

**EXPLANATORY STATEMENT***Migration Regulations 1994***MIGRATION (IMMI 18/048: SPECIFICATION OF OCCUPATIONS – SUBCLASS 482 VISA) INSTRUMENT 2018***(Subregulation 2.72(9))*

1. The instrument, IMMI 18/048, is made under subregulation 2.72(9) of the *Migration Regulations 1994* (the Regulations).
2. The instrument replaces *Migration (IMMI 18/004: (Specification of Occupations – Subclass 457 Visa) Instrument 2018* (F2018L00044). IMMI 18/004 is repealed by operation of law following the repeal of paragraph 2.72(10)(aa) of the Regulations by the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018*.
3. The instrument notes in section 5 that ANZSCO is defined in regulation 1.03 of the Regulations. Regulation 1.03 of the Regulations provides the following definition of ANZSCO: ‘ANZSCO has the meaning specified by the Minister in an instrument in writing for this definition.’ The instrument made under regulation 1.03 for the definition of ANZSCO is IMMI 18/051. Section 5 of IMMI 18/051 provides:

‘For the purposes of regulation 1.03 of the Regulations, ANZSCO means the Australian and New Zealand Standard Classification of Occupations published by the Australian Bureau of Statistics, as in force on 18 March 2018.’
4. ANZSCO may be accessed on the Australian Bureau of Statistics website.
5. The purpose of the instrument is to address changes to the Regulations by the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018*. In particular, the changes support the new Subclass 482 (Temporary Skill Shortage) visa and related nomination criteria, which replace the Subclass 457 (Temporary Work (Skilled)) visa and related nomination criteria.
6. The instrument specifies the occupations that may be nominated in relation to applicants for Subclass 482 visas. In accordance with paragraph 2.72(9)(a) of the Regulations, occupations are specified as short term skilled occupations, or medium and long term

strategic skills occupations. For a nomination to be approved, it is a requirement that, at the time the nomination is made, the occupation is specified in a legislative instrument. It will not affect the nomination, or the related Subclass 482 visa application, if the occupation is subsequently omitted from the relevant occupation list.

7. Short term skilled occupations are listed in the Short Term Skilled Occupation List (STSOL), and medium and long term strategic skills occupations are listed in the Medium and Long Term Strategic Skills List (MLTSSL) and the new Regional Occupation List. This instrument also sets out circumstances in which an occupation is not applicable to a nominee because the position to which the occupation relates is subject to an ‘inapplicability condition’ as set out in section 8.
8. The instrument adds a Regional Occupation List with 59 specified occupations. These occupations have been introduced to support employers in regional Australia, based on advice from the Department of Jobs and Small Business. This means that occupations on the Regional Occupation List are only specified if the position is in regional Australia as defined. All other occupations, as specified in the STSOL and MLTSSL, may be nominated for positions located anywhere in Australia.
9. The creation of the Regional Occupation List involves the following changes from the content of IMMI 18/004, based on labour market needs in regional Australia:
  - a. the occupation Horse Breeder (ANSZCO code 121316) was removed from the MLTSSL and included in the Regional Occupation List;
  - b. 10 occupations, listed below, were removed from the STSOL and added to the Regional Occupation List; and
  - c. 48 new occupations, listed below, were added to the Regional Occupation List.
10. The occupations removed from the STSOL and included in the Regional Occupation List are:
 

a. Post Office Manager	(ANSZCO code 142115);
b. Fitness Centre Manager	(ANSZCO code 149112);
c. Sports Centre Manager	(ANZSCO code 149113);
d. Aeroplane Pilot	(ANZSCO code 231111);
e. Flying Instructor	(ANZSCO code 231113);
f. Helicopter Pilot	(ANZSCO code 231114);
g. Wine Maker	(ANZSCO code 234213);

- h. Agricultural Technician (ANZSCO code 311111);
- i. Property Manager (ANZSCO code 612112); and
- j. Real Estate Representative (ANZSCO code 612115).

11. The new occupations included in the Regional Occupation List are:

- a. Public Relations Manager (ANZSCO code 131114);
- b. Policy and Planning Manager (ANZSCO code 132411);
- c. Project Builder (ANZSCO code 133112);
- d. Procurement Manager (ANZSCO code 133612);
- e. Medical Administrator (ANZSCO code 134211);
- f. Regional Education Manager (ANZSCO code 134412);
- g. Sports Administrator (ANZSCO code 139915);
- h. Caravan Park & Camping Ground Manager (ANZSCO code 141211);
- i. Amusement Centre Manager (ANZSCO code 149111);
- j. Cinema or Theatre Manager (ANZSCO code 149912);
- k. Financial Institution Branch Manager (ANZSCO code 149914);
- l. Human Resource Adviser (ANZSCO code 223111);
- m. Workplace Relations Adviser (ANZSCO code 223113);
- n. Policy Analyst (ANZSCO code 224412);
- o. Liaison Officer (ANZSCO code 224912);
- p. Market Research Analyst (ANZSCO code 225112);
- q. Ship's Master (ANZSCO code 231213);
- r. Multimedia Designer (ANZSCO code 232413);
- s. Conservation Officer (ANZSCO code 234311);
- t. Exercise Physiologist (ANZSCO code 234915);
- u. Vocational Education Teacher (ANZSCO code 242211);
- v. Environmental Health Officer (ANZSCO code 251311);
- w. Intellectual Property Lawyer (ANZSCO code 271214);
- x. Translator (ANZSCO code 272413);
- y. Community Arts Worker (ANZSCO code 272611);
- z. Operating Theatre Technician (ANZSCO code 311214);
- aa. Pathology Collector (ANZSCO code 311216);
- bb. Construction Estimator (ANZSCO code 312114);
- cc. Surveying or Spatial Science Technician (ANZSCO code 312116);
- dd. Mechanical Engineering Draftsperson (ANZSCO code 312511);
- ee. Safety Inspector (ANZSCO code 312611);
- ff. Maintenance Planner (ANZSCO code 312911);
- gg. Building and Engineering Technicians nec (ANZSCO code 312999);
- hh. Vehicle Painter (ANZSCO code 324311);
- ii. Floor Finisher (ANZSCO code 332111);
- jj. Electrical Linesworker (ANZSCO code 342211);
- kk. Zookeeper (ANZSCO code 361114);
- ll. Nurseryperson (ANZSCO code 362411);
- mm. Gas or Petroleum Operator (ANZSCO code 399212);

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|-----|--------------------------|---------------------------|
| nn. | Dental Hygienist         | (ANZSCO code 411211);     |
| oo. | Dental Therapist         | (ANZSCO code 411214);     |
| pp. | Emergency Service Worker | (ANZSCO code 441211);     |
| qq. | Driving Instructor       | (ANZSCO code 451211);     |
| rr. | Funeral Workers nec      | (ANZSCO code 451399);     |
| ss. | Flight Attendant         | (ANZSCO code 451711);     |
| tt. | First Aid Trainer        | (ANZSCO code 451815);     |
| uu. | Jockey                   | (ANZSCO code 452413); and |
| vv. | Clinical Coder           | (ANZSCO code 599915).     |
12. Another change from IMMI 18/004 is that ‘inapplicability condition 1’ no longer applies to 12 occupations. This inapplicability condition operated to exclude positions that did not require two years of relevant work experience. This inapplicability condition is no longer required because all applicants for the Subclass 482 visa are required to have two years of relevant work experience. This change means that the nominee may have less than two years of relevant experience when the nomination is made, and the requirement must now be met by the time a decision is made on the visa application. The occupations affected by this change are:
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|----|--|---------------------------|
| a. | Finance Manager                                | (ANZSCO code 132211);     |
| b. | ICT Project Manager                            | (ANZSCO code 135112);     |
| c. | Information and Organisation Professionals nec | (ANZSCO code 224999);     |
| d. | Advertising Specialist                         | (ANZSCO code 225111);     |
| e. | Graphic Designer                               | (ANZSCO code 232411);     |
| f. | University Lecturer                            | (ANZSCO code 242111);     |
| g. | Web Developer                                  | (ANZSCO code 261212);     |
| h. | Software Tester                                | (ANZSCO code 261314);     |
| i. | ICT Support Engineer                           | (ANZSCO code 263212);     |
| j. | ICT Systems Test Engineer                      | (ANZSCO code 263213);     |
| k. | Hairdresser                                    | (ANZSCO code 391111); and |
| l. | Contract Administrator                         | (ANZSCO code 511111).     |
13. Another change from IMMI 18/004 is that 22 occupations are no longer restricted to positions in regional Australia. Inapplicability condition 10 has been removed from the occupations, all of which continue to be included in the STSOL, based on advice from the Department of Jobs and Small Business. This is consistent with the creation of the Regional Occupation List, which covers all occupations restricted to regional Australia and specifies those occupations as medium and long term strategic skills occupations. The occupations in the STSOL that are no longer subject to inapplicability condition 10 are:
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|----|---------------------|-----------------------|
| a. | Aquaculture Farmer  | (ANZSCO code 121111); |
| b. | Cotton Grower       | (ANZSCO code 121211); |
| c. | Flower Grower       | (ANZSCO code 121212); |
| d. | Fruit or Nut Grower | (ANZSCO code 121213); |

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| e. Grain, Oilseed or Pasture Grower           | (ANZSCO code 121214);     |
| f. Grape Grower                               | (ANZSCO code 121215);     |
| g. Mixed Crop Farmer                          | (ANZSCO code 121216);     |
| h. Sugar Cane Grower                          | (ANZSCO code 121217);     |
| i. Vegetable Grower                           | (ANZSCO code 121221);     |
| j. Crop Farmers nec                           | (ANZSCO code 121299);     |
| k. Apiarist                                   | (ANZSCO code 121311);     |
| l. Beef Cattle Farmer                         | (ANZSCO code 121312);     |
| m. Dairy Cattle Farmer                        | (ANZSCO code 121313);     |
| n. Mixed Livestock Farmer                     | (ANZSCO code 121317);     |
| o. Pig Farmer                                 | (ANZSCO code 121318);     |
| p. Poultry Farmer                             | (ANZSCO code 121321);     |
| q. Sheep Farmer                               | (ANZSCO code 121322);     |
| r. Livestock Farmers nec                      | (ANZSCO code 121399);     |
| s. Mixed Crop and Livestock Farmer            | (ANZSCO code 121411);     |
| t. Production Manager (Forestry)              | (ANZSCO code 133511);     |
| u. Accommodation and Hospitality Managers nec | (ANZSCO code 141999); and |
| v. Primary Products Inspectors nec            | (ANZSCO code 311399).     |
14. Another change from IMMI 18/004 is that the occupations of Property Manager (ANZSCO code 612112) and Real Estate Agent Representative (ANZSCO code 612115), which have been relocated from the STSOL to the Regional Occupation List, are no longer subject to inapplicability conditions 19 and 21. These conditions relate to the minimum turnover of the business (AUD 1,000,000) and the minimum number of employees in the business (five). The removal of these conditions reflects the needs of small businesses in regional Australia.
15. A technical change from IMMI 18/004 is that the term “base salary” is no longer used. The term “annual earnings” is now used in inapplicability conditions 2, 3, 4, 5 and 23 to reflect the introduction of a new framework for assessing the adequacy of the proposed remuneration of nominees for Subclass 482 visas. This framework is contained in subregulations 2.72(15) to (17) of the Regulations. The operation of the five inapplicability conditions is unaffected by this change as ‘base salary’ (an undefined term) has the same meaning as ‘annual earnings’. The definition of earnings in regulation 2.57A of the Regulations excludes amounts which cannot be determined in advance, such as non-guaranteed overtime, commissions and bonuses.

16. This instrument is part of a broad package of reforms for the employer sponsored skilled visa programs, announced by the Government on 18 April 2017. The Department of Home Affairs has engaged with external stakeholders since the announcement in developing the policy settings and considered feedback received.
17. These reforms were also informed by earlier reviews including: the 2014 *Independent Review into the Integrity of the Subclass 457 Programme*; the 2016 Productivity Commission Inquiry Report: *Migrant Intake into Australia*; the 2016 *Review of the Temporary Skilled Migration Income Threshold*; and the 2016 Senate Inquiry *A National Disgrace: The Exploitation of Temporary Work Visa Holders*. These reviews were subject to extensive consultation processes, including: individuals; academics; bodies and businesses who use the employer sponsored skilled visa programs; migration agents; representatives of foreign governments; the Ministerial Advisory Council on Skilled Migration; and government departments and agencies. The consultation occurred before the instrument was made. This accords with subsection 17(1) of the *Legislation Act 2003* which envisages consultations where appropriate and reasonably practicable.
18. As noted above, the changes from IMMI 18/004 have been occasioned by the necessity to reflect the creation of the Subclass 482 visa and the decision to establish a Regional Occupation List to give greater visibility to the additional occupations, which may only be nominated for positions in regional Australia. This instrument and the three occupation lists will be subject to further amendments in the future, in response to regular reviews by the Department of Jobs and Small Business of occupations eligible for skilled visas. The next scheduled review will be in July 2018. Changes will be made on the basis of advice from Government departments, labour market analysis and consultation with industry. The amended occupation lists will ensure that the entry of skilled foreign workers to Australia remains carefully calibrated to Australia's labour market needs.
19. A Regulation Impact statement has been prepared in accordance with advice from the Office of Best Practice Regulation (OBPR). The OBPR reference is 21946.

20. Under section 42 of the *Legislation Act 2003*, the instrument is subject to disallowance and therefore a Statement of Compatibility with Human Rights has been prepared and is attached.
21. The instrument commences on 18 March 2018.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **Migration (IMMI 18/048: Specification of Occupations – Subclass 482 visa) Instrument 2018**

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Migration (IMMI 18/048: Specification of Occupations – Subclass 482) Instrument 2018**

The *Migration Regulations 1994* (‘the Migration Regulations’) set out requirements for the grant of a Temporary Skill Shortage (subclass 482) visa (‘the TSS visa’). One requirement is that the applicant be nominated by their employer. This instrument specifies the lists of skilled occupations and Australian and New Zealand Standard Classification of Occupations (ANZSCO) codes for the assessment of nominations under the relevant Migration Regulations.

The ANZSCO code is used by the Department of Home Affairs to ensure that applicants who wish to come to Australia as temporary skilled entrants are nominated in a skilled occupation for that purpose. ANZSCO is defined in legislative instrument IMMI 18/051 (Specification of Occupations and Assessing Authorities), under regulation 1.03.

The Short-term Skilled Occupation List (STSOL), Medium and Long-term Strategic Skills List (MLTSSL) and Regional Occupation List are designed to be dynamic and respond to changing labour market conditions. These lists are reviewed regularly by the Department of Jobs and Small Business (DJSB), based on labour market analysis and stakeholder consultation.

The MLTSSL and STSOL are currently used for the subclass 457 visa which the TSS visa is replacing. It is therefore necessary to re-specify the lists for this new subclass. In addition, new occupations are being made available for regional employer sponsors (the Regional Occupation List) through the Medium-term stream of the TSS visa with a regional caveat, and consequential changes to occupations previously listed on the MLTSSL and STSOL, based on advice from the Department of Jobs and Small Business. This includes new and amended occupational caveats that restrict the eligibility of an occupation in certain conditions.

This instrument specifies the MLTSSL, which provides eligible occupations and ANZSCO codes for nominations for the medium-term stream of the TSS visa. The medium-term stream visa can be granted with validity periods of up to four years, with opportunity to renew in Australia and to apply for permanent residence visas after three years. Occupations on the MLTSSL are those identified by the Australian Government as being in shortage in the Australian labour market in the medium to long-term. This instrument has 208 occupations on the MLTSSL.

This instrument also specifies the Regional Occupation List, which provides eligible occupations and ANZSCO codes for nominations by regional employers for the medium-term stream of the TSS visa. It includes 59 occupations eligible for positions located in regional Australia, as defined by the Migration Regulations. This is comprised of 48 new occupations,



one occupation moved from the MLTSSL and 10 occupations moved from the STSOL. DJSB identified these occupations as needed to support businesses in regional Australia.

This instrument also specifies the STSOL, which provides eligible occupations and ANZSCO codes for nominations for the short-term stream of the TSS visa. The short-term stream visa can be granted with a visa validity period of up to two years and opportunity for one renewal in Australia. Occupations on the STSOL are those identified by the Australian Government as being in shortage in the Australian labour market in the immediate to short-term. There are 242 occupations on the STSOL, as informed by DJSB's review of eligible occupations. Of these, 22 occupations no longer have a caveat applied to restrict these positions to regional Australia.

The instrument also includes inapplicability conditions ('caveats') for certain occupations for the purpose of nominations. A range of caveats are specified to provide clarification for applications and ensure the integrity of this visa program. These include, but are not limited to, caveats that limit the breadth of the occupation to certain industries, skills or tasks or specify a minimum salary. Caveats are specified for the purposes of the application satisfying the criteria for the nomination and therefore ensuring that applicants are nominated for genuinely skilled positions.

### **Human rights implications**

The instrument has been assessed against the seven core international human rights treaties. Article 6 of ICESCR provides that:

*The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

Article 2(1) of the ICCPR provides:

*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Article 2 of the ICESCR reflects the provision relating to discrimination on article 2(1) of the ICCPR.

Article 26 of the ICCPR provides:

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee, to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Specification of lists of occupations for which foreign workers may be nominated for entry and stay in Australia in this Legislative Instrument engage the above rights to non-

discrimination, including, for those persons who are already in Australia, as they relate to the right to work.

In its General Comment 18, the UN Human Rights Committee stated that:

*The Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.*

Similarly, in its General Comment on Article 2 of the ICESCR (E/C.12/GC/20), UNCESCR has stated (at 13) that:

*Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.*

Neither the *International Covenant on Civil and Political Rights* (ICCPR) nor the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) give a right for non-citizens to enter Australia for the purposes of seeking residence or employment. The UN Human Rights Committee, in its General Comment 15 on the position of aliens under the ICCPR, stated that:

*The [ICCPR] does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the [ICCPR] even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.*

*Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the [ICCPR].*

As such, Australia is able to set requirements for the entry of non-citizens into Australia and conditions for their stay, and does so on the basis of reasonable and objective criteria.

The aim of the TSS program is to maximise the benefits of skilled entrants to the Australian economy. This includes channelling medium-term stream skilled migrants into the occupations that have been identified to be in the long-term strategic interest of the Australian economy, and restricting short-term stream skilled migrants to occupations that are currently in shortage but for which there may not be a long-term requirement. Australia sets the requirements for the entry and conditions of stay for skilled migrants on the basis of reasonable and objective criteria, formulated by DJSB through labour market analysis and public consultation.

Further, Article 4 of ICESCR provides that the State may subject the rights enunciated in the ICESCR:

*...only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in democratic society.*

The authority of the Australian Government to grant visas of a particular duration and the authority to place conditions and limitations on non-citizens in respect of those visas, including their work rights, is lawful as a matter of domestic law and has as its objectives ensuring the continued access of Australian citizens and permanent residents to paid employment and the continued integrity of Australia's migration program. The list of eligible occupations in this Legislative Instrument are intended to ensure that persons who are already in Australia permanently are given the opportunity to seek work before those seeking to enter Australia to work and live in Australia. Providing Australians citizens and permanent residents with the first priority for jobs ensures that Australians are provided the opportunity to improve their standard of living and promotes their right to work. Broadly speaking, access to such opportunities promotes social stability. As such, they are for the "purpose of promoting the general welfare in a democratic society" and are justified in accordance with Article 4 of ICESCR.

Therefore, differentiating between short-term and long-term skills needs using eligible occupations on the MLTSSL, Regional Occupation List and STSOL is a reasonable and proportionate differentiation to support Australia's economic needs and helps Australian citizens and permanent residents retain access to the employment market. Further, the use of caveats that limit the breadth of the occupation to certain industries, skills or tasks or specify a minimum salary are a reasonable and proportionate measure to help ensure that the visa applicant will be employed in a genuinely skilled position. The skills lists also maintain a differentiation on the basis of the location of work, by providing additional opportunities for persons choosing to work in regional areas. This is designed to support regional employers by providing access to occupations that reflect the labour demand and skills needs of regional economies.

This engages Article 12 (1) of the International Covenant on Civil and Political Rights (ICCPR), which states:

*Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*

Australia's international obligations mean that visa holders cannot be required to live or work in particular areas, but they may be encouraged to do so. TSS visa holders who choose to seek nomination by an employer in a regional area but do not wish to stay in that particular regional area may instead move to another regional area and continue to work for their nominating employer. In the case that they move to another regional area to work for a different nominating employer, the same process of re-nomination will apply as in any other case where a TSS visa holder changes nominating employers. If a TSS visa holder begins work in a regional area but subsequently wishes to work in an urban area, they are not prevented from doing so. A TSS visa holder in this situation may instead apply for any other visa with work rights for which they meet the requirements under the Migration Regulations.

The 11 occupations being moved by this Instrument to be a regional occupation are already caveated to regional areas. Any subclass 457 holder who was granted a visa to work in one of

these occupations before it was caveated is entitled to continue working in their present location for the duration of their visa. Their freedom to remain in their current location and their right to work for the duration of that visa is not impacted. Changes to the lists of occupations will only affect the person if they choose to apply for a subsequent visa. If the person decides that they wish to apply for a subsequent visa to remain in Australia, they may choose to move to a regional area to continue working in that occupation or apply for any other visa with work rights for which they meet the requirements under the Migration Regulations. In addition, current visa applicants will not be impacted as the new lists will apply only to new nomination applications received after they come into effect.

The use of a regional list and caveats is reasonable and proportionate because it allows the Minister, based on advice from DJSB, the flexibility and precision required to carefully tailor the occupation lists to reflect Australia's diverse labour market needs, which vary between regional and urban centres. Restricting certain occupations to positions nominated by employers in regional Australia is reasonable and proportionate to ensure that the TSS visa supports Australia's regional economic needs and contributes to Australia's overall economic success and this does not unduly limit a foreign worker's freedom of movement or right to work.

### **Conclusion**

The Legislative Instrument is compatible with human rights because to the extent it may limit human rights, those limitations are reasonable, necessary and proportionate.

**The Hon Alan Tudge MP, Minister for Citizenship and Multicultural Affairs**