.00 in 2021.<sup>77</sup> This cost excludes medical examination fees and migration agent fees if the applicant chooses to use one. An application for such a visa can be rejected on the simple ground that the primary applicant has not produced an English test to prove their competency in English, even though the applicant may already be present and/or employed in Australia. This happened to the author in May 2018 when my application for Subclass 186 (Direct Entry stream) made in November 2017 was rejected on the ground that I did not sit for an English test to prove my English proficiency, although I was employed as a University Lecturer and the Subclass 186 (Direct Entry stream) visa that I applied for was needed to continue on the same job. I was employed from outside Australia and nominated by the university for the Subclass 457 (Temporary Work (Skilled)), a temporary visa for which my educational qualifications were acceptable as proof of English competence. That temporary visa was granted to me prior to my arrival in Australia. The same employer later nominated me for Subclass 186 (Direct Entry stream) and I was to continue, and have since continued, in the same employment as was the case for Subclass 457 (Temporary Work (Skilled)). Yet the same educational qualifications that formed the basis of my employment in Australia and met the English language requirements for the temporary visa did not meet the competent English requirements

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<sup>77</sup> Australian Government Department of Home Affairs, *Visa Pricing Estimator: Estimate the Cost of your Visa*, <https://immi.homeaffairs.gov.au/visas/visa-pricing-estimator> (accessed 19.01.2021).

for the permanent visa, though in material terms the Subclass 186 (Direct Entry stream) permanent visa was to be held by the same person who was already present and working in Australia and in respect of the same employment with the same employer. I paid a visa charge of AUD 8,346.00 for the Subclass 186 (Direct Entry stream) visa application, which was rejected for no reason other than for failure to produce an English language test. I also paid a medical examination charge of AUD 1,638.90, bringing the total fees incurred for the 186 (Direct Entry stream) visa at the time to AUD 9,984.9. There were related expenses I did not record. In a subsequent application I made for Subclass 186 (Temporary Transition stream) in 2019, I paid an amount of AUD 13,351.92 which comprised a visa charge of AUD 9,220.12, a medical examination fee of AUD 1,720.27 and a migration agent fee of AUD 2,420.00, bringing the total amount charged from me for applying for the permanent residency to AUD 23,336.82.

The Australian Government was satisfied with my educational qualifications as meeting English language requirements both to participate in the Australian society and for the same employment while I was on the temporary visa but would not accept the same qualifications as proof of competent English for the permanent visa. It could be argued that one is a temporary visa and the other is a permanent visa, and that these are different categories of visas with different criteria. However, this does not address the subject of why the English language criterion and the evidence to prove the respective competence cannot be common to different visas, since different visas do not come with an obligation or condition that the visa applicant shall operate and carry on their lives in Australia at the level or standard of English language competence set as the criterion for the particular visa type upon the grant of the visa. For example, a temporary visa holder and a permanent visa holder, a citizen working for the same employer and holding equivalent positions (e.g. university lecturers) are not required to operate at different levels of English language merely because of the visa type or citizenship status.

Again, it is problematic that professional bodies would separate an applicant for professional registration's competency in English from the very qualifications relied on in support of the application to join a particular profession in Australia. Everywhere in the world successful completion of a programme or course of study in a given field is evidence of competency in the field of study and competency using the language in which instruction for the study has been conducted. If a migrant can complete the recommended professional course of study and training in English in Australia, it is less clear why successful completion of that programme or course of study should not be conclusive of the person's ability to perform their duties in the same field using English upon entering into the profession. Severing a person's competence in English from their qualifications relied on to enter into a certain profession creates an artificial barrier to entering into that profession. Such requirements expose migrants to exploitation: they incur

the costs of sitting for English tests they should not sit for in the first place; and they may never enter into the profession if they do not obtain the required score, which often has nothing to do with English language competence in practice in the particular professional field.

For example, the Nursing and Midwifery Board of Australia (NMBA) requires applicants for registration as an enrolled nurse, registered nurse or midwife to achieve the required minimum scores in one of a number of English language tests and meet the requirements for test results specified for each test. One of such tests is the International English Language Testing System (IELTS). The applicant must sit for IELTS (academic module) and obtain a minimum overall score of 7 and a minimum score of 7 in each of the four components of listening, reading, writing and speaking. The score of 7 may be difficult to achieve for many applicants, even though in practice they may be able to do their job in English. Apart from the difficulty of scoring 7, the NMBA further limits the chances of passing the test by stating that it 'will only accept test results (i) from one test sitting, or (ii) a maximum of two test sittings in a six month period only if' the applicant achieves 'a minimum overall score of 7 in each sitting, and (...) a minimum score of 7 in each component across the two sittings, and no score in any component of the test is below 6.5.'<sup>78</sup> The requirements can impede passing and entering into the nursing profession in two ways. Firstly, if an applicant does not obtain the required test scores in one or in two test sittings, they cannot seek to register over the six-month period from the date they first sat for the test; even if they sat for the test for the third time within the six-month period and achieved the required score this time round. At the end of the six months, they have to sit for a test afresh if they did not obtain the required scores in the previous six months. The rule also means in two test sittings an applicant must obtain an overall score of 7 in *each sitting* and a minimum of 7 in *each component* in *each sitting*, and that score in each of the components must not be lower than 6.5. Secondly, the standard requires that an applicant resit all the four components instead of the one or ones failed.

The English language requirements that artificially, without relying on the substance of an applicant's language ability, limit entry into a profession based on nationality would be in compliance with section 9(1) of the Racial Discrimination Act 1975. Again, where rules are designed in such a way that they cannot be complied with by persons of one nationality, while being lenient towards persons of another nationality and thereby deny persons of the first nationality from enjoying a right that but for the rule they would enjoy, then the rules are inconsistent with section 9(1A) of the Racial Discrimination Act.

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<sup>78</sup> Nursing and Midwifery Board of Australia, *Registration Standard: English Language Skills*, *op. cit.*, p. 3.

The English language requirements for both visas and entering into the studied professions unreasonably disadvantage persons of nationalities deemed not primary speakers of the English language or not from the recognised countries, while favouring those considered primary speakers of English or who are from the recognised countries. Most migrants from countries which are not recognised would have obtained their primary, secondary, vocational and/or tertiary education in their home countries. Therefore, requiring them to have *a combination* of primary, secondary and tertiary education from *a recognised country* in order to qualify for the exemption from an English test effectively excludes them from ever being able to use their educational qualifications in English to meet the English language requirements. The same conclusion can be reached in relation to the requirements that applicants must have *five years full-time equivalent continuous* education taught and assessed solely in English, *in a recognised country*, consisting of *a combination* of tertiary and secondary education or tertiary and vocational education or tertiary, secondary and vocational education or tertiary education. Most migrants who have already obtained initial education in their home countries are less likely to spend another five years in their host country continuously, let alone having a combination of secondary education with whatever education level they go for in the host country.

Migrants who sit for English language tests come from countries not recognised for purposes of English as the primary language. Requiring these migrants to pass an English test in one sitting or in two sittings with overall score of 7 in each sitting and a score of 7 in each component in the second sitting and not lower than 6.5 in any component, is arguably intended to ensure that they cannot pass the test.

## 5. CONCLUSION

Section 5(2) of the Migration Act 1958 and Regulation 5.17 of the Migration Regulations 1994 adequately, comprehensively and effectively satisfy any legitimate purpose for which visa applicants and persons seeking employment in Australia are required to prove their level of English language ability. It is stipulated that applicants for visas should prove their proficiency in English by a test result or evidence of educational qualifications in English or be a citizen of and hold a passport of a recognised country. The object of the English language requirements that migrants should be able to get a job and participate in Australian society generally can be established by any of these means. Consequently, all other English language requirements are duplicitous and place unjustifiable financial and psychological burden on migrants with social implications and make them prey to exploitation and modern slavery.

The stated purpose of the English language requirements is to ensure that migrants are able to get a job and participate in Australian society. Migrants already employed in Australia and those who have already completed university education in Australia would have undoubtedly proven that they can obtain a job and participate in Australian society. Yet these same persons are required to sit for an English test if they were to apply for visas of Subclass 186 (Direct Entry stream), Subclass 186 (Temporary Transition stream) or a post-graduate visa, such as Subclass 485 (Temporary Graduate). It cannot be in consonance with the purposes of the English language requirements, Australian laws on equality and fair and equitable treatment to require migrants of certain nationalities to sit for an English test and setting an expiry date to the test, while giving others free entry simply because they hold a passport from a certain country. Severing the English language proficiency of migrants from their educational qualifications in English when they apply for visas or seek to enter into certain professions belies the purpose of asking the person to prove their English language competence, especially when that level of educational qualification is otherwise acceptable for employment or for entering into the profession in Australia. Australian values of fair play, fair go, the rule of law and equality of treatment must manifest in the Australian migration law and policy. Migrants who enter into Australia to work, make a living and contribute to the Australian society deserve better treatment and Australia can certainly do better in accordance with its espoused values. Many migrants might not go for the citizenship or permanent residency of their host countries if they were assured of equality of treatment and non-discrimination in accordance with Australian values. However, if visa status or citizenship status becomes a basis for exclusion, exploitation and discrimination, in a country that preaches equality and non-discrimination regardless of nationality and race, then migrants would want to acquire the status that guarantees them some measure of equality of treatment and respect. Therein lies the challenge to the developed world, not just Australia, that will promote liberalization of trade and investment regimes for their businesses in the developing world, which include rules on national treatment, most-favoured-treatment and rules against what is called protectionism.

The English language requirements would seem to be aimed at excluding certain undesirable persons from the profession rather than at satisfying the regulatory bodies of the persons' English language competence. Indeed, Burke, Thapliyal and Baker have argued that the 'response of the colonial and postcolonial state to culturally diverse and economically disadvantaged migrant groups has been dominated by discrimination, exclusion and segregation.'<sup>79</sup> The preference for English language from certain countries and exemption of citizens of those countries from the English language requirements evidence a desire for

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<sup>79</sup> R. Burke, N. Thapliyal, S. Baker, 2018, *op. cit.*, p. 85.

preferential or selective inclusion of citizens from these countries.<sup>80</sup> The issue here is not about inclusion or exclusion per se, but the camouflage with which the inclusion or exclusion is done contrary to what has been officially described as ‘Australian values’,<sup>81</sup> including equality and fair play. Migrants too deserve rules on national treatment, most-favoured-national treatment and rules against protectionist immigration laws and policies, because they also make a contribution to the development of their host countries.

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<sup>80</sup> *Ibid.*, p. 93.

<sup>81</sup> See Australian Government Department of Home Affairs, *Life in Australia: Australian Values and Principles*, Commonwealth of Australia 2020.

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