

TO: Foreign Affairs Defence and Trade References Committee

Dear Madam/Sir,

REF. SUBMISSION - AUSTRALIA'S ENGAGEMENT IN AFGHANISTAN

I am a solicitor, specialising in Immigration and Administrative Law.

1.

It is submitted that a large number of visa applicants in Afghanistan who applied for certification to facilitate a Subclass 201 In-Country Special Humanitarian Visa Assessment have been unlawfully and improperly rejected upon the following basis.

2.

In accordance with Migration Regulations - Schedule 2 - Sub-clause 201.211 (1A) of Instrument Immi 12/127 at sub paragraph 3 - the primary criteria is the necessity for employment with the relevant agencies (refer clause 3 (a) (i), (ii) and (iii)).

3.

It is submitted that the certification process has been irrevocably contaminated upon the following basis. Many decision records are based upon the non-particularised finding that certification has been refused as.... "you were not considered an employee of one of the Australian Government agencies identified...". The basis of such claim is that the Applicant was employed through contractors.

4.

Attention is drawn to the Attachments to this email, which are

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Australian Tax Office Publication ... "Difference between Employees and Contractors" (Attachment 1).

<https://www.ato.gov.au/business/employee-or-contractor/difference-between-employees-and-contractors/>

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Fair Work Ombudsman ... "Difference between Contractors and Employees (Attachment 2)

<https://www.fairwork.gov.au/find-help-for/independent-contractors#difference-between-contractors-and-employees?print=1>

5.

It is submitted that such Guidelines explicitly reflect multiple, easily available case law which serves to extinguish artificial reliance upon contractor status. If requested, I can provide a selection of relevant case law (but it is easily available and I request that the committee make themselves familiar with such precedent).

6.

It is submitted that critical flaw in decision making regarding certification is that the online instructions as to completion of this document failed to elicit either at all or satisfactorily the relevant criteria (e.g. presented in the Attachments) so as to enable lawful decision making so as to consider whether contractor characteristics could plainly and properly be ascribed employee status.

7.

Given the relevant Instrument obviously invokes Australian law, natural justice/procedural fairness obviously dictates that relevant questions must be presented so as to facilitate lawful appraisal.

Thus, it is submitted that after examining the Certification Application and responses the Committee may plainly make a decision that on an en masse basis lawful decision making has not occurred, which may be viewed as a gravely serious matter.

8.

Such position can obviously not be ameliorated by virtue of adopted a purported "common sense" approach as a substitute for proper assessment. Indeed, such appraisal, considering the dire consequence of rejection, may be viewed as derisive.

9. If this Submission may be viewed as meritorious, there has been a large number of Certification Applicants who have been unlawfully rejected and an equally large group who could have applied but who were discouraged by virtue of the rationale adopted - that is the word processed generic non-particularised rejection letters.

10. I would be appreciative if I received acknowledgement of this Submission.

Yours sincerely,
Adrian Joel
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