

## **EXPLANATORY STATEMENT**

Issued by the Minister for Home Affairs

*Migration Act 1958*

*Migration Amendment (Postgraduate Research in Critical Technology—Student Visa Conditions) Regulations 2022*

The *Migration Act 1958* (the Migration Act) is an Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.

Subsection 504(1) of the Migration Act provides that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act.

### **Overview**

The *Migration Amendment (Postgraduate Research in Critical Technology—Student Visa Conditions) Regulations 2022* (the Amendment Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to:

- insert new visa condition 8208 in Schedule 8 to the Migration Regulations, to apply to Subclass 500 (Student) visas (student visas) as part of a legislative framework to safeguard against the risk of unwanted transfer of Australia’s critical technology in certain temporary and permanent visa programs; and
- repeal visa conditions 8204A and 8204B from Schedule 8 to the Migration Regulations, which have been replaced by the more targeted, clearer condition 8208.

New visa condition 8208 is an integral part of the new legislative framework established on 1 July 2022 by the *Migration Amendment (Protecting Australia’s Critical Technology) Regulations 2022* (the PACT Regulations). Although the PACT Regulations originally included visa conditions 8204A and 8204B as part of this framework, further consultation with stakeholders indicated that there was scope to make the operation of these conditions more effective and streamlined, ensuring their targeted application in the context of managing risks to critical technologies. Technical issues were also identified in the numbering of the conditions, which did not conform to the established four-digit format for visa condition codes.

The Amendment Regulations address these issues. New visa condition 8208 is appropriately targeted and clear in its scope and effect, complementing other elements of the new framework established by the PACT Regulations. By expressly linking and limiting the condition to critical technology related study, this ensures the condition will only be enlivened in limited circumstances. By repealing visa conditions 8204A and 8204B and replacing them with new condition 8208, the Amendment Regulations strike an appropriate balance between the need to protect Australia's research capabilities, and promoting Australia as a destination of choice for international students, including at postgraduate research level.

Importantly, although the amendments that establish the new critical technology screening framework commence on 1 July 2022, they will only take effect when the Minister makes a legislative instrument to specify the kinds of technology that will be covered by this new framework. Until then, the screening provisions will sit out of effect.

### **Promoting and protecting Australia's critical technologies and research capabilities**

The Australian Government is committed to maximising the opportunities offered by critical technologies, and supporting competitive, trusted, and diverse technology innovation and international markets, while minimising risks to our national interest.

Critical technologies are current and emerging technologies that have the capacity to significantly enhance or pose risk to our national interest. They are fundamental to Australia's economic prosperity, social cohesion and national security, and are increasingly the focus of international geopolitical competition. Critical technologies can be digital (such as artificial intelligence) or non-digital (such as synthetic biology).

Australia's ability to harness the opportunities created by critical technologies has a significant impact on our economic success, national security and community safety. The Australian Government will work collaboratively with universities, research institutes and Australian industry to ensure we get the balance right, by promoting innovation, science and research; and by supporting competitive markets that rapidly and safely adopt new technologies and seize commercial opportunities. It is vital we ensure Australians can confidently take advantage of the opportunities presented by new and emerging technologies.

The safe and responsible development and application of critical technologies presents enormous opportunities for the Australian community and economy. Critical technologies will underpin exponential improvements in productivity, facilitating economic growth and high quality jobs, enabling all Australians to participate securely in the digital economy, improving our health, raising our living standards, and improving our defence and national security capabilities.

Critical technologies also confer a strategic edge, and at a time of intensifying geostrategic competition, this can be used to threaten our values, interests and way of life. This convergence of factors presents a spectrum of risks to Australia's ability to realise the opportunities of secure, transparent critical technologies, including through: the malicious design, development and use of technology contrary to our values and institutions; impeding our ability to make sovereign decisions about the access, control and application of critical technologies; and interference in our domestic critical technologies ecosystem.

It is vital to maintain the integrity of our research, science, ideas, information and capabilities—to enable Australian industries to thrive and maximise Australia’s domestic research capability and intellectual property. The amendments in the PACT Regulations, complemented and refined by the Amendment Regulations, will strengthen the Australian Government’s ability to identify and manage risks associated with the unwanted transfer of critical technology, including intellectual property and property derived from critical technology.

### **A new framework to screen for and manage the risk of unwanted transfer of critical technology in Australia’s temporary and permanent visa programs**

On 1 July 2022, amendments to the Migration Regulations will commence that will establish a legislative framework to enhance the Australian Government’s ability to screen for, identify and manage risks associated with the potential unwanted transfer of critical technology.

These amendments, contained in the PACT Regulations, will establish a layered approach to managing the risk of unwanted transfer in certain temporary and permanent visa programs. Initially, the framework will apply only in relation to student visas, and particularly to postgraduate research in fields associated with certain specified critical technologies. The legislative framework establishes a mechanism for targeted pre-visa screening, through new public interest criterion 4003B. This is complemented by new visa condition 8208, which provides an appropriately targeted safeguard after visa grant, requiring additional screening where a student visa holder intends to undertake critical technology related study in the postgraduate research sector.

#### Activating the framework

Although the amendments that establish the critical technology screening framework will commence on 1 July 2022, the framework will not be activated until a legislative instrument is made to specify the kinds of technology it will cover.

This instrument – to be made by the Minister under subregulation 1.15Q(2) of the Migration Regulations – is in effect the keystone of the new framework. If no technology is specified as ‘critical technology’, the screening requirements in public interest criterion 4003B and condition 8208 are not activated.

### **The purpose of the Amendment Regulations**

The Amendment Regulations repeal visa conditions 8204A and 8204B from Schedule 8 to the Migration Regulations immediately after they commence on 1 July 2022, and replace them with visa condition 8208.

The Amendment Regulations ensure that consistency in the numbering of visa conditions in Schedule 8 to the Migration Regulations is appropriately maintained. Visa condition codes in Schedule 8 would usually be identified by a four-digit, strictly numeric code; conditions 8204A and 8204B do not conform to this requirement. The Amendment Regulations are therefore necessary to address this issue, so that the new critical technology related visa condition can be correctly applied and displayed in visa processing systems, visa grant notices and the Visa Entitlement Verification Online (VEVO) system.

While new visa condition 8208 maintains the core intent of repealed conditions 8204A and 8204B – safeguarding against the risk of unwanted transfer of critical technology – it addresses issues in the scope and potential application of those conditions. Visa condition 8208 provides for appropriately targeted screening for potential risks associated with critical technology related study in the postgraduate research sector. Unlike repealed conditions 8204A and 8204B, visa condition 8208 only requires student visa holders to seek approval of a change of course, thesis topic or research in limited circumstances, where the visa holder intends to undertake critical technology related study in the postgraduate research sector.

Although condition 8208 will be imposed on all student visas, its effect is limited to student visa holders who either:

- are already studying in the postgraduate research sector (at the masters degree (research) or doctoral degree level), and intend to change their course of study, thesis or research topic to one that relates to critical technology; or
- are not currently studying in the postgraduate research sector, and intend to change their principal course of study to a course at the masters degree (research) or doctoral degree level that relates to critical technology.

In these circumstances, condition 8208 would provide that the visa holder must not undertake critical technology related study unless the Minister has approved (in writing) the visa holder undertaking that critical technology related study. The Minister must be satisfied that there is not an unreasonable risk of an unwanted transfer of critical technology by the visa holder.

Visa condition 8208 also includes an express exception in relation to the course of study (or activities related to study) evidenced in the student visa holder's visa application. This ensures student visa holders are not required to seek approval again for the course of study, or activities related to study, for which their visa was granted. This aligns with the overarching intent of visa condition 8208, and appropriately ensures the condition is only enlivened in limited circumstances, where a student visa holder intends to change their course of study, thesis or research topic to one that relates to critical technology, in the postgraduate research sector.

New student visa condition 8208 is an important element of the legislative framework established by the amendments in the PACT Regulations, alongside new public interest criterion 4003B (PIC 4003B), which was inserted on 1 July 2022 by the PACT Regulations.

PIC 4003B applies in relation to Student (Temporary) (Class TU) visa applications, where the applicant's course of study or intended course of study is a postgraduate research course, or the applicant is a member of the family unit of a student visa holder whose course of study or intended course of study is a postgraduate research course. Where PIC 4003B applies, an assessment of the risk of an unwanted transfer of critical technology by the visa applicant is undertaken as part of the consideration of the visa application, before a decision is made whether to grant a visa. New visa condition 8208 complements this by providing for a further opportunity, in relation to student visa holders, for targeted assessment of the risk of unwanted transfer of critical technology before the visa holder undertakes critical technology related study in the postgraduate research sector.

Relevantly, the amendments in Part 1 of the PACT Regulations establish the related concepts of *critical technology* and *unwanted transfer of critical technology* for the purposes of the Migration Regulations, including new visa condition 8208.

The Amendment Regulations also provide for independent merits review, by the Administrative Appeals Tribunal under Part 5 of the Migration Act, of decisions under new visa condition 8208 not to approve a visa holder undertaking critical technology related study.

## **Consultation**

Subsection 17(1) of the *Legislation Act 2003* requires that the rule-maker must be satisfied that there has been undertaken any consultation that is considered by the rule-maker to be appropriate and reasonably practicable to undertake.

The Department of Home Affairs consulted the Department of the Prime Minister and Cabinet (including the Critical Technology Policy Coordination Office), the Department of Education, Skills and Employment, the Department of Industry, Science, Energy and Resources, the Commonwealth Scientific and Industrial Research Organisation (CSIRO) and other relevant agencies. The Department of Home Affairs also consulted representatives of the higher education sector, including through the Universities Foreign Interference Taskforce (UFIT) Critical Technology Working Group. The amendments are considered necessary to ensure that concerns with repealed conditions 8204A and 8204B are addressed, while also maintaining the layered approach to the new screening framework at appropriately targeted points before and after visa grant.

The Office of Best Practice Regulation (OBPR) has also been consulted in relation to the Amendment Regulations. The amendments in the Amendment Regulations are considered to have no more than minor regulatory impact, and clarify and refine the scope and effect of the new conditions relating to critical technology related study in the postgraduate research sector. The OBPR consultation reference number is OBPR22-02396.

## **Other matters**

The matters dealt with in the Regulations are appropriate for implementation in regulations rather than by parliamentary enactment. The Migration Act expressly provides for these matters to be prescribed in regulations. It has been the consistent practice of the Government of the day to provide for detailed visa criteria and conditions in the Migration Regulations rather than in the Migration Act itself.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence immediately after the commencement of Part 1 of Schedule 1 to the PACT Regulations on 1 July 2022. The timing of this commencement ensures that visa conditions 8204A and 8204B, inserted in Schedule 8 to the Migration Regulations by the PACT Regulations, are immediately repealed and replaced by new visa condition 8208. This ensures that visa condition 8208 will be imposed on all student visas, rather than either condition 8204A or 8204B, addressing the technical issues described in relation to the condition codes, and providing greater clarity in relation to the scope and effect of the visa condition relating to critical technology related study.

A Statement of Compatibility with Human Rights has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of this Statement is at [Attachment A](#). Details of the Regulations are set out in [Attachment B](#).

**Statement of Compatibility with Human Rights**

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

***Migration Amendment (Postgraduate Research in Critical Technology—Student Visa Conditions) Regulations 2022***

This Disallowable 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 Disallowable Legislative Instrument**

The Australian Government is committed to maximising the opportunities offered by critical technologies while minimising risks to our national interest. Australia’s ability to harness the opportunities created by critical technologies has a significant impact on our economic success, national security and community safety.

Critical technologies can be digital (such as artificial intelligence) or non-digital (such as synthetic biology). Technological advances drive increased productivity, growth and improved living standards; but also have the potential to harm our national security and undermine our democratic values and principles, for example, if foreign actors and entities extracted this knowledge contrary to Australia’s national interests and undermined our competitive advantage if subject to espionage or foreign interference. Critical technologies are also enabling rapid military modernisation, economic coercion, foreign interference and cyber threats.

This convergence of factors presents a spectrum of risks to Australia’s ability to realise the opportunities of secure, transparent critical technologies, including through: the design, development and use of technology contrary to our values and institutions; impeding our ability to make sovereign decisions about the access, control and application of critical technologies; and interference in our domestic critical technologies ecosystem.

It is vital to maintain the integrity of our research, science, ideas, information and capabilities—to enable Australian industries to thrive and maximise our sovereign intellectual property.

The *Migration Amendment (Protecting Australia’s Critical Technology) Regulations 2022* (the PACT Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to strengthen Australia’s visa integrity framework to address some of these gaps.

The amendments in Part 1 of Schedule 1 to the PACT Regulations commenced on 1 July 2022 and establish the concepts of **critical technology** and **unwanted transfer of critical technology** for the purposes of the Migration Regulations. Part 1 of Schedule 1 to the PACT Regulations also contains a number of amendments relating to student visa conditions, including requirements relating to approval for undertaking, or changing, courses of study, to ensure that there is not an unreasonable risk of an unwanted transfer of critical technology by the visa holder.

This Disallowable Legislative Instrument, the *Migration Amendment (Postgraduate Research in Critical Technology – Student Visa Conditions) Regulations 2022* (the Amendment Regulations), also commences on 1 July 2022 and repeals the student visa conditions that were introduced by the PACT Regulations, replacing them with a revised, more clearly targeted visa condition that will be imposed on all student visas. Instead of a requirement for all student visa holders to seek approval before changing their course or aspects of their study, the Amendment Regulations establish a new visa condition (condition 8208) which is better targeted to address the risks of unwanted transfer of critical technology in the postgraduate research sector. This visa condition strikes an appropriate balance between the need to safeguard against the risk of unwanted transfer of critical technology, and the important contribution that international students make to Australia’s postgraduate research sector. Visa condition 8208 will require student visa holders who intend to undertake critical technology related study in a postgraduate research course to obtain approval by the Minister (or delegate) to do so. Student visa holders who intend to undertake any other course of study, or a postgraduate course of study not relating to critical technology, are not affected by visa condition 8208. Where an affected student visa holder seeks the Minister’s approval to undertake critical technology related study, the Minister’s decision would follow an assessment of the risk of an unwanted transfer of critical technology by the visa holder. This visa condition will apply to student visas granted where the associated visa application is made on or after 1 July 2022.

The Amendment Regulations also provide for merits review under Part 5 of the *Migration Act 1958* (the Migration Act) of decisions not to approve a visa holder undertaking critical technology related study.

### **Human rights implications**

This Disallowable Legislative Instrument may engage the following rights:

- The right to education in Article 13 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR);
- The right to liberty in Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR);
- *Non-refoulement* obligations in Article 3(1) of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) and Articles 6 and 7 of the ICCPR;
- The expulsion of aliens in Article 13 of the ICCPR;
- Rights relating to family and children in Articles 17(1) and 23(1) of the ICCPR and Article 3 of the *Convention on the Rights of the Child* (CRC).



The amendments made by the PACT Regulations, together with the amendments made by the Amendment Regulations, seek to protect Australia's critical technologies by providing mechanisms for ensuring ministerial oversight of individuals whose presence in Australia may directly or indirectly pose an unreasonable risk of unwanted critical knowledge transfer.

The Amendment Regulations insert a visa condition that requires student visa holders to seek approval to undertake critical technology related study in the postgraduate research sector. If a student visa holder undertakes such study without obtaining this approval, they will have failed to comply with a condition of their visa and will be liable for consideration of discretionary cancellation of their student visa under paragraph 116(1)(b) of the Migration Act.

While it is not anticipated that a significant number of visa holders will be impacted by this measure, it is important the Minister, or the Minister's delegate, has the ability to use these powers, where required, in order to mitigate the risks posed by the unwanted transfer of critical technology to foreign actors and entities.

The measures in this Disallowable Legislative Instrument are aimed at the legitimate objectives of protecting Australia's national security, public order, public health and safety, and Australia's international relations.

#### Right to education

Article 13(1) of the ICESCR states:

*The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.*

Article 13(2) of the ICESCR states, in part:

*The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:*

*(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;*

The United Nations Committee on Economic, Social and Cultural Rights in General Comment No. 13 specifies that the right to education includes that educational institutions be accessible, physically as well as economically, to everyone without discrimination.

The objective of these amendments is to protect national security, public order, public health and safety, and Australia's international relations by preventing the unwanted direct and indirect transfer of critical technology to foreign actors and entities where such actions would prejudice or harm Australia's national security, defence or international relations, the health and safety of the Australian community, or interfere with the prevention and prosecution of criminal offences.

These objectives will be achieved by providing oversight of student visa holders who wish to undertake critical technology related study in, or related to, the postgraduate research sector. If the visa holder wishes to undertake critical technology related study, they must obtain the written approval of the Minister (or delegate) to do this, if the Minister (or delegate) is satisfied that there is not an unreasonable risk of unwanted transfer of critical technology by the visa holder.

The amendments do not limit access to education, and, most relevantly, to higher education, by student visa holders in the broad sense. Rather they impose a requirement for individual students to obtain approval in certain limited circumstances to ensure that their studies do not pose unreasonable risks to Australia's national security, public order and community safety.

The amendments will not hinder genuine academic exchange. The amendments are not anticipated to have an impact on the number or type of products that education providers may offer, or consumer demand for education. It is not expected that Australia's universities will need to make extensive changes to their existing course descriptions as a result of these amendments. The amendments will apply to all student visas and will remain country-agnostic, however they require student visa holders to seek the Minister's approval in circumstances where they intend to undertake critical technology related study at the postgraduate research level.

A decision not to approve a student visa holder undertaking critical technology related study is subject to merits review under Part 5 of the *Migration Act 1958*. A decision not to approve a student visa holder undertaking critical technology related study will not limit their ability to undertake other courses of study and continue their education in Australia. If a student visa holder proceeds to undertake critical technology related study without obtaining approval, their visa may be cancelled, which may impact on their ability to undertake further study in Australia. However, such a decision would consider the student visa holder's individual circumstances and be a reasonable and proportionate response to the risks their studies may have posed to Australia's national security and community safety.

#### Right to liberty

Article 9(1) of the ICCPR states:

*Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*

The purpose of the Migration Act is to 'regulate, in the national interest, the coming into and presence in Australia of non-citizens'. A person whose visa is cancelled becomes an 'unlawful non-citizen' under the Migration Act and is liable to be detained under section 189 and liable for removal from Australia under section 198.

The potential for harm to Australia's interests from such an unwanted transfer is significant and to address the risks posed by rapid military modernisation, economic coercion, foreign interference and cyber threats and to maintain the integrity of Australia's research, science, ideas, information and capabilities, it is necessary for the Minister to be able to consider whether to cancel a person's visa where they have failed to obtain approval to undertake critical technology related study.

To the extent that cancelling a person's visa following a breach of the visa condition introduced by this amendment may result in a limitation of their right to liberty, any detention would not be arbitrary as it would be reasonable, necessary and proportionate in the circumstances. In most cases, the person whose visa has been cancelled would be removed as soon as reasonably practicable, but will be liable to be detained as an unlawful non-citizen under the Migration Act pending that removal.

When exercising discretionary cancellation powers, delegates considering the cancellation of visas will be guided by comprehensive policy guidelines and be required to take into account the visa holder's circumstances, relevant *non-refoulement* obligations, and the seriousness of the breach. The visa holder will be given the opportunity to provide reasons why the visa should not be cancelled, in line with procedural fairness requirements under the Migration Act. The visa holder will also have the opportunity to seek merits review and/or judicial review of a decision to cancel their visa.

Held detention in an immigration detention centre is a last resort for the management of unlawful non-citizens, particularly individuals whose removal may not be practicable in the reasonably foreseeable future. If the person whose student visa is cancelled is not eligible for a bridging visa, the Minister has a personal discretionary power under the Migration Act to intervene in an individual case and grant a visa, including a bridging visa, to a person in immigration detention, if the Minister thinks it is in the public interest to do so. What is and what is not in the public interest is for the Minister to decide.

The Minister also has a personal discretionary power to allow a detainee to reside outside of an immigration detention facility at a specified address in the community (residence determination). While a residence determination permits an individual to be placed in the community subject to certain conditions, it continues to be a detention placement.

The Minister's powers to consider whether to grant a visa to permit an unlawful non-citizen's release from immigration detention, or to permit a community placement under a residence determination, until they are able to be removed from Australia, means that the person's individual circumstances, and the risk they may pose to the Australian community can be taken into account. This enables the least restrictive option to be implemented for the person having regard to their circumstances.

This ensures that any detention consequent to a visa cancellation is not arbitrary. Rather it constitutes a proportionate response to the individual circumstances of each case.

In light of the above considerations, to the extent the amendments may engage the right to liberty under Article 9 of the ICCPR, the amendments are consistent with Article 9(1) of the ICCPR as any detention would be lawful and would not be arbitrary.

#### *Non-refoulement obligations*

Article 6 of the ICCPR states:

*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

Article 7 of the ICCPR states:

*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*

Article 3(1) of the CAT states:

*No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*

As a person whose visa is cancelled is liable for removal from Australia under the Migration Act and since the amendment introduces a visa condition that may lead to a person's visa being cancelled, it potentially engages Article 3(1) of the CAT and Articles 6 and 7 of the ICCPR.

Australia remains committed to its international *non-refoulement* obligations. To the extent that these articles may be engaged, there is scope for these obligations to be considered as part of the decision to cancel a visa or through the protection visa process if the person makes a claim to engage Australia's protection obligations. Individuals would not be subject to involuntary removal from Australia to the country to which their protection claims relate unless and until any claims for protection they have advanced through a valid protection visa application have been assessed according to law. Where the assessment of that application results in a protection finding, as defined in section 197C of the Migration Act, the unlawful non-citizen is not required or authorised to be removed from Australia to that country. As such, this amendment does not affect Australia's commitment to complying with its *non-refoulement* obligations in relation to Article 3 of the CAT and Articles 6 and 7 of the ICCPR.

#### Expulsion of aliens

Article 13 of the ICCPR states:

*An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.*

Under international law, Australia has the right to take reasonable steps to control the entry and stay of aliens. Decisions to cancel a visa for contraventions of the visa condition introduced by the Amendment Regulations will be made in accordance with the Migration Act and the Migration Regulations.

In addition to the right to merits review for a decision not to approve the person undertaking critical technology related study, to the extent individuals may have their visa cancelled for undertaking such study without obtaining this approval, leading to their expulsion, the Migration Act and Regulation processes are in accordance with Article 13 in that, prior to a decision to cancel, the visa holder is provided with the opportunity to put forward reasons as to why their visa should not be cancelled to a delegated officer. Procedural fairness provisions for visa cancellations are set out in Subdivision E of Part 2 of the Migration Act and will apply to these decisions. Merits review by the Administrative Appeals Tribunal and/or judicial review in Australian courts will also be available. As such, this amendment does not limit Article 13 of the ICCPR.

### Rights relating to families and children

Article 17(1) of the ICCPR states:

*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

Article 23(1) of the ICCPR states:

*The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

Article 3(1) of the CRC states:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

This measure may engage Articles 17 and 23 of the ICCPR where student visa holders whose visas are subject to cancellation have family members who are entitled to remain in Australia, for example because they are Australian citizens.

Article 17 of the ICCPR sets out a prohibition on arbitrary and unlawful interference with the family and Article 23 sets out an obligation about the protection of the family unit. These obligations may be engaged by visa cancellation for breach of the student visa condition introduced by the Amendment Regulations, to the extent that such visa holders may be detained or removed from Australia consequent to their visa being cancelled. In some circumstances, the detention or the removal of a person from Australia may result in the separation of family members as a direct consequence of action taken by Australia. In other circumstances, separation of family members will be a consequence of the choices made by family members who continue to have a right to remain in Australia.

To the extent that family members are separated as a direct consequence of action taken by the Commonwealth, it will not be an unlawful or arbitrary interference with the family or otherwise impermissibly limit Articles 17 or 23. These rights can be subject to proportionate and reasonable limitations that are aimed at legitimate objectives. In the case of these measures, these objectives include protecting Australia's national security, community health and safety by mitigating the risk of unwanted transfer by visa holders of critical technology to foreign actors and entities.

The degree of hardship that may be caused by a cancellation decision on the visa holder's family members in Australia would be taken into account as part of a discretionary decision to cancel the visa. While rights relating to family generally weigh against cancellation, these rights do not grant an absolute right to remain in Australia and so they also need to be considered in conjunction with the risks that unwanted transfer of critical technology will have on Australia's national security, community health and safety.

In accordance with Article 3 of the CRC, the best interests of the child are a primary consideration to be taken into account in decisions affecting a child. To the extent that a discretionary decision to cancel a student visa for breach of the visa condition introduced by the Amendment Regulations may impact a child, the decision-maker will appropriately weigh the best interests of any children in Australia against other primary considerations, including the safety of the Australian community.

### **Conclusion**

The amendments to the Migration Regulations made by this Disallowable Legislative Instrument are compatible with human rights as, to the extent they may limit some human rights, those limitations are reasonable, necessary and proportionate to the objectives of protecting Australia's national security and the safety of the Australian community.

*The Honourable Clare O'Neil MP, Minister for Home Affairs*

**Details of the Migration Amendment (Postgraduate Research in Critical Technology—Student Visa Conditions) Regulations 2022**

**Section 1 – Name**

This section provides that the name of the instrument is the *Migration Amendment (Postgraduate Research in Critical Technology—Student Visa Conditions) Regulations 2022* (the Amendment Regulations).

**Section 2 – Commencement**

This section provides for the commencement of the instrument.

The whole of the instrument commences immediately after the commencement of Part 1 of Schedule 1 to the *Migration Amendment (Protecting Australia’s Critical Technology) Regulations 2022* (the PACT Regulations).

Part 1 of Schedule 1 to the PACT Regulations commenced on 1 July 2022. The Amendment Regulations commence immediately after the commencement of Part 1 of Schedule 1 to the PACT Regulations on 1 July 2022. The timing of the commencement of the Amendment Regulations is intended to ensure conditions 8204A and 8204B in Schedule 8 to the *Migration Regulations 1994* (the Migration Regulations) – as inserted by the PACT Regulations – are repealed immediately after they commenced on 1 July 2022, and replaced with new visa condition 8208.

The amendments to the Migration Regulations by the Amendment Regulations provide that new visa condition 8208 is imposed on all Subclass 500 (Student) visas, subject to the application provision inserted in Schedule 13 to the Migration Regulations by the amendment in item 7 of Schedule 1 to the Amendment Regulations. This amendment is described in more detail below at Item [7] – Part 108 of Schedule 13.

**Section 3 – Authority**

This section provides that the instrument is made under the *Migration Act 1958* (the Migration Act).

**Section 4 – Schedules**

This section provides for how the amendments in the Amendment Regulations operate.

## **Schedule 1 – Amendments**

### **Part 1—Main amendments**

#### ***Migration Regulations 1994***

##### **Item [1] – Paragraphs 500.611(1)(aa) and (ab) of Schedule 2**

This item amends subclause 500.611(1) of Schedule 2 to the Migration Regulations. It repeals paragraphs 500.611(1)(aa) and (ab) and inserts a new paragraph 500.611(1)(aa) in their place.

Subclause 500.611(1) sets out the conditions that must be imposed on a Subclass 500 (Student) visa (student visa) if the applicant satisfies the primary criteria for grant of the visa.

The effect of paragraph 500.611(1)(aa) is to provide that new visa condition 8208 must be imposed on a student visa where the applicant satisfies the primary criteria. New visa condition 8208 is inserted in Schedule 8 to the Migration Regulations by the amendment in item 4 of Schedule 1 to the Amendment Regulations.

The repeal of paragraphs 500.611(1)(aa) and (ab) is a consequential amendment, following the repeal of visa conditions 8204A or 8204B by the amendment in item [3] of Schedule 1 to the Amendment Regulations. New visa condition 8208 effectively replaces visa conditions 8204A and 8204B, providing a clearer and more targeted approach to screening arrangements to identify and manage the risk of unwanted transfer of critical technology in the postgraduate research sector. The amendments in the Amendment Regulations also ensure that consistency is appropriately maintained in the numbering and format of condition codes used to identify visa conditions in Schedule 8 to the Migration Regulations.

##### **Item [2] – Paragraph 500.612(1)(a) of Schedule 2**

This item amends paragraph 500.612(1)(a) to omit reference to condition 8204B, and replaces it with a reference to new visa condition 8208.

Subclause 500.612(1) sets out the conditions that must be imposed on a student visa if the applicant satisfies the secondary criteria for grant of the visa.

The effect of the amendment is to provide that new visa condition 8208 must be imposed on a student visa where the applicant satisfies the secondary criteria. The omission of the reference to visa condition 8204B is a consequential amendment, following the repeal of visa condition 8204B by the amendment in item 3 of Schedule 1 to the Amendment Regulations. New visa condition 8208 effectively replaces visa condition 8204B, providing a clearer and more targeted approach to screening arrangements to identify and manage the risk of unwanted transfer of critical technology in the postgraduate research sector. The amendments in the Amendment Regulations also ensure that consistency is appropriately maintained in the numbering and format of condition codes used to identify visa conditions in Schedule 8 to the Migration Regulations.



### **Item [3] – Clauses 8204A and 8204B of Schedule 8**

This item repeals clauses 8204A and 8204B of Schedule 8 to the Migration Regulations.

Clauses 8204A and 8204B were inserted in Schedule 8 to the Migration Regulations on 1 July 2022 by the amendment in item 8 of Schedule 1 to the PACT Regulations. In the course of preparing changes to departmental IT systems for 1 July 2022 to implement the amendments in the PACT Regulations, the Department of Home Affairs (the Department) identified a technical issue with the condition codes 8204A and 8204B. Specifically, the Department's visa systems are unable to support condition codes that include letters as well as numbers, and that do not conform to a strict four-digit numeric format. To address this, it is necessary to amend the Migration Regulations to revise conditions 8204A and 8204B in Schedule 8 to the Migration Regulations, immediately after they commence on 1 July 2022. The amendments in the Amendment Regulations also ensure that consistency is appropriately maintained in the numbering and format of condition codes used to identify visa conditions in Schedule 8 to the Migration Regulations.

The need to make these amendments also presents an opportunity to refine and clarify the scope of the visa conditions dealing with the risk of unwanted transfer of critical technology in the postgraduate research sector. The strategic advantage afforded to Australia through its strong native research capability must be balanced with the risk of unwanted knowledge transfer that enables foreign, dual-use applications of critical technology. The amendments in the PACT Regulations that commenced on 1 July 2022 introduced enhanced visa screening to enable the Department of Home Affairs to strengthen its approach to assessing and mitigating national security risks relating to the unwanted knowledge transfer of critical technology.

In line with this, new visa condition 8208 makes the intended scope and effect of the condition clearer on the face of the legislation. It also strikes an appropriate balance between the need to safeguard against the risk of unwanted transfer of Australia's critical technology with the important role of international students in the postgraduate research sector, including in relation to research into new and emerging critical technologies.

The Amendment Regulations therefore repeal conditions 8204A and 8204B and replace them with the more targeted visa condition 8208, focusing expressly on postgraduate research in critical technology – as inserted by the amendment in item 4 of Schedule 1 to the Amendment Regulations.

As section 2 of the Amendment Regulations provides for commencement of the amendments in the Amendment Regulations immediately after the amendments in Part 1 of Schedule 1 to the PACT Regulations commence, the Amendment Regulations ensure that conditions 8204A and 8204B are not available to be imposed on a student visa, and that condition 8208 would be imposed instead.

### **Item [4] – After clause 8207 of Schedule 8**

This item inserts new clause 8208 in Schedule 8 to the Migration Regulations (visa condition 8208), immediately after current clause 8207 in that Schedule.

New visa condition 8208 replaces conditions 8204A and 8204B, and clarifies the scope and effect of the student visa condition that is intended to manage and safeguard against the risk of unwanted transfer of critical technology in the postgraduate research sector. A student visa

holder would only be required to seek the Minister's approval in circumstances where they intend to undertake **critical technology related study** (as defined in subclause 8208(3)). If a student visa holder whose visa is subject to condition 8208 intends to undertake a course of study that is not at the masters degree (research) or doctoral degree level, the visa condition would not be enlivened.

#### *Assessing the risk of an unwanted transfer of critical technology*

New subclause 8208(1) provides that the visa holder must not undertake **critical technology related study** unless:

- the Minister is satisfied that there is not an unreasonable risk of an unwanted transfer of critical technology by the visa holder; and
- the Minister has approved (in writing) the visa holder undertaking that critical technology related study.

Paragraph 8208(1)(a) requires the Minister to be satisfied that there is not an unreasonable risk of an unwanted transfer of critical technology by the visa holder, before making a decision under paragraph 8208(1)(b) to approve the visa holder undertaking that critical technology related study.

An unreasonable risk of unwanted transfer is not intended to include a remote risk. Whether the risk is unreasonable for a particular person would involve consideration of the person's background and affiliations, the sensitivity of the material with which the person is proposing to work, and other relevant matters. Whether a transfer of critical technology may or must be made in compliance with a foreign law would not, of itself, render the risk of transfer 'reasonable' for these purposes. Common law procedural fairness, including the fair hearing rule, would apply in relation to a decision made under paragraph 8208(1)(b).

#### *Exception for a course of study, or related activities, evidenced in the visa application*

New subclause 8208(2) provides that subclause 8208(1) does not apply in relation to the intended course of study, or activities related to study in Australia, evidenced in the visa holder's visa application. The purpose of this exception is to ensure that a visa holder is not required to seek approval again, by effect of condition 8208, for a course of study that was evidenced in their visa application.

Relevantly, subclause 500.217(6) of Schedule 2, as amended by the PACT Regulations on 1 July 2022, provides that a student visa applicant must satisfy public interest criterion 4003B (PIC 4003B) if their course of study (or intended course of study) is a postgraduate research course. PIC 4003B provides that the Minister has not determined that there is an unreasonable risk of an unwanted transfer of critical technology by the applicant. As such, it is appropriate that visa condition 8208 does not apply in relation to changes of course, thesis or research topic within a course of study that was evidenced in the student visa holder's visa application. If, however, that student visa holder subsequently intends to change course, or undertake a thesis or research topic in relation to a critical technology that was not evidenced in their visa application, visa condition 8208 would be enlivened if that new course, thesis or research topic relates to critical technology.

### *The meaning of ‘critical technology related study’*

New subclause 8208(3) establishes the meaning of the expression ***critical technology related study*** for the purposes of clause 8208. In clause 8208, critical technology related study means:

- a postgraduate research course that relates to ***critical technology*** (as defined in regulation 1.03 of the Migration Regulations); or
- a bridging course required as a prerequisite to a postgraduate research course that relates to critical technology; or
- a thesis or research topic that is for a postgraduate research course, and relates to critical technology.

New clause 8208 relies on the definition of ***postgraduate research course*** provided in clause 500.111 of Schedule 2 to the Migration Regulations. A postgraduate research course is defined as a course of study leading to the award of a masters degree (research) or a doctoral degree. Relevantly, the expression ***course of study*** is also defined in clause 500.111.

If a student visa is subject to condition 8208, the visa holder would only be required to seek and obtain the Minister’s approval if:

- their intended postgraduate research course relates to critical technology; or
- they are seeking to undertake a package of courses, where the principal course is a postgraduate course that relates to critical technology and they are required to undertake a prerequisite bridging course before commencing the postgraduate research course.

Where a student visa holder is required to undertake a bridging course as a condition of enrolment in a postgraduate research course that relates to critical technology, the intention of visa condition 8208 is to require them to obtain the Minister’s approval before undertaking the bridging course. This is intended to ensure the necessary visa screening occurs as soon as practicable in the visa holder’s study pathway, to provide certainty for the student visa holder and the education provider before the visa holder commences the bridging course – rather than immediately before they undertake the principal (postgraduate research) course.

If a student visa holder intends to undertake a postgraduate research course that does not relate to critical technology, visa condition 8208 would not be enlivened. The student visa holder would therefore not be required to seek the Minister’s approval in these circumstances.

Similarly, visa condition 8208 would not be enlivened if a student visa holder intends to undertake a course of study that would lead to a qualification that is not a masters degree (research) or doctoral degree, or that does not lead to a qualification in the Australian Qualifications Framework (AQF).

### *Consequences of non-compliance with visa condition 8208*

New visa condition 8208 enables targeted visa screening processes for student visa holders who intend to undertake research in certain critical technology areas. Where a visa holder undertakes critical technology related study without the Minister's approval, this would constitute a contravention of the visa condition. In these circumstances, the visa holder may be liable for consideration of visa cancellation under paragraph 116(1)(b) of the Migration Act.

When exercising discretionary cancellation powers, delegates of the Minister considering the cancellation of visas are guided by comprehensive policy guidelines, and would be required to take into account the visa holder's circumstances, relevant *non-refoulement* obligations, and, where the proposed cancellation is for non-compliance with visa condition 8208, the seriousness of the breach. The visa holder would be given the opportunity to provide reasons why the visa should not be cancelled, in line with procedural fairness requirements under the Migration Act. The visa holder would also have the opportunity to seek merits review and judicial review of a decision to cancel their visa.

### *The meaning of critical technology*

The term ***critical technology*** is defined in regulation 1.03 of the Migration Regulations to mean:

- technology of a kind specified by the Minister in a legislative instrument made under subregulation 1.15Q(2); or
- property (whether tangible or intangible) that is part of, a result of, or used for the purposes of researching, testing, developing or manufacturing any technology specified by the Minister in a legislative instrument made under subregulation 1.15Q(2).

The express references to critical technology in new visa condition 8208 therefore have the effect of circumscribing the circumstances in which the visa condition is enlivened. If a postgraduate research course does not relate to critical technology, as defined in regulation 1.03, visa condition 8208 would not be enlivened.

## **Part 2—Other amendments**

### ***Migration Regulations 1994***

#### **Item [5] – Paragraphs 4.02(4)(u) and (v)**

This item repeals paragraphs 4.02(4)(u) and (v) and substitutes new paragraph 4.02(4)(u).

To provide access to merits review, it is necessary to provide for a review right by prescribing the relevant decisions pursuant to subsection 338(9) of the Migration Act. New paragraph 4.02(4)(u) provides for review by the Administrative Appeals Tribunal (AAT), under Part 5 of the Migration Act, in relation to a decision under new condition 8208 not to approve a student visa holder undertaking critical technology related study. This mirrors the merits review arrangements that were previously provided for by repealed paragraphs 4.02(4)(u) and (v) in relation to repealed conditions 8204A and 8204B.

### **Item [6] – Paragraph 4.02(5)(t)**

This item amends paragraph 4.02(5)(t) of the Migration Regulations by omitting reference to paragraph 4.02(4)(v). This is a consequential amendment, following the repeal of paragraph 4.02(4)(v) by item 5 of Schedule 1 to the Amendment Regulations.

The reference to paragraph 4.02(4)(u) in paragraph 4.02(5)(t) is not affected by this amendment. As such, paragraph 4.02(5)(t) continues to provide that an application for review of a decision to which amended paragraph 4.02(4)(u) applies may only be made by the visa holder.

Relevantly, amended paragraph 4.02(4)(u) provides that a decision not to approve a visa holder undertaking critical technology related study, for the purposes of condition 8208, is a reviewable decision under Part 5 of the Migration Act.

### **Item [7] – Part 108 of Schedule 13**

This item provides that the amendments made by Division 1 of Part 1 of Schedule 1 to the PACT Regulations and Part 1 of Schedule 1 to the Amendment Regulations apply in relation to any application for a visa made on or after 1 July 2022.

The intention of this amendment is to make clear that the amendments in the Amendment Regulations apply in relation to all student visa applications made on or after 1 July 2022. This amendment also makes clear that, although the amendments to the Migration Regulations by the PACT Regulations will commence on 1 July 2022, the Amendment Regulations repeal conditions 8204A and 8204B immediately after they are inserted in Schedule 8 to the Migration Regulations, and replace them with new condition 8208.