



Australian Government
Department of Home Affairs

Submission

For decision

PDMS Ref. Number: MS24-000053

Date of Clearance: 06/08/2024

To Minister for Home Affairs, Minister for Immigration and Multicultural Affairs, Minister for Cyber Security

Subject For approval and making: Home Affairs Legislation (Minister—Decision-making powers for Immigration Group and National Security and Resilience Group) Amendment (Resolution of Status Visa Additional Cohort) Delegation (ADMIN 24/006) 2024

Timing At your earliest convenience.

Recommendations

That you:

1. **agree** to delegate your power to issue a certificate under the *Migration Regulations 1994* for certain Resolution of Status (Class CD) visa applicants to SES Band 1 and 2 employees in Immigration Policy Division and Immigration Compliance Division, and any SES Band 3 position holder for Immigration Group; and
agreed / not agreed / please discuss
2. **sign** and **date** *Home Affairs Legislation (Minister—Decision-making powers for Immigration Group and National Security and Resilience Group) Amendment (Resolution of Status Visa Additional Cohort) Delegation (ADMIN 24/006) 2024* at **Attachment A**.
signed / not signed

Minister for Home Affairs, Minister for Immigration and Multicultural Affairs, Minister for Cyber Security

Signature.....

Date:...../...../2024

Released by Department of Home Affairs
under the Freedom of Information Act 1982

Minister's Comments

Key Issues

1. This submission seeks your signature of the proposed delegation instrument *Home Affairs Legislation (Minister—Decision-making powers for Immigration Group and National Security and Resilience Group) Amendment (Resolution of Status Visa Additional Cohort) Delegation (ADMIN 24/006) 2024 (ADMIN 24/006)* at Attachment A.
2. ADMIN 24/006 would delegate your power under sub-regulation 2.07AQ(3A) of the *Migration Regulations 1994* (the Migration Regulations) to issue a certificate stating that, by reason of the High Court's decision in *Love v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 152 (**Love**), an individual has been released from, has not been taken into, will not be taken into, or could not be taken into immigration detention. For more information on the relevant provision, see 'Background' below.
3. If signed, your power to issue such a certificate will be delegated to SES Band 1 and SES Band 2 employees in Immigration Policy Division and Immigration Compliance Division, and any SES Band 3 position holder(s) in the Department of Home Affairs' (the Department) Immigration Group.
4. ADMIN 24/006 would amend existing delegation instrument *Home Affairs Legislation (Minister—Decision-making powers for Immigration Group and National Security and Resilience Group) Delegation and Authorisation 2021 (ADMIN 21/051)*. This delegation instrument is included at Attachment B for reference. ADMIN 24/006 will establish the proposed delegation of your power under subregulation 2.07AQ(3A), but will not otherwise change any of the existing delegations under ADMIN 21/051.

Background

5. Subregulation 1.16(1) of the Migration Regulations allows the Minister, by writing, to delegate any of the Minister's powers under the Migration Regulations to departmental officers.
6. In December 2023, the *Migration Amendment (Resolution of Status Visa Additional Cohort) Regulations 2023* (the **Amendment Regulations**) amended the Migration Regulations to allow for persons affected by the High Court's decision in *Love* who have accepted an offer of a permanent stay in Australia to be granted a Subclass 851 (Resolution of Status) visa.

Released by Department of Home Affairs
under the Freedom of Information Act 1982

7. In *Love*, a majority of the High Court held that an Aboriginal or Torres Strait Islander non-citizen who meets the tripartite test (as set out by Brennan J in *Mabo v Queensland [No. 2]* (1992) 175 CLR 1) is not an 'alien' within the meaning of paragraph 51(xix) of the Constitution. Such persons fall largely outside the scope of the aliens power; critically, the High Court found that a non-citizen non-alien cannot be detained or removed from Australia under the *Migration Act 1958* (the Migration Act).
8. For a person to qualify for this permanent visa pathway, the circumstance specified by subregulation 2.07AQ(3A) of the Migration Regulations must exist for the person. This provision states that the circumstance exists if the Minister has issued a certificate stating that, by reason of the High Court's decision in *Love*:
- a person in the migration zone has been released from, has not been taken into, or could not be taken into immigration detention; or
 - for a person outside of the migration zone—that the Minister is satisfied that the person could not be detained under section 189 of the Migration Act if the person was in the migration zone.

9.

s. 47C(1)

10.

s. 42(1)

11. This delegated power will be restricted to SES in Immigration Policy Division and Immigration Compliance Division within the Immigration Group, as well as the SES Band 3 (Deputy Secretary) position holder responsible for Immigration Group.

Consultation – internal

12.

s. 42(1)

13.

s. 42(1)

14.

s. 47C(1)

Consultation – Secretary / Associate Secretary Immigration / ABF Commissioner

15. s. 47C(1)

16. s. 47C(1)

17. s. 47C(1)

Client service implications

18. S. 47C(1)

Risks and Sensitivities

19. If ADMIN 24/006 is not signed, the power to certify a person as being affected by the High Court's decision in *Love* will remain available only to you as the Minister to exercise. s. 47E(d)

S. 47E(d)

20. The power under sub-regulation 2.07AQ(3A) would only be delegated to SES officers in Immigration Group. This approach would appropriately constrain the delegation to senior officers in the relevant parts of the Department, with appropriate skills, knowledge and experience.

Financial/systems/legal/deregulation/media implications

21. There will be no financial impact as a result of the proposed delegation of your powers.

22. S. 47C(1)

23. S. 47C(1)

Attachments

Attachment A *Home Affairs Legislation (Minister—Decision-making powers for Immigration Group and National Security and Resilience Group) Amendment (Resolution of Status Visa Additional Cohort) Delegation (ADMIN 24/006) 2024*

Attachment B *Home Affairs Legislation (Minister—Decision-making powers for Immigration Group and National Security and Resilience Group) Delegation and Authorisation 2021 (ADMIN 21/051)*

Authorising Officer
Cleared by: Jeremy Wolter A/g Assistant Secretary Legislation Branch Date: 06/08/2024 Mob: s. 22(1)(a)(ii)

Contact Officer: Jeremy Wolter, Acting Assistant Secretary, Legislation Branch, Mob: s. 22(1)(a)(ii)

CC Assistant Minister for Immigration
Assistant Minister for Citizenship and Multicultural Affairs
Secretary
Associate Secretary Immigration
Group Manager Legal
Group Manager Immigration Policy
First Assistant Secretary Immigration Policy
First Assistant Secretary Immigration Compliance
Assistant Secretary Compliance and Community Protection Policy