

EXPLANATORY STATEMENT

Issued by authority of the Minister for Home Affairs

Migration Act 1958

Migration (Designated Migration Law—Visa Condition 8208) Determination (LIN 24/009) 2024

This Instrument, which may also be cited by departmental reference LIN 24/009, is made under paragraph 495A(3)(b) of the *Migration Act 1958* (the Act).

This Instrument commences on the later of:

- 1 April 2024; and
- the day after this Instrument is registered on the Federal Register of Legislation.

The Instrument is a legislative instrument for the *Legislation Act 2003* (the Legislation Act).

Purpose

Subsection 495A(1) of the Act provides that the Minister may arrange for the use, under the Minister's control, of computer programs for any purpose for which, under the 'designated migration law', the Minister may or must make a decision; or exercise any power, or comply with any obligation; or do anything else related to making a decision, exercising a power, or complying with an obligation. The term 'designated migration law' is defined in subsection 495A(3) of the Act. In particular, paragraph 495A(3)(b) of the Act provides that the Minister may determine, by legislative instrument, any provision of the Act or the *Migration Regulations 1994* (the Migration Regulations) to be part of the 'designated migration law'.

The Instrument operates to determine visa condition 8208 (condition 8208) in Schedule 8 to the Migration Regulations to be part of the designated migration law for the purposes of section 495A of the Act.

The *Migration Amendment (Postgraduate Research in Critical Technology—Student Visa Conditions) Regulations 2022* (the PACT Student Visa Condition Regulations) amended the Migration Regulations on 1 July 2022, to insert condition 8208 which applies 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. 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).

Condition 8208 requires student visa holders who intend to undertake critical technology related study in a postgraduate research course to obtain the approval of the Minister (or the Minister's delegate) to do so. Where an affected student visa holder seeks the Minister's approval to undertake

critical technology related study, the Minister’s decision under paragraph 8208(1)(b) would follow an assessment of the risk of an unwanted transfer of critical technology by the visa holder.

The purpose of this Instrument is to allow for the use of computerised decision-making in certain circumstances. Specifically, by determining that condition 8208 is part of the designated migration law, this allows the Minister to arrange for the use of computer programs to make a decision, exercise a power or comply with an obligation, or do anything else relating to a decision, power or obligation, in relation to critical technology related study under condition 8208.

Consultation

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

The PACT Regulations, the related legislative instrument *Migration (Critical Technology—Kinds of Technology) Specification (LIN 24/010) 2024*, and the visa screening framework that these legislative instruments establish have been the subject of extensive consultation. Within government, this included the Department of the Prime Minister and Cabinet, the Department of Industry, Science and Resources (including the Critical Technologies Hub), the Department of Education, Skills and Employment, the Commonwealth Scientific and Industrial Research Organisation (CSIRO), the Department of Foreign Affairs and Trade, 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, and industry peak bodies through a series of roundtables and bilateral engagements. The outcomes of this consultation process informed the approach to finalising the list of technologies specified in LIN 24/010.

While this Instrument has not been the subject of separate consultation, the matters dealt with by this Instrument are machinery in nature and necessary and appropriate to support the implementation of the framework. Consultation undertaken in relation to the implementation of condition 8208 generally is set out in the Explanatory Statement for PACT Student Visa Condition Regulations.

The Office of Impact Analysis (OIA) was consulted and considered that the Instrument dealt with matters of a minor or machinery nature and no regulatory impact statement was required. The OIA reference number is OBPR22-02396.

Details of the instrument

Section 1 sets out the name of the Instrument.

Section 2 provides for the commencement of the Instrument on 1 April 2024 or the day after the Instrument is registered on the Federal Register of Legislation, whichever is the later.

Section 3 provides that the Instrument is made under paragraph 495A(3)(b) of the Act.

Section 4 sets out definitions of terms used in the Instrument.

Section 5 provides that the Instrument determines visa condition 8208 of Schedule 8 to the Migration Regulations to be part of the designated migration law for the purposes of section 495A of the Act.

Parliamentary scrutiny and other considerations

The Instrument is exempt from disallowance under section 42 of the Legislation Act. This is because the Instrument is made under paragraph 495A(3)(b) of the Act, which is exempt from disallowance under paragraph (a) of item 20 of the table covered by section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*. Section 10 provides that for the purposes of paragraph 44(2)(b) of the Legislation Act, the disallowance requirements of that Act do not apply to legislative instruments listed in the table covered by section 10.

Relevantly, the Explanatory Statement to the *Legislation (Exemptions and Other Matters) Regulation 2015* provides on page 31 of that Statement, that item 20 of the table “preserves the exemption that previously existed in item 26 of the table in subsection 44(2) of the *Legislative Instruments Act 2003*. These instruments made under the Migration Act and Migration Regulations are appropriate for executive control.”

As the Instrument is not disallowable, a Statement of Compatibility with Human Rights is not required under section 15J of the Legislation Act.

The Instrument is made by the Minister for Home Affairs under paragraph 495A(3)(b) of the Act, for the purposes of section 495A of the Act.