'MATE SPEAK ENGLISH, YOU'RE IN AUSTRALIA NOW'

English language requirements in skilled migration

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Amid the fanfare of 'stopping the boats' and cracking down on international student rorts, a quiet revolution has been brewing in skilled migration to Australia. The last decade has seen the introduction or increase in English language requirements to obtain a broad range of permanent skilled visas and, in trades-related fields, the temporary skilled 457 visa. These moves have been variously justified on the bases that enhanced English language ability is necessary to ensure occupational health and safety ('OH&S') standards are met, to facilitate skills transfers to Australian workers, to improve migrants' labour market participation and to guard against exploitative working conditions for migrant workers who may not be familiar with their labour rights or know how to readily access legal or union assistance.

While there is no doubt a sound basis to many of these policy rationales for the language thresholds, this article unpacks the naturalness of the need for ever-increasing English language standards. Other, less exclusionary, mechanisms may be available to achieve the same policy outcomes. This is especially significant because, as I argue below, the English language requirements appear to skew the skilled immigration program in terms of national origin and, possibly, race. This means, first, that Australia's skilled migration program is not necessarily picking the best and the brightest. A second downside is the social impact of these admission policies. English requirements were no doubt intended to reduce migrants' segregation and marginalisation in Australia. However, these English standards (with their implicit homogenising message that Australia wants migrants who sound like us and speak our language) may work not to promote integration but rather reflect and cultivate an underlying nativism in Australia. Such xenophobic community attitudes (which gain national profile from time to time) were showcased in early 2010 in a Facebook group that received media attention called 'Mate speak english, you're in australia now' of which 5000 private school students were members. The page featured a picture of the Australian flag with the words 'Fuck off we're full', and told readers 'if you wanna speak your crappy language, go back to were (sic) you came from'.[1] This raises a concern that English thresholds for skilled migration can feed into certain community expectations that anyone who sounds different has no right to be here.

I recognise the ambitiousness of my questioning whether acquisition of English language skills, to a particular level, should be compulsory as a precondition to entry into Australia or permanent residency. My starting point is that language is constitutive of a person's identity as a lens through which people orient themselves to the world and thus seems linked to individual rights.[2] Yet I acknowledge that language is also a basis for communication and the inevitable effects of living in a country in which English is overwhelmingly dominant must necessarily shape our English language policies.[3] There are, thus, core tensions involved in language policy that do not attend calls for the protection of cultural diversity or religious pluralism.[4]

My critique of language-based visa requirements encounters additional complexity by questioning the appropriateness of requiring English language skills not for residents and citizens already settled in Australia (on which there is significant international literature, especially in Europe, Canada and the United States) but as a condition of entry or residence for prospective migrants. In so doing, I confront not only the naturalness of monolingualism in Australia, but also the perception that immigration policy is inevitably designed to selectively admit desirable entrants (read: those who promise a significant economic contribution) and exclude the rest. As Elana Shohamy has written, 'once a test becomes a method of control, supported by central bodies, it rarely faces any objection by those who are subjects of the test'.[5] She was referring to language testing in general, but her observation is even more resonant where the language test is an immigration control measure. However, I am not suggesting here that Australian employers be forced, or even encouraged, to hire employees without adequate English skills for the job. Nor am I arguing against English language eligibility requirements for professional registration in some fields. Rather, I argue that increasingly inflexible English language thresholds for visa applicants have undesirable and unintended consequences.

I first sketch the trend across temporary and permanent skilled visas whereby, in the last five years, English language requirements have been elevated by both regulatory amendments and judicial interpretation of the Migration Regulations. I then turn to consider and unpack the policy rationales that have been offered for these increases. Finally, I point to some recent indicators of the impact of these reforms on the migration program and provide a critical view of these impacts.

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1. James Campbell and Eliza Sum, 'Race Hate Rocks some of Nation's Most Elite Schools', *Herald Sun* (Melbourne), 3 January 2010.

2. Cristina Rodriguez, 'Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States' (2001) 36 *Harvard Civil Rights – Civil Liberties Law Review* 133, 133–4.

3. Nancy Faires Conklin and Margaret A Lourie, *A Host of Tongues* (1983) 113.

4. Alan Patten and Will Kymlicka, 'Introduction: Language Rights and Political Theory: Context, Issues and Approaches' in Will Kymlicka and Alan Patten (Eds), *Language Rights and Political Theory* (2004) 1, 3.

5. Elana Shohamy, *The Power of Tests: A Critical Perspective on the Uses of Language Tests* (2001) 36.

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The climbing English language requirements

General skilled migration

Australian governments have experimented with pre-migration language testing since the 1980s. Mandatory pre-arrival testing was introduced by the Labor government in 1993, following high unemployment of migrants of non-English speaking backgrounds in the 1991–93 recession.[6] The current points-tested skilled visas require threshold English, with additional points awarded for stronger English language ability. For some time this English standard was vocational English.[7] But in 2007, the last year of the Howard government and in what has been described as 'a shift from altruism to pragmatism',[8] the threshold for almost all points-tested permanent skilled visas rose to 'competent English'.[9] There were two key exceptions. Applicants for skilled independent visas with trade qualifications required only vocational English and applicants for Skilled Regional Sponsored visas had to meet a concessional competent English standard.[10] In 2009, the Rudd government removed the former exemption and increased the standard of concessional competent English.[11]

The dramatically revised points test, effective July 2011, brought a renewed emphasis on English language ability. A threshold of competent English now applies to all skilled points tested visas. But no points are awarded for competent English. Additional points are now only available for proficient or superior English (a new even-higher standard).[12]

Employer Nomination Scheme

Employer Nomination Scheme ('ENS') visas allow Australian employers to sponsor highly skilled foreigners for permanent residence. The sponsored employee must be under 45 and have vocational English, unless the appointment is exceptional.[13] Until recently, the Migration Review Tribunal ('MRT') readily waived English requirements, applying Department of Immigration and Citizenship ('DIAC') policy to find appointments exceptional.[14] In one matter, for instance, the MRT granted the English language exemption to an applicant for a job as a chef in a residence for persons with psychiatric and intellectual disabilities. It took into account the nature of the employment duties, the fact that the applicant had already transferred his skills to the Australians with whom he worked, as well as the great difficulty faced by the employer in finding and retaining an Australian chef for the job.[15]

But the 2007 Full Federal Court decision, *An v MIAC*, suggests a shift in judicial approach to this exemption. Here, a South Korean toy designer, sponsored by a manufacturing workplace wholly staffed by South Koreans with minimal English, sought an exemption. The Court upheld the MRT's refusal of the exemption for 'exceptional appointments'. Emphasising that 'exceptional' required that the position be 'unusual', the Court held that an appointment is not rendered exceptional simply because others in the workplace speak the applicant's language. According to Lindgren J, '[s]uch a view would tend to facilitate the perpetuation of foreign language workplaces, contrary to the policy underlying the [English language] requirement.'[16]

In dissent, Finkelstein J considered that a position may be unusual where 'the ability to speak English is, for all practical purposes, useless both at the present time and in the foreseeable future'.[17] While the effect of this Full Federal Court judgment might have been restricted to the facts of this case, it does appear to have precipitated a trend narrowing the application of the exemption in the regulations. Since this Full Court decision, almost every reported Tribunal decision has found against the existence of 'exceptional circumstances' for the purpose of the English language exemption.[18]

Indeed, a second trend has emerged, where the MRT has rejected the factors prescribed in Departmental policy as irrelevant to the task of assessing whether exceptional circumstances exist. The policy considerations (which included that the nature of the work performed does not require English language, the applicant can nevertheless comply with OH&S requirements and understand her labour rights, and the employer was unable to recruit workers with higher English skills) were held not relevant to making out the legal stipulation that the position is unique. Courts confirmed the MRT's approach, requiring something more than these factors in order to demonstrate that the position requires attributes beyond what is usual for comparable positions.[19] A 2010 MRT case placed considerable weight on its findings that a cook without vocational English presents an OH&S risk in the event of an emergency and that his skills were not so extraordinary as to warrant taking such risks.[20]

Short-term business 457 visas

The 457 visa scheme allows migrants to work in a specified position with a sponsoring employer for up to four years. Since it was established in 1996, it has included no explicit English language requirement except where necessary for licensing or professional registration. In July 2007, responding to reports of abusive working

6. Clive Brooks and Lynne Williams, *Immigrants and the Labour Market: The 1990–1994 Recession and Recovery in Perspective* (1995).

7. A score of at least 5 on each component of the International English Language Testing System (IELTS): reading, writing, speaking and listening. Reg 1.15B(4) *Migration Regulations 1994* (Cth).

8. Lesleyanne Hawthorne, ' "Picking Winners": The recent transformation of Australia's skilled migration policy' (2005) 39(3) *International Migration Review* 663, 666.

9. Competent English (at least 6 on each IELTS test component) applies to subclasses 175 and 885 (skilled independent) visas, and subclasses 176 and 886 (skilled sponsored) visas: Reg 1.15C.

10. Concessional competent English was set at an average score of 5.5 in IELTS, and applied to Skilled – Regional Sponsored subclasses 475 and 487: former Reg 1.15E.

11. Concessional competent English is now set at an average score of IELTS 6: Reg 1.15E.

12. Super English requires a score of at least 8 on each IELTS component: Reg 1.15 EA.

13. Migration Regulations, Sch 2, cls 121.211A or 856.213(c)(ii).

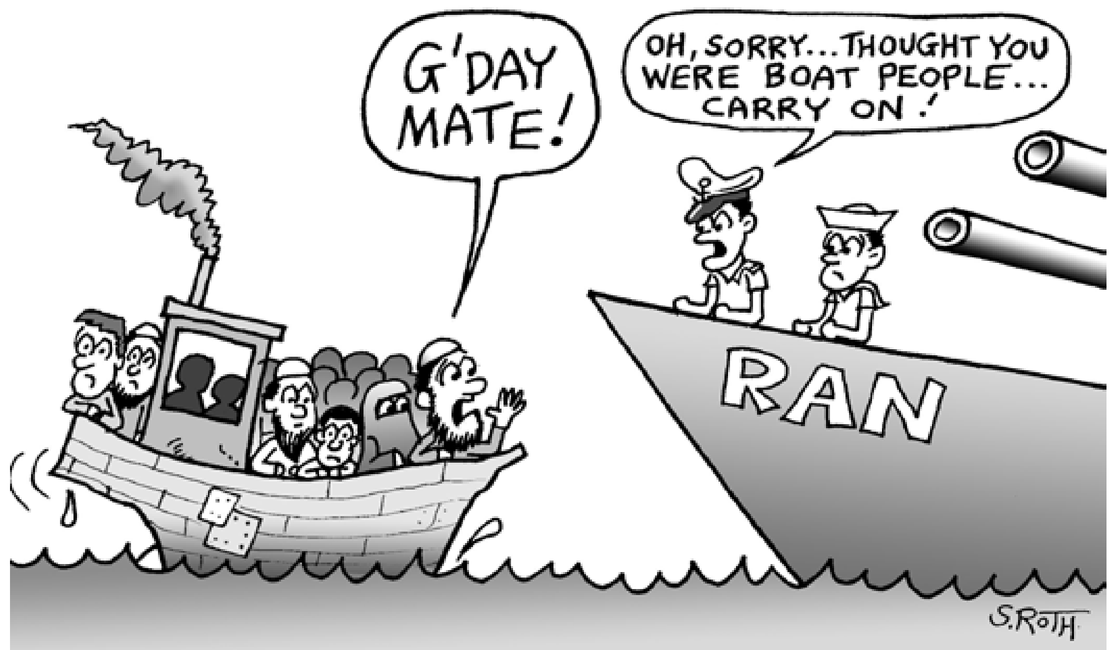
14. See DIAC Policy Advice Manual 3 cl 28.4.

15. *Wen Zhou Xie* [2005] MRTA 140.

16. [2007] FCAFC 97, [30] per Lindgren J, with whom Emmett J agreed.

17. Ibid, [118].

18. Eg *0802770* [2009] MRTA 346; *0801708* [2009] MRTA 123; *071937828* [2008] MRTA 1360; *071478129* [2008] MRTA 306. In only one reported decision, handed down shortly after *An*, did the MRT find that a Chinese cook without vocational English would comply with OH&S standards and transfer skills to a Cantonese speaking workplace, Zilver Restaurant in Sydney: *071157987* [2007] MRTA 365. In another, the MRT granted a dispensation from vocational English mainly on the basis that the applicant was a minister of religion, itself an exceptional appointment: *0901708* [2010] MRTA 1286.



conditions among 457 visa-holders, the Howard Government introduced an English language requirement of an average IELTS (International English Language Testing System) test band score of 4.5. This new application requirement applied mainly to lower-waged 457 visa-applicants (those earning under $75 000 pa) or applicants working at the lower end of the occupational skills spectrum (with trades skills, rather than professional qualifications).[21] In 2009, the Rudd government increased the language standard required for these applicants to vocational English,[22] and in July 2010 increased the salary level exemption to $85 090.[23]

The policy rationales

The present system marks a significant valorisation of English language ability across a range of temporary and permanent visa pathways for migrant workers. Naturally, various rationales have been offered for the increased language requirements in different visa categories. These emphasise the need for English to understand and respond to OH&S risks in the workplace, to reduce the scope for exploitation and ensure workers are equipped to raise concerns about their welfare with appropriate authorities, to benefit Australia by facilitating skills transfers to the local workforce and, in general, to participate more effectively in the Australian labour market. I now briefly set out these justifications. While many may seem immediately persuasive, I suggest that the asserted rationales are more complicated than they at first appear and may be better addressed by policies other than language restrictions to immigration.

Occupational health and safety

Especially within the 457 temporary skilled visa program, media reports have proliferated of disproportionately high numbers of workplace injuries and deaths. One 457 forestry worker was killed by a falling tree in 2007; it was claimed he had 'never used a chainsaw before'.[24] In September 2006, a tissue-paper mill was closed by government inspectors who issued 39 infringements for breaches of employment and safety laws.[25]

Disaggregated statistics on the number of fatalities or injuries involving migrant workers by visa class are unavailable: there is no coordination between visa status figures held by DIAC and the data on OH&S incidents collected by state and territory agencies.[26] Nevertheless, scholarly commentary on Australia's skilled migration program has propounded a strong correlation between English language skills and the prevention of OH&S risks.[27] Indeed, the government-appointed review of the integrity of the 457 visa program, led by industrial relations expert Barbara Deegan, grouped OH&S and English language together in a single issues paper.[28] Numerous studies around the world have identified far higher injury rates among immigrant and foreign born workers, citing language or communication problems as a significant risk factor.[29]

However, there are limitations to the conclusions we can draw from much of this research. Very few have controlled for other occupational hazards prevalent for immigrant workers, such as inadequate training.[30] Further, a number of recent overseas studies have concluded that the high incidence of workplace injury of foreign-born workers is due not to their language skills but their concentration in precarious jobs in hazardous industries (like construction, agriculture and manufacturing), industries with notoriously limited collective representation and inferior labour standards.[31] Indeed, these factors are likely to be borne out in Australia since, in 2008, DIAC reported that around 10 per cent of 457 visa holders worked in construction, just over 10 per cent in manufacturing and around 7 per cent in mining — industries which report among the highest numbers of workplace deaths for the population as a whole.[32] There is also growing evidence that precarious employment has significant adverse effects on OH&S.[33] Thus, the OH&S risks encountered by foreign temporary workers may be less due to their poor English skills and more strongly determined by their concentration in precarious jobs and the vulnerability that is brought by their temporary residency status.

Further, alternative measures seem better adapted to reducing OH&S risks associated with migrant workers than the blunt tool of mandatory English language restrictions. For instance, we might require sponsoring employers to provide additional OH&S safeguards such as compulsory induction training for migrant workers employed in high risk industries. Or, if English is considered essential for OH&S compliance, the sponsoring employer might be required to provide assistance for intensive English language classes for

19. *Li v Minister for Immigration* [2010] FMCA 583.

20. 0807353 [2010] MRTA 467.

21. Further exemptions were available for applicants who had completed education in an English-speaking institution, were passport-holders from certain Western English-speaking countries or who were sponsored through Labour Agreements negotiated between employer, government and union representatives.

22. Migration Regulations, Sch 2, cl 457.223(6)(a).

23. *Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Business (Long Stay)) Visas*, IMMI 10/086.

24. Matthew Moore, 'A lonely death among the pines', *Sydney Morning Herald* (Sydney), 28 August 2007, 8; Malcolm Knox, 'Opportunity of a lifetime ended in tragedy', *Sydney Morning Herald* (Sydney), 28 August 2007, 7.

25. Nick O'Malley, 'Unskilled, unsafe: site shut as foreign workers fall short', *Sydney Morning Herald* (Sydney), 4 September 2006, 1.

26. Commonwealth, *Visa Subclass 457 Integrity Review: Final Report*, October 2008, 85.

27. Bob Kinnaird, 'Current Issues in the Skilled Temporary Subclass 457 Visa' (2006) 14 *People and Place* 49, 54.

28. Commonwealth, *Visa Subclass 457 Integrity Review, Issues Paper #2: English Language Requirement/Occupational Health and Safety*, August 2008.

29. See, eg, Xiuwen Dong and James Platner, 'Occupational fatalities of Hispanic construction workers from 1992 to 2000' (2004) 45(1) *American Journal of Industrial Medicine* 45; Stephanie Premji, Karen Messing and Katherine Lippel, 'Broken English, broken bones? Mechanisms linking language proficiency and occupational health in a Montreal garment factory' (2008) 38(1) *International Journal of Health Services,* 1.

30. Tom O'Connor et al, 'Adequacy of health and safety training among young Latino construction workers' (2005) 47(3) *Journal of Occupational and Environmental Medicine* 272.

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workers on arrival, as recommended by a 2007 Commonwealth Parliamentary inquiry.[34]

Instead, introducing English language requirements for admission to the Australian workforce seems to suggest that OH&S dangers for migrant workers are the migrants' responsibility. By law this is not the case: employers must ensure safe workplaces regardless of whether the worker communicates predominantly in English, which includes the obligation to communicate safety instructions or procedures in whatever language is understood by workers.[35] Our OH&S laws have been drafted on the assumption that many workplaces in Australia are not solely English-speaking, so if employers of migrants workers are failing to uphold OH&S standards, a solution might lie in better enforcing these laws, rather than denying entry to certain migrant workers.

Exploitation and confidence in the workplace

Governments, unions and worker advocate groups argue that English language skills are necessary for migrants to understand their labour rights and raise complaints if they face exploitation in the workplace.[36] Press reports abound of the extreme power imbalances which have arisen where migrant workers lack fluency in English, such as the account of an Indonesian worker with poor English who could not understand the contract he was told to sign, and was threatened with deportation by his employer when he sought assistance.[37]

However, if designed to prevent such exploitation entirely, the English language thresholds will have limited utility. It seems more likely that temporary visa-holders tend not to complain about illegal employer conduct — not because of communication difficulties, but out of fear of losing their employment and, thus, their right to remain in Australia (the 457 visa is tied to continued employment for the sponsoring employer). And, to the extent that English language ability does empower workers to combat exploitative working conditions, the 457 Integrity Review concluded in 2008 that a limited ability to speak, understand and read English is sufficient to allay concerns about vulnerability; written English is unnecessary for that purpose.[38] But the Rudd government did not implement that recommendation; rather, it increased the English language requirements further for all language capabilities. In short, requiring stronger English to guard against migrant worker exploitation seems a blunt tool to combat an evil that could equally be addressed by providing better information to workers, before arrival, in their own language, about their rights and responsibilities in Australia and where to seek assistance.

Migrants' labour market contributions

A decade of research bears out the differentiated experiences of immigrant workers from English and non-English speaking backgrounds. A 2009 study, commissioned by the Department of Education, Employment and Workplace Relations ('DEEWR'), found that language proficiency is a key factor influencing the differential employment outcomes of international students.[39] The 2006 Census data showed that employment outcomes for recently arrived migrants varied widely depending on their background: 52 per cent of English speaking background migrants secured work in the first five years, similar outcomes applied for Commonwealth-Asian migrants but non-English speaking background ('NESB') migrants from China and India experienced far lower employment rates.[40] Data from the *Longitudinal Survey of Immigrants to Australia* shows that skilled migrants' oral English language proficiency predicted the extent to which they were employed and the frequency with which they used their qualifications.[41]

These established linkages, while obviously compelling, do not necessarily justify the uniformity of mandatory minimum English language standards in the skilled migration program. For instance, it is not clear that this labour market disadvantage occurs uniformly across occupational categories. The Census figures show that employment rates were poor for NESB migrants trained in engineering, but NESB hairdressers were highly likely to work in their field.[42] In certain fields, migrants with poor English might find employment within their ethnic communities, especially in hospitality and the trades, so lack of English proficiency may not affect their immediate work outcomes.[43] Similarly, the English language threshold will not affect the employment status of migrants who have been sponsored by an employer and already secured a position.

Further, while certain employers may accord hiring preference to applicants with higher English language skills, it is not clear that we should uncritically accept this employer bias as inevitable, or desirable. Noting the range of perceived attributes which influence employers' hiring practices, including migrants' length of residence in Australia, their level of cultural enclosure and English language ability, the DEEWR commissioned research study cited above recommended that

31. Katherine Loh and Scott Richardson, 'Foreign-born workers: Trends in fatal occupational injuries, 1996-2001' (2004) *Monthly Labor Review* 42; Ana María Siefert and Karen Messing, 'Cleaning up after globalization: an ergonomic analysis of the work activity of hotel cleaner' (2006) *Antipodes* 557.

32. *Issues Paper #2*, above n 28, 11.

33. Michael Quinlan, Claire Mayhew and Philip Bohle, 'The global expansion of precarious employment, work disorganization, and consequences for occupational health' (2001) 31(2) *International Journal of Health Services,* 335; Stephanie Toh and Michael Quinlan, 'Safeguarding the global contingent workforce? Guestworkers in Australia' (2009) 30(5) *International Journal of Manpower,* 453, 458.

34. Joint Standing Committee on Migration, Parliament of Australia, *Temporary visas … permanent benefits: Ensuring the effectiveness, fairness and integrity of the temporary business visa program* (2007) 86.

35. Eg, *Occupational Health and Safety Act 2004* (Vic), s 22(1)(c); *Occupational Health and Safety Act 1984* (WA), s 19; *Occupational Health and Safety Act 2000* (NSW), s 8(1)(d).

36. Government of Western Australia, Response to Deegan Issues Paper # 2, August 2008, 7; *457 Integrity Review: Final Report*, above n 26, 54–5.

37. Victoria Laurie, 'Temporary Workers Seek Church's Help', *The Australian* (Sydney), 22 March 2008, 9. See also Michelle Bissett and Ingrid Landau, 'Australia's 457 Visa Scheme and the Rights of Migrant Workers' (2008) 33(3) *Alternative Law Journal* 142, 145.

38. *457 Integrity Review: Final Report*, above n 26, 55.

39. Sophi Arkoudis et al, *The Impact of English Language Proficiency and Workplace Readiness on the Employment Outcomes of Tertiary International Students* (2009).

40. Ibid 6.

41. See Kinnaird, above n 27, 83, 89–90.

42. Arkoudis, above n 39, 6.

43. Ibid 9.

employer groups be encouraged to develop access and equity guidelines for recruiting overseas workers.[44]

A related argument is that, beyond guarding against migrants' differential treatment in the labour market, English language proficiency is required for foreign workers to transfer their skills to the Australian workforce. This labour market rationale is an implicit policy-driver or overt criterion for the grant of a visa in all skilled visa categories. This has led the MRT to refuse an English language exemption to a Chinese cook applying for an ENS visa on the basis that 'the applicant's ability to transfer his skills was limited to passing on skills to Cantonese-speaking employees and as such it is likely to make a limited contribution to Australia where most people speak English'.[45]

Yet suggesting that skills transfers within the Australian workforce require fluent English fails to account for the linguistic diversity in many Australian workplaces (be they staffed by international students, working holiday makers, recently resettled refugees or former family-sponsored migrants who may be Australian citizens). It seems entirely plausible that a non-English speaking migrant can transfer skills to a non-English speaking Australian worker. Given the demographic reality of our globalised economy, it seems foolish to assume that monolingualism best advances the interests of growth and efficiency in all cases.

Arguments about broader social inclusion

Unsurprisingly, arguments about the settlement outcomes of non-English speaking migrants permeate government defences of language thresholds for permanent residence. They rest on the idea that English language skills drive integration and social mobility, producing the social cohesion necessary in a democratic welfare state like Australia. Benedict Anderson famously argued that nations exist as 'imagined communities' where people envision themselves as members of a particular group who can all read the same texts.[46] And so, it is supposed, that sustained political commitment, and mutual cooperation among citizens, are better achieved when elements of the Australian political community live in a world of common meaning and are able to identify common terms, even if their perspectives differ from time to time.

Yet even accepting that linguistic integration is desirable, we may still query whether language thresholds are the best mechanisms to achieve this. As Will Kymlicka argues in his defence of multicultural liberal politics, migrants are typically eager to interact in their new host communities and learn the dominant language.[47] In Australia, English as a Second Language ('ESL') tuition would be highly attractive to new entrants whose English falls below the legislated threshold. But skilled migrants (temporary and permanent) and their dependants are not all currently eligible for funded placements under the government's ESL Program, even though all these primary visa-holders are full Australian tax-payers. Maintaining these language barriers carries some serious costs for the Australian labour market: we may be less likely to attract a highly skilled workforce on the basis of merit alone and may be missing out by not fostering the growing commercial linkages in the Asia Pacific region. In the absence of increased resourcing, from this perspective it would be preferable to require migrants with insufficient English skills to self-fund English language acquisition (possibly in conjunction with their employers) rather than deny entry to such migrants altogether.

At the same time, we might also question some of the monocultural assumptions that nation-builders typically take for granted. Australia is certainly an overwhelmingly English-speaking country. Yet in 2006, 561 400 Australians, or 2.8 per cent of the population, reported not being proficient in English. The proportion of Australians born in a non-English speaking country is growing steadily, as is the proportion of Australians who speak a language other than English at home.[48] This does not represent a large portion of the population by any means. But, even so, this social reality of linguistic diversity in Australia is not represented at the level of federal parliament or other government offices. In this light, minimum English language requirements in the migration program are suggestive of an unconscious desire to preserve an image of Australia which does not reflect the present-day Australian community. They hint at an inclination to preserve cultural hierarchies built up in Australia after many decades of cultural and racial hegemony.

The impacts of language requirements on the migration program

While each of these rationales have undoubtedly been factors in driving the English language standards across skilled visa classes, it seems likely that other social anxieties are also at play. A sense of the evil to be avoided is encapsulated in a recent observation in *The Australian*, that '[w]orkers from India, China and The Philippines are flooding into Australia's hospitals, factories and construction sites as employers increasingly look to developing countries to combat chronic skills shortages.'[49] This view does have a real basis: the greatest increase in 457 visa applications from the late 1990s to 2007 was in workers from developing countries, especially China and the Philippines.[50] A similar trend is discernible in permanent skills streams.[51]

So language thresholds may have been deployed intentionally to reverse these trends. Whatever the design, their *effect* has arguably been to shrink the intake of migrant workers, temporary and permanent, from developing countries which are predominantly not English-speaking. A marked decline in visa grant rates has occurred throughout the skilled migration program, which was reportedly precipitated by the global economic downturn.[52] I suggest that this drop may not necessarily be attributable to economic conditions alone because these declines have not been uniform. The intake of skilled migrants (both temporary and permanent) from non-English speaking countries fell disproportionately between 2006 and 2009, as the following tables demonstrate.

44. Ibid 13.

45. 071937828 [2008] MRTA 1360.

46. Benedict Anderson, *Imagined Communities: Reflections on the origin and spread of nationalism* (1991).

47. Kymlicka and Patten, above n 4, 6–7.

48. Andrew Jakubowicz, 'Auditing Multiculturalism: the Australian empire a generation after Galbally' (Speech delivered at the Annual Conference of Federation of Ethnic Community Councils of Australia, Melbourne, 4 December 2003), 2–3; and 34150DS0018 Migrants, 2006 Census of Population and Housing, Australia, Table 2.3

49. Paul Maley, 'Developing countries go for 457 visas' *The Australian* (Sydney), 15 March 2008.

50. Peter Mares, 'The Permanent Shift to Temporary Migration', *Inside Story*, 17 June 2009, <http://inside.org.au>.

51. DIAC, *Report on Migration Program 2008–09*, 5.

52. Senator Chris Evans, 'Reforms result in 20 per cent drop in net overseas migration' (Media release, 26 May 2010).

OH&S laws have been drafted on the assumption that many workplaces in Australia are not solely English-speaking, so if employers of migrants workers are failing to uphold OH&S standards, a solution might lie in better enforcing these laws, rather than denying entry to certain migrant workers.

457 visa grants[53]

	2006–07	2007–08	2008–09	% change 07–08 to 08–09
South Africa	6650	9365	9740	4%
India	11960	15110	14770	-2%
UK	18890	23780	21070	-11%
South Korea	1320	1430	1110	-22%
China	4440	7310	4910	-32%

Skilled permanent visa grants[54]

	2006–07	2007–08	2008–09	% change 07–08 to 08–09
South Africa	4293	6556	10485	60%
India	15865	19281	20105	4%
UK	24800	23155	23178	0%
China	14688	14924	13927	-7%
South Korea	3105	4331	3807	-12%

Thus, it seems Australia's skilled migration program has embraced criteria which skew the selection outcomes for temporary and permanent arrivals in favour of applicants from Western countries and developing countries within the Commonwealth (such as India and Malaysia where there are strong traditions of teaching in English).

My contention here is certainly not that this outcome was intended. Nor do I suggest that this discrimination is cognisable in Australian law. Some time ago the Federal Court rejected the argument of an aggrieved skilled visa applicant that the English language requirement was inconsistent with s 9 of the *Racial Discrimination Act 1975* (Cth).[55] (This, however, stands in marked contrast to Canada and the United Kingdom where advocates have mounted legal challenges to the introduction of English language requirements for skilled and student migration.[56])

Yet there is, of course, an historical precedent for using language testing to drive political objectives behind Australia's immigration program. The racial exclusion of the White Australia policy was facilitated by a 'dictation test' which was ostensibly a test of literacy. In fact, it required the correct transcription of 50 words in any European language (later extended to 'any prescribed' language).[57] Directed to 'be applied in a language with which the immigrant is not sufficiently acquainted to be able to write out at dictation',[58] the dictation test was explicitly designed to ensure failure and be a certain bar to entry to, or continued residence in, Australia. Australian parliament at the time hailed it as:

> a legitimate attempt to preserve Australia's white racial purity, to shield Australian workers from the vagaries of cheap Asiatic labour, and to protect national sovereignty against a potential 'Asiatic' invasion.[59]

Between 1902 and 1946, only 125 000 people from so-called 'alien races' were admitted to Australia.[60] The operational drivers of the White Australia policy were camouflaged through the (supposedly more legitimate) device of screening for language ability; they 'guarantee[ed] racial exclusion in a non-racial way'.[61] While I do not suggest that our current language requirements are masking such overtly racist intentions, it bears reflecting how our 'natural' expectations for English language ability in Australia's migrant populations have been influenced by decades of exclusionary practices based on ethnicity through language.

Conclusion

It is ironic that while the Howard government was proudly abandoning multiculturalism as a political value, dramatic increases were taking place in skilled migration including from a diverse range of developing countries. More recently it seems that increased language barriers have been deployed as a mechanism to contract the immigration intake. These application thresholds may have already changed not only the size but the colour of the skilled immigration program. Initially there seem to be reasonable labour market justifications for requiring English language proficiency. But on closer inspection these rationales for language ability are more complex than they appear and may be better addressed by policy measures other than higher English language thresholds for potential applicants. And these language barriers carry significant costs: they may intensify certain racial biases already in our migration system, further reduce the national diversity among skilled visa-holders and act to disadvantage or deter poorer NESB applicants for skilled visas.

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53. Commonwealth Department of Immigration and Citizenship, Statistics: Country Profiles <immi.gov.au/media/statistics/country-profiles/textversion/> at 21 April 2011.

54. Ibid.

55. *Qiu* (1994) 55 FCR 439, 449–50; see also *Re Kaufman* (1997) 44 ALD 701, 703.

56. *English UK v Secretary Of State for the Home Department* [2010] EWHC 1726 (Admin); Nicholas Keung, 'All immigrants face mandatory language test', *The Toronto Star* (Toronto, Canada), 20 July 2010 at <thestar.com/news/canada/article/838085--all-immigrants-face-mandatory-language-test> at 21 April 2011.

57. Section 3(a) *Immigration Restriction Act 1901* (Cth).

58. Letter from FJ Quinlan, Assistant Secretary, Home and Territories Department to The Collector of Customs, Fremantle, 4 March 1927, <http://vrroom.naa.gov.au/print/?ID=25257> at 21 April 2011.

59. Gwenda Tavan, *The Long Slow Death of White Australia* (2005), 8.

60. Lesleyanne Hawthorne, 'The Political Dimension of English Language Testing in Australia' (1997) 14(3) *Language Testing* 248, 248.

61. Barry York, 'Immigration Restriction, 1901–1957' *Studies in Australian Ethnic History* (1992) 8.