Submission

by the

Vietnamese Community in Australia

to the

Senate Legal and Constitutional References Committee's

Inquiry into

The Administration And Operation Of The Migration Act 1958

8 August 2005

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Introduction

We thank the Committee for the opportunity of making this Submission.

Our Submission deals with Terms a., b., and e. of the Terms of References. It covers the matters set out under the following Sections, most of which relate to Vietnamese asylum seekers on the "Hao Kiet" boat which arrived in Australia in July 2003.

We provide one **Attachment**, the 8 March 2005 submission by the Hao Kiet asylum seekers' lawyers to the Refugee Review Tribunal. Its contents, particularly Sections 2 and 3, support most Sections of this Submission. The enclosures referred to in that submission are not attached to this Submission.

Recent Section 417 decisions for Vietnamese asylum seekers

We strongly support and are grateful to the Immigration Minister for recently exercising her S417 Ministerial Discretion powers to grant visas to 2 groups of Vietnamese boat asylum seekers.

One group comprises the final 13 of the 53 original Hao Kiet asylum seekers. In their case, we believe that should their then current High Court application be successful and their cases were remitted to the Refugee Review Tribunal, they would be virtually assured of being granted refugee status. That is because the reasoning that led to refugee status for some 20 Hao Kiet people before them, applies to the whole boatload. The Ministerial intervention saved them from languishing further in detention, saved unnecessary legal costs, and is the public interest.

The other group, a husband and wife currently in the Baxter camp, today were given their permanent visas. After having been detained for more than 4 years in Australia (and about 6 years in the Galang camp in Indonesia during the 90s), they are now free. Rejected by Australia's refugee status assessment system which, in their case, we believe, was too tough and wrong, they are now safe from persecution.

Wrongful application of the people-smuggling provisions

Three people on the Hao Kiet were prosecuted, and two of them were convicted as people-smugglers and sentenced to the mandatory minimum term of 5 years of imprisonment each.

People-smuggling law intended to target profiteers, not asylum seekers

In his Second Reading Speech, Parliamentary Secretary to the Minister for Finance and Administration, Mr. Slipper, said[1]:

> *"I want to make clear that this legislation is **primarily aimed at the profiteers** from people trafficking who organise individuals or groups to enter Australia illegally for a fee. Although the law will apply equally to everyone, I stress that **refugees are not at risk from these provisions**. This is because the refugees convention, to which Australia is a party, provides that refugees are not to be subjected to penalties on account of their illegal entry or presence in the country of first refuge."* (all emphases are added)

[1] Official Hansard, Wednesday, 30 June 1999, p. 7994

Prosecution knew that no profit was involved

As the Prosecutor, Hilton Dembo, acknowledged[2], the Government knew that no profit was involved:

> ***"The venture was not for profit, ie. contrary to the spirit of the second reading speech**, which indicated that the section was enacted inter-alia to stop those involved in people smuggling for profit"*

Trial judge urged government to intervene in favor of the defendants

At the 17 March 2004 trial of one of the defendants, the trial judge expressed a belief

> *"that this case may be one where **the Commonwealth Executive will need to intervene, relying on the prerogative of mercy**, to alleviate the harshness of the mandatory sentencing regime that I am required to apply"*

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We call for action to ensure that the people-smuggling law cannot again be mis-used to prosecute asylum seekers who do not organise the entry for material profit.

We believe that the Government's action in prosecuting the above people, then the to-date lack of action to alleviate their sufferings, indicates malicious intent, or at least lack of respect for the will of the Parliament, on the part of DIMIA officials involved.

Unacceptable conduct by RRT Member [redacted]

The conduct of Mr. [redacted], a Refugee Review Tribunal Member who reviewed a number of cases, was dishonest, and lacked professionalism. In particular, he:

- Prepared a report (which would be used to reject all the applicants), then portrayed it as a DFAT (Department of Foreign Affairs and Trade) report;
- Failed to disclose to the applicants the highly relevant fact that he had gone to Vietnam and prepared the above report,
- Started preparing the above report even before the primary decision (rejecting all applicants) had been handed down,
- Possibly has disclosed information to Vietnamese authorities about the applicants' whereabouts and other information.

Please see Section 3 of the Attachment.

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The RRT's apparent lack of independence – its Members are appointed, re-appointed, or dismissed by the Immigration Minister – is a systemic problem. Others, such as the Attorney-General or the HREOC, should have a say in such matters.

The RRT "non-adversarial" system was supposed to result in informal and quick but fair decisions. However, in practice this means Members habitually and critically questioning claims by applicants and information favorable to them, while uncritically accepting information adverse to applicants (including from DFAT). This means that applicants – usually with little English, little understanding of the system, and

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[2] AACP (Australian Association Of Crown Prosecutors, www.aacp.net.au) Annual Conference July 2004, 'Surviving the difficult Prosecution' by Hilton Dembo

sometimes scared in the setting of the Tribunal Hearing – are fundamentally ad disadvantaged.

We call for a systemic solution to ensure that RRT Members cannot again abuse their powers to harm asylum seekers, in ways similar to what Mr. L[redacted] has done.

We call on the RRT to review Mr. [redacted]'s actions in this case, and other cases in which he took part in decision-making, and take remedial actions where necessary.

While Mr. L[redacted] apparently no longer works for the RRT, we call on the Government to ensure that he is not appointed to other positions of public trust.

DFAT's Country Information is not objective or reliable

Responding to requests from DIMIA and the RRT, DFAT prepared documents giving its views about the circumstances surrounding the Hao Kiet people. In so doing, DFAT clearly, heavily, and actively behind-the-scene, avoided displeasing the Hanoi regime (*"Clearly we [DFAT] need to consider whether doing so would compromise bilateral relations, and compromise the ability of our posts in Vietnam to conduct business with the host authorities"* – see Attachment). It gradually toned down its views so much that the original views, generally supporting the Hao Kiet claims, in the end were not supportive. In other words, DFAT's purported views are not an honest, objective, or reliable assessment.

Please see Section 2 of the Attachment, particularly 2.1.

The fact that DFAT's Country Information lacks objectivity and reliability is, by itself, a matter of grave concern. That it took a determined and lengthy FOI battle to unearth this information, causes more worry, because it indicates that there are other problems yet to be unearthed.

Following on from the above, it is reasonable to believe that DFAT would also lack objectivity and reliability in relation to deportations and post-deportation safety of deportees.

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DFAT's above-mentioned lack of objectivity and reliability arises, we believe, mainly because of its systemic conflict of interest: the same organisation needs to maintain good international relations, as well as challenge them. At the level of individual officials, those who insist on stating objective opinions are likely to have career problems. But beyond these matters, it is possible that the "cultural" problems that DIMIA is said to have (which we believe is caused by government policy), also exist in DFAT.

If the Refugee Review Tribunal retains its practice of seeking DFAT's Country Information and views relating to applications before it, then we call on the RRT to, as a matter of policy, reduce the weight it gives to such information.

We call on the RRT to give more weight to sources that do not have conflicts of interest. These include the HREOC and international reputable human rights organisations such as Human Rights Watch, Amnesty International.

DIMIA influenced DFAT to change its views

After seeking DFAT's views, DIMIA then actively sought DFAT to change them to make it easier for DIMIA to reject the asylum applicants.

Please see Section 2 of the Attachment, particularly 2.1.

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DIMIA's action in trying to change the views that it sought, is plainly wrong and makes a mockery of the seeking. Also of concern is the fact that this behaviour was not apparent until after a FOI battle, indicating that other worrying instances exist, yet to be uncovered. These actions lead to serious doubts about DIMIA's ability to carry out its role as the primary decision maker in relation to asylum claims.

DIMIA, DFAT, and possibly RRT, disclosed cases to Vietnamese authorities

A senior DIMIA official discussed *"details of the [Hao Kiet] case with the Vietnamese government officials"* (see Attachment).

DFAT also conducted similar and ongoing discussions.

Regarding the RRT, at least Member [redacted], in preparing his above-mentioned report, can reasonably be assumed to also have disclosed the Hao Kiet people's whereabouts to the Vietnamese regime.

Please see Section 2.2 of the Attachment.

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These disclosures are inconsistent with the Government's often-stated respect for the privacy and safety of asylum seekers. They also directly conflict with and negate DIMIA's promises to asylum seekers to keep their information confidential, as well as go against the very principle that the RRT stands for – the protection of refugees. That this can happen and the people committing these wrongs do not face any accountability actions, is cause for concern, because this may happen again.

Consular Agreement and asylum seekers

The Consular Agreement between Australia and Vietnam requires each State to promptly inform the other when it detains the other's nationals. The point to note here, is that this arrangement is **for the benefit of those nationals**. Common sense would therefore dictate that Australia should not apply this provision of the Agreement in the case of asylum seekers. However, it is possible that DFAT would justify its actions as being required under the Agreement.

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There is a need to ensure that the Agreement takes into account the special and obvious needs when the detained nationals are asylum seekers. Either the Agreement should be modified, or DFAT's guidelines for its operations should reflect this need.

- End of Submission's body -

Attachment
(to the Vietnamese Community in Australia's Submission)

The 8 March 2005 submission by the Hao Kiet asylum seekers' lawyers to the Refugee Review Tribunal

Your ref: "see below"
Our ref: FV 31421

8 March 2005

District Registrar
Refugee Review Tribunal
Pacific Power Building
Level 29, 201 Elizabeth Street
SYDNEY NSW 2000

BY HAND

Dear District Registrar

RESISTANCE FORCE REMITTALS – PRE HEARING SUBMISSION

We refer to the following Refugee Review Tribunal ("RRT") applicants ("Applicants") whose cases were recently remitted by the Federal Court of Australia for reconsideration:

	Applicant(s)	RRT Ref	RRT Remittal Ref
Member Mr Andrew Mullin	1.	N03/47654	N05/50607
	2.	N03/47668	N05/50610
	3.	N03/47667	N05/60611
	4.	N03/47660	N05/50623
	5.	N03/47673	N05/50625
	6.	N03/47665	N05/50618
	7.	N03/47669	N05/50624
	8.	N03/47670	N05/50621
Member Dr Irene O'Connell	9.	N03/47650	N05/50617
	10.	N03/47652	N05/50622
	11.	N03/47659	N05/50609
	12.	N03/47661	N05/50619
	13.	N03/47662	N05/50612
	14.	N03/47663	N05/50620
	15.	N03/47666	N05/50608

1. Background

The Applicants are part of a group of 54 persons who arrived in Australia, aboard a vessel named the Hao Kiet, in around July 2003. These 54 persons claim to be members of a political group known as the Resistance Force ("RF")

We trust that Member [redacted] Member [redacted] have already reviewed the material contained on the Applicants' original Department of Immigration and Multicultural and Indigenous Affairs ("DIMIA") and RRT files (file numbers for the latter are noted above) ("Primary Material").

Below are further submissions which are both supplementary and complementary to the Primary Material.

2. "DFAT View"

A report which figured prominently in the Applicants' original RRT applications is: Country Information Report No.120/03: *Request for information regarding Vietnamese boat people on Christmas Island*, dated 16 September 2003: CX84861 (""DFAT View"").

As far as the Applicants' original RRT applications are concerned the following should be noted in relation to the DFAT View:

- On 8 December 2003, a request was made to the Department of Foreign Affairs and Trade ("DFAT") under the *Freedom of Information Act 1982 (Cth)* seeking all information before DFAT about the RF as individuals or as a group and in particular in relation to the preparation of "DFAT View" ("FOI Request").

- On 9 December 2003, a request was made to the RRT to exercise its summons power under paragraph 427(3)(b) of the *Migration Act 1958 (Cth)* ("Act") to get the documents sought in the FOI Request in order to expedite the process ("Summons Request"). In this regard, the RRT declined to exercise its summons power and advised that it preferred to let FOI Requests made to other agencies run their course.

- On 24 February 2004, the RRT was notified that DFAT had withheld 29 of the 59 documents identified as falling within the terms of the FOI Request. A request was made to the RRT to defer any adverse decision pending the conclusion of the FOI Request processes ("Adjournment Request").

- On 26 March 2004, the RRT was informed that DFAT had affirmed its decision on internal review about not disclosing documents previously withheld under the FOI Request and that a review application would be lodged with the Administrative Appeals Tribunal ("AAT") ("AAT FOI Review").

- On 31 March 2004, the RRT advised that it would not defer its decisions pending the conclusion of the AAT FOI Review.

- On 13 April 2004, the RRT notified the majority of the RF of its decision to affirm the relevant DIMIA decisions.

Subsequently, but before the hearing in the AAT FOI Review, DFAT revised its view about the applicability of exemptions to the 29 excluded documents. DFAT provided **all** those 29 documents to the RF with only small or no exclusions (except in one case): see paragraph 15 of the Batley Affidavit (referred below).

The AAT FOI Review was heard before Senior Member Allen of the AAT ("AAT FOI Hearing"). By the end of the AAT FOI Hearing, it became apparent that there are more than 59 documents falling within the ambit of the FOI Request.

Sometime after the AAT FOI Hearing, DFAT informed the RF that it had identified a further 13 documents. Broadly, DFAT also informed the RF that it would be claiming similar exemptions over parts of these latter discovered documents.

The present submission will refer to the FOI Request documents as they are numbered in the AAT FOI Review.

Please find enclosed:

a. full copies of documents 31, 32, 34, 35, 38 40-57, 64, 66, 67, 69 and 72;

b. partial copies of documents 33, 36, 37, 39, 58, 59; 60-63, 65, 68, 70 and 71; and

c. affidavit of Kathy Kay Klugman dated 28 October 2004, annexed to which is – inter alia – an affidavit of James Batley dated 4 June 2004 ("Batley Affidavit"), including Schedules of Exempt Documents.

The documents released by DFAT and the Schedules of Exempt Documents provided in relation to the same:

1. indicate that "DFAT View" in its final form should be given little or no weight and that DFAT's assessment in its "raw" form supports much of the RF's claims; and

2. The conduct of DIMIA and DFAT since the RF's arrival in Australia has given rise to a sur place claim.

2.1 "DFAT View" – final form -v- raw form

The documents released by DFAT indicate:

i. DIMIA did not consider it "appropriate" to convey DFAT's advice in its "raw form" to the primary decision-makers: see Document 34.

ii. When DFAT became aware that their report may need to be provided to the RF (and thus be put in the public domain), a senior DFAT officer observed that there was a need to write the report with a view to its possible impact on relations with Vietnam:

"Clearly we need to consider whether doing so would compromise bilateral relations, and compromise the ability of our posts in Vietnam to conduct business with the host authorities": see Document 34. Such a comment calls into question the objectivity of the "DFAT View".

iii. Similarly, Document 37 reveals the following comment by a DFAT officer:

"do you want our reply phrased in such a way that it would do no harm if it got into the public arena or can we assume that this document will be treated as classified information?"

iv. DFAT's concern with ensuring that the "DFAT View" does not "compromise" Australia's bilateral relations with Vietnam, and the fact that the "DFAT View" was prepared with this mind, is also evident in paragraphs 8 and 10 of the Batley Affidavit.

v. Ultimately, Document 68 confirms that the final version of the DFAT view was prepared

"in a way that can be released to the case officers (ie not classified); and ..."

vi. There was an ongoing process of editing of the "DAFT View" based upon comments from DIMIA to remove "hooks" (see Document 50) and "add a few glosses" (see Document 68). This tended to remove qualifications to the "raw" advice which existed in earlier versions of the "DFAT View". Hence, an early version of the "DFAT View" said:

"Should the boat people be returned to Vietnam, we consider, ***on balance****, that the central authorities would not wish to provoke Australian criticism by mistreating them in a serious or* ***obvious*** *manner. Given this, it is possible,* ***but unlikely****, that the authorities might seek custodial sentences for any returnees thought to have been ringleaders.":* see Document 38.

Also see Document 68 which states:

"We also believe, ***on balance****, that the central authorities would not wish to provoke Australian criticism by* ***obviously mistreating*** *the returnees."*

vii. Amendments to the above versions, suggested by DIMIA, saw the deletion of "on balance" and the replacement of "but unlikely" with "but only a remote chance that". In the final version, "on balance" is deleted, so is any reference to possible custodial sentences for the ringleaders (see further below).

viii. Earlier versions of the "DFAT View" tended to support some of the RF's claims, including that they might be perceived as being anti-regime and punished as a result and that, at the very least, the instigators could face on-going difficulties, beyond the "warning" mentioned in the final version of the "DFAT View". Indeed, the kind of difficulties noted in the earlier versions of the "DFAT View" were similar to those which certain RF members had said they had suffered previously as a consequence of their family history, thus making such claims more credible:

"There is a very small chance that the authorities might seek custodial sentences for, or place under administrative detention, any returnees whose publicly-advertised opposition to the Vietnamese government was deemed to reflect ongoing anti-regime intent": see Document 53.

"Any seen as instigators might, assuming they are not formally charged or placed on probation, as discussed above, also be subjected to low-level administrative harassment (eg disadvantaged in relation to job opportunities or access to public services)": see Document 47.

In relation to the first of these two quotations, further discussions between DIMIA and DFAT sought to indicate that any custodial sentences would be "short": see Document 50.

It would appear that DFAT would not agree to such an assessment because the information before it indicated that sentences could range from 6 months to 3 years: see Document 53. Eventually, the whole thought contained in the quotation was removed from the final version.

ix. It would also appear that the Australian Ambassador to Vietnam declined to include a thought suggested by DIMIA. An email reveals that:

"... the Ambassador decided that he could not state categorically that media attention would have no effect": see Document 54.

x. In fact an early version of the "DFAT View" states:

"On the assumption the Vietnamese government knows about the media claims, it is possible the authorities could treat the returnees concerned more severely than might normally be the case": see Document 35.

In this regard, we note that the Primary Material as well as the documents released by DFAT make clear that the Vietnamese authorities are well aware of, among other thing, the "media attention" the RF has received.

The uncertainty of the fate of the RF, if returned, is spelled out by comments by the Ambassador and another DFAT officer in Document 53 where they delete a phrase suggested by DIMIA which indicates that publicity would have no adverse effect and comment:

"The situation is more ambiguous, in that publicity surrounding the case might disadvantage, but might help, these individuals' cases. We simply do not know."

xi. Ultimately, the final version of the "DFAT View" contains none of the above comments, stating: that DFAT *"know of no comparable cases ... involving individuals who have attracted media attention abroad through volunteering information about anti-government activities"* where the authorities have imposed detention. The "DFAT View" then, at DIMIA's suggestion (see Document 44), compares the RF with a group returned under the auspices of the UNHCR who are not apparently comparable (no suggestion that media attention in their cases was given to anti-regime activities) and who did not (by and large) suffer mistreatment.

xii. The toning down of the "DFAT View" is also evident in Document 36 which indicates the following deletions:

"The government can, on the basis of Vietnam's criminal law, take ~~harsh~~ action against anyone harming (or inciting others to harm) the security or unity of the State, or slandering the State or its organizations. ~~Free speech as understood in Australia is not allowed~~".

The final version of the "DFAT View" removes this comment altogether.

xiii. Similarly, Document 36 indicates the deletion of the following comment:

~~*"It is nevertheless possible that local authorities at the point of departure might harass or stigmatise some of the individuals concerned"*~~.

xiv. Document 38 further indicates that the "DFAT View" was watered down. That document contains the following comments in relation to the likelihood of whether the Vietnamese authorities would inform DFAT of their knowledge of the RF's existence of the leaflet drop:

"Even then, it does not follow that the Vietnamese authorities would tell us what they knew."

"It is quite possible that pamphlets could have been discreetly left or distributed at the cemetery – this would not be difficult to do"

Similarly, Document 68, yet another earlier version of the "DFAT View" states:

"We have not been able to find any publicly available evidence to confirm or refute the story, and must therefore rely on conjecture"

"It does not follow, however, that the Vietnamese authorities would provide a straightforward response to any enquiries."

The above comments are not present in the final version of the "DFAT View".

xv. Document 38 provides yet another example of toning down, it states:

"we think it probable that all members of the group would be questioned if they were returned, and subjected to some degree of surveillance. Certain individuals might also be subjected to low-level administrative harassment"

Subsequent to DIMIA's intervention/suggestions, the final version of the "DFAT View" presents the above assessment in the following less controversial manner:

*"**In the nature of the Vietnamese system**, it is probable that all members of the group would, on return, be subjected to **routine** questioning for **administrative purposes** and to some degree of surveillance.*

xvi. DIMIA's influence on the "DFAT View" is also evident in Document 44. For instance, that documents reveals a request by DIMIA for the insertion of the emboldened comment at the end this sentence:

*"We consider a distinction is likely to be made by the Vietnamese authorities between those who use the internet or other widely accessible platforms to spread their message, and others **such as the particular group of Vietnamese in question whose protest was more ad hoc and localised.**"*

xvii. Document 46, an earlier version of the "DFAT View" contains some critical comments/amendments by DFAT which are not presented in the final version of the "DFAT View", for instance:

"The Vietnamese Government has arrested ~~***high profile dissidents***~~ individuals for disseminating material about democracy on the internet, or for publicly distributing leaflets about human rights. ***[Comment: the individuals***

in question gained prominence as a result of being imprisoned for expressing their views, hence our suggested change].

Clearly, the result of the Applicants' original RRT applications should have been different if the RRT was aware of the above comment. Indeed the result of the Applicants' remittal applications must be different to that of their original RRT applications.

Another critical comment, noted in Document 46, which is not contained in the final version of the "DFAT View" is:

"In our view, the alleged incident would be seen as relatively insignificant [Comment: Accepted text] and it would be unlikely to give rise to serious penalties such as lengthy prison terms, should the people concerned be returned to Vietnam. ***[Comment: The Vietnamese legal system is not transparent and its judgments are inconsistent, making it difficult to define circumstances in which action would be taken against individuals for airing 'anti-government' views****"*

2.2 "DFAT View" - additional sur place claims

The documents released by DFAT indicate:

i. A DFAT officer had spoken to "officials" in Vietnam "about the case", (see Document 35), and a "senior DIMIA official" had discussed:

"details of the case with the Vietnamese government officials" (see Document 53).

Such discussions give rise to a further *sur place* claim to those set out in the Primary Material. Reference to the said discussions are missing from the final version of the DFAT View.

ii. Similarly, Document 58 (under cover of Document 57) is a cable from DIMIA to DFAT's Hanoi Post, advising of DIMIA's decision to refuse the grant of protection visas to the RF prior to the RF members themselves being informed. In the cable, DIMIA states:

"In view of this, and the likely media coverage in Australia, it would be appropriate for you to brief the Vietnamese authorities on the progress of the matter"

iii. Document 39, referred in the Schedule of Exempt Documents and in paragraph 25 of the Batley Affidavit, is dated 20 August 2004 (ie shortly after the arrival of the Applicant's Boat) and described by DFAT as:

"confidential communication from Australia's Embassy in Hanoi containing sensitive information in relation to the cooperation between Vietnam and Australia on the arrival in Australia of boats with Vietnamese citizens aboard, and other issued."

Document 39 further contains:

"a report on discussions between Australian Government (DIMIA) and Vietnamese Government officials" (see paragraph 26 of the Batley Affidavit)

"concern[ing] sensitive matters, such as the arrival in Australia by boat of Vietnamese nationals claiming refugee status on the basis that they are in need of protection from the Vietnamese Government" (see paragraph 27 of the Batley Affidavit)

that if disclosed

"would cause damage to the relations of the Australian Government and the Vietnamese Government" (see paragraphs 21 of the Batley Affidavit)

iv. Documents 58, 59 and 65 indicate that there have been "confidential communications" about the RF:

"from the highest levels of the Vietnamese Government ["Vietnamese Ministers"] to the Australian Minister for Foreign Affairs, Mr Downer": see paragraph 34 of the Batley Affidavit and the Additional Schedule of Exempt Document.

The above conduct conflicts with DIMIA's promises of confidentiality to the RF, with DIMIA's promises that the information provided by the Applicants' would not be provided to the Vietnamese authorities.

3. "DFAT View 2" – another possible sur place claim

i. As part of their original RRT applications, on or about 15 January 2004, the Applicants received a letter from the RRT, which letter provided the Applicants *"the opportunity to comment"* on what the letter described as *"a recent report by the Department of Foreign Affairs and Trade"*.

ii. Enclosed with the relevant letter was a two page document entitled "*Department of Foreign Affairs & Trade 2003, DFAT Report 266 – Vietnam: RRT Information Request VNM16317, 18 December*" ("Report 266").

iii. On or about 16 January 2004, (most of) the Applicants received a further letter from the RRT about Report 266, which letter advised the Applicants that Report 266:

"is relevant to [the Applicants'] review (and may be adverse to the [Applicants'] claims) because [Report 266] refers to improving conditions in Vietnam including likely treatment of returnees, and suggests that [the Applicants'] do not face a real chance of persecution".

iv. On 20 January 2004, we wrote, on the Applicants' behalf, to the RRT and sought an extension of the time provided by the RRT to Applicants to respond to Report 266.

v. On or about 20 January 2004 the RRT wrote to us and advised that it would allow the Applicants until 20 February 2004 to respond to Report 266.

vi. On or about 20 February 2004, on behalf of the Applicants, we wrote to the RRT about various matters relating to the Applicants' original RRT

applications, including and in particular Report 266 ("Report 266 Submission").

vii. On or around 13 July 2004 the solicitors for DIMIA and the RRT, filed bundles of relevant documents for the Applicants' recent Federal Court applications.

viii. On our inspection of the said relevant documents, we observed a document which led us to believe that Report 266 was drafted or

"prepared by a Member of the Refugee Review Tribunal following his visit to Vietnam".

ix. The relevant document further led us to believe that:

a. the RRT may have the "notes prepared by the Member" involved in the preparation of Report 266; and

b. the Department of Foreign Affairs and Trade ("DFAT") may have records of correspondences between DFAT and the RRT and/or the Member involved in the preparation of Report 266.

x. As a result of, inter alia, the said beliefs, on 9 September 2004 we caused a subpoena to be filed with the Court and served on the Minister for Foreign Affairs ("Subpoena").

xi. The Subpoena required the Minister for Foreign Affairs to produce, among other things,

"[a]ny material that relates to the preparation of [Report 266]".

xii. Annexure "**A**" hereto comprises copies documents produced under the Subpoena – the pages of which have been numbered 86 to 127 (inclusive),

xiii. Also as a result of the our beliefs as set out above, on 8 September 2004 we caused a Notice to Produce to be filed with the Court and served on the RRT ("RRT Notice to Produce").

xiv. The RRT Notice to Produce required the RRT to produce:

"Any material (in whatever form) relating to the preparation, production or procurement of [Report 266], including but not limited to the notes of the relevant Refugee Review Tribunal Member who visited Vietnam prior to the preparation of [Report 266]."

xv. Annexure "**B**" hereto comprises copies of documents produced under the RRT Notice to Produce.

xvi. The letters/report received from the RRT referred to in paragraphs i, ii, iii, and v (in this section) misled us.

xvii. Prior to the our inspection of the my bundles of relevant documents filed in the Applicants' recent Federal Court applications, we had understood Report 266 to have been prepared by DFAT.

xviii. However, following our inspection of the said bundles of relevant documents and the documents which comprise Annexures "**A**" and "**B**" hereto, we understood that Report 266 was substantially prepared by (former RRT) Member [redacted] following a visit to Vietnam by the same.

xix. Our Report 266 Submission proceeds on the basis that Report 266 *"by and large, supports the Applicants' claims"*, that is, my Report 266 Submission proceeds on the basis that [redacted] (and also former RRT Member [redacted]) may have misread/misunderstood Report 266 or read the same out of context[3].

Such a submission would not have been made if we knew that the RRT, and in particular [redacted], had been involved in the preparation of Report 266

In the alternative, we would have sought to further refute Report 266 and, in particular, the view intended by the drafter of Report 266 being a view which:

"refers to improving conditions in Vietnam including likely treatment of returnees, and suggests that [the Applicants'] do not face a real chance of persecution".

Please advise if Members [redacted] share this view so that we can make such a submission.

xx. Whether or not Members [redacted] share this view, kindly advise:

a. why – as is indicated by page 86 of Annexure "**A**" hereto – [redacted] was preparing Report 266 at a time when the relevant primary decisions by DIMIA had not yet been handed down;

b. why Report 266 was finalised during the time the RRT was holding hearings for the Applicants as part of their original RRT Applications;

c. of the purpose of [redacted]'s visit to Vietnam, being the visit which led to the creation of Report 266;

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[3] Suring the course of the Applicants' original RRT applications, the RRT and in particular [redacted] had expressed the view that Report 266 *"is relevant to [the Applicants'] review (and may be adverse to the [Applicants'] claims) because [Report 266] refers to improving conditions in Vietnam including likely treatment of returnees, and suggests that [the Applicants'] do not face a real chance of persecution"*.

d. of [redacted]'s itinerary, including places visited by [redacted] in Vietnam, as well as the dates and durations of those visits;

e. the source material relied on by [redacted] in drafting Report 266, in particular, details of persons spoken to, material read or viewed, record of observations (eg notes) etc; and

f. whether and to what extent [redacted] knew of and/or revealed details of the Applicants' claims prior to and/or during his visit to Vietnam, that is, the visit which led to the creation of Report 266.

xxi. Please do not make any unfavourable decision in relations to the Applicants until:

i. the information (and/or material) requested above has been provided to the Applicants; and

i. the Applicants have had the opportunity to make submissions in relation to the same.

xxii. The information requested herein is highly relevant because the manner in which Report 266 was drafted suggests that [redacted] may have directly/indirectly:

a. revealed information about the Applicants to the Vietnamese authorities; and/or

b. alerted the Vietnamese authorities about the presence of the Applicants in Australia

and thus given rise to a further sur place claim in relation to the Applicants.

4. People Smuggling

The Primary Material contains claims that the RF would be persecuted in relation to their involvement or alleged involvement in people smuggling[4].

The Primary Material contends that in Vietnam people smuggling is not just seen as a criminal act but rather a political act.

Such a claim is relevant to all the Applicants, particularly V[redacted]

The Applicants have, by and large, all claimed to have been involved in organising the RF's escape from Vietnam. Such involvement includes making monetary and non-monetary contributions to facilitate the escape.

Thus the Applicants are at risk of persecution for people smuggling and/or being associated with (or having assisted) people smugglers (eg V[redacted], [redacted] S[redacted] N[redacted] (see submission of 8 January 2004), H[redacted] and T[redacted]).

[4] See, in particular, pages 21 to 27 and 42 to 47 of our submission of 8 January 2004.

The information set out below is relevant to all members of the RF, as opposed to just Van Tol Tran.

4.1 V[redacted]

With regards to Mr V[redacted] we have already provided the RRT with parts of [redacted] criminal trial, a trial at which [redacted] was convicted for people smuggling.

The RRT has also been provided with copies of various articles reporting on [redacted] people smuggling conviction. An example of the numerous press reports in which the [redacted] name has been mentioned is one on ABC online dated 2 March 2004 and entitled *Three face Perth court on people smuggling charges*. Copies of this and other material which mentions Tol are attached.

Member Andrew Jacovides ("Member Jacovides") has decided 11 of the RF's RRT applications.

4.2 N03/47657 of 1 April 2004

Member Jacovides is of the view that those members of the RF who have received media attention for having been implicated in "people smuggling" may be at risk of persecution if returned to Vietnam. For instance, in N03/47657 of 1 April 2004 the Member states:

> *"The Tribunal considered the applicant's associated claim that he will be punished by the authorities in Vietnam for being a "people smuggler". The applicant does not claim to be a "people smuggler" but he is fearful that the authorities in Vietnam will assume that he is a people smuggler. However, the Tribunal finds that the matter of people smuggling has received considerable attention in the media since the boat arrived in Australia, as indicated by the articles summarised above, and those suspected of people smuggling have been identified. There has been no suggestion that the applicant was implicated in people smuggling. The Tribunal is satisfied that the applicant is not a people smuggler or a person who will be considered to be a people smuggler by the authorities in Vietnam. The applicant was clearly a passenger on the boat to Australia. It finds therefore, that the applicant's fear in this regard is not well-founded".*

The above suggests that the Member is of the view that even those suspected of people smuggling are at risk of persecution in Vietnam.

Relevant to such a conclusion, is the fact that at the time of the above decision and by virtue of, at least, our submission of 25 March 2004 in support of the Applicants Member Jacovides was aware that the 3 members of the RF, including [redacted], who were charged with people smuggling had already been tried and in [redacted] case convicted.

4.3 Article 1F

With regards to the Article 1F submission contained in our submission of 8 January 2004, we advise that in the case of the other 2 member of the RF who were charged with people smuggling, one (T[redacted]) was acquitted at first instance; and the other (H[redacted]) was successful in appealing the relevant conviction.

Tol is currently in the process of appealing his people smuggling conviction.

4.4 N04/49710 of 25 October 2004 – T[redacted]

In N04/49710 of 25 October 2004, Member Jacovides found T[redacted]" – mentioned above) to be a refugee by reason of the harm may face due to his alleged involvement in people smuggling.

[redacted] case for refugee status in relation to persecution for people smuggling is much more compelling. This is because, unlike [redacted] has actually been convicted of people smuggling.

In relation to L[redacted], N04/49710 states:

> *"... **the Tribunal finds that for other reasons the applicant does have a well-founded fear of persecution in Vietnam for reasons of political opinion. The Tribunal is satisfied that the people smuggling charges against the applicant and his association with known political activists on the boat will attract the adverse interest of the authorities in Vietnam.***
>
> *Information from external sources indicates that the authorities in Vietnam continue to imprison citizens for people-smuggling and 'illegal migrations'. These activities are not only considered to be crimes but also activities "undermining state and community party policy" (Amnesty International, 2003, supra, folio Tribunal N04/49710, Part 1, folio 36). DFAT in its correspondences with DIMIA, while preparing Country Information Report No 120/03: Request for Information regarding Vietnamese boat people on Christmas Island, advised that "people smuggling is illegal in Vietnam and individuals identified as been instrumental in organising a group departure may face prosecution under the normal processes of Vietnamese law". DFAT advised that there is "a very small chance that the authorities might seek custodial sentences for, or place under administrative detention, any returnees whose publicly advertised opposition to the Vietnamese government was deemed to reflect ongoing anti-government regime intent" (Tribunal file N04/49710, Part 2, folio 93) and cautions that the Vietnamese legal system is not transparent and its judgements are inconsistent, making it difficult to define circumstances in which action would be taken against individuals for airing "anti-government" views" (Tribunal file N04/49710, Part 2, folio 93). The US Department of State further advises that the government of Vietnam "arrest and detain citizens arbitrarily" and persons "arrested for the peaceful expression of views were subject to charge under several provisions in the Criminal Code that outlaw acts against the State" (US Department of State, 2004, Country Reports on Human Rights Practices – 2003, "Vietnam, Section 1, 25 February).*
>
> *The Tribunal has formed the view that a political opinions will be attributed to the applicant by the authorities in Vietnam and he will be vulnerable to arrest and detention as an opponent of the State. The Tribunal is aware that people-smuggling is a crime in Vietnam. It accepts that the authorities of Vietnam can legitimately prosecute citizens implicated in people-smuggling. However, **the Tribunal finds that the authorities in Vietnam will not view the applicant simply as a criminal implicated in people-smuggling but also as a person who assisted political activists to flee the country. The Tribunal is satisfied that the applicant will be punished by the authorities in Vietnam for criminal conduct as well as political crimes***

against the State. *The Tribunal considers the risk of persecution to be small but it is not satisfied that it is remote or insubstantial."* [emphasis added]

The above is relevant and applies to all of the RF, particularly Tol.

The materials obtained from DFAT and the media coverage Tol and the RF have received, particularly regarding their escape from Vietnam, is sufficient evidence that the Vietnamese authorities are aware of Tol's people smuggling charges.

The *Consular Agreement between Australia And the Socialist Republic of Vietnam (Hanoi, 29 July 2003), Entry into force 6 August 2004, Australian Treaty Series [2004] ATS 25* ("Agreement") would also ensure that the Vietnamese authorities are aware of such details.

In this regard, Article 11 of the Agreement, broadly, requires Australia's "competent authorities" having arrested and prosecuted Lai, Tol and Hoa Can Nguyen to notify the Vietnamese authorities:

> *"(e) ... without delay and within three working days ... if ... a [Vietnamese] national ... is arrested or committed to prison or to custody pending trial or is detained in any other manner ... authorities of [Australia] shall inform the [Vietnamese] consular post of the reasons for which a national has been arrested or committed to prison or to custody pending trial or detained in any other manner. Any communication addressed to the [Vietnamese] consular post by the detained person shall also be forwarded by the said authorities without delay. The said authorities shall inform the detained person concerned without delay of his or her rights under this sub-paragraph;*
>
> *(f) in the case of a trial or other legal proceedings against a national of the sending State in the receiving State, the competent authorities of the receiving State shall provide information to the consular post on the charges against that national. A consular officer shall be permitted to attend the trial or other legal proceedings;"*

We further note that Australia has taken compulsory action in relation to the Hao Kiet, being the boat on which the RF came to Australia. In this regard the Article 16 of the Agreement states:

> *"1. In case the courts or other competent authorities of the receiving State intend to take compulsory actions or start an official investigation with regard to a vessel or aboard a vessel of the sending State, those authorities shall notify the consular post in advance so as to enable a consular officer or his or her representative to be present when actions are taken. If the urgency of the matter prevents prior notification, the competent authorities of the receiving State shall notify the consular post immediately after the actions have been taken and promptly provide him or her with full particulars of said actions, upon the request of a consular officer.*
>
> *2. The provisions of paragraph 1 of this Article shall apply to similar actions taken on shore by the competent authorities of the receiving State against the master or any member of the crew of a vessel of the sending State."*

Article 6 of the Agreement appears to indicate that there might also have been a need for communications between Australia and Vietnam regarding the birth of Amy Tran in

Australia, being newly born member of the RF who was recently granted refuge status following a successful RRT application (see below).

4.5 Further material on people smuggling

Below are further reports on the treatment, in Vietnam, of those implicated in "people smuggling" (or "organising illegal migrations" as it is terms in Vietnam).

In describing the "crime" of "people smuggling, the terminology used by the Vietnamese authorities, courts and state-run media indicates that "people smugglers" are being targeted for their political (or imputed political) opinions: see below.

Similarly, the lengthy sentences handed to such individuals indicates that the laws under which these persons are "prosecuted" are not appropriate or adapted to a legitimate government objective.

For instance, the Asian Centre for Human Rights ("ACHR"), weekly publication, dated 7 July 2004 (Index:ACHRF/28/2004) entitled *Behind the razor's wire: Montagnards of Vietnam*[5] reports:

> *"The decisions of Phnom Penh to allow humanitarian aid to the Montagnard refugees and to open two offices of the United Nations High Commissioner for Refugees in Mondulkiri and Rattanakiri have exposed the* ***Hanoi's attempt to sweep aside the crisis in the Central Highlands by terming the asylum seekers as "illegal immigrants."*** *Since the violent crackdown of the peaceful and democratic protests on 2-6 February 2001 in the Central Highlands, the flow of the refugees have been consistent, indicating deteriorating human rights situations.*
>
> *Hanoi attempted to subdue the ethnic minorities through repression and humiliation. A court in Central Daklak province of Vietnam sentenced eight indigenous Ede people, majority of whom are Christians, on 25 December 2002, the Christmas Day, for organizing the demonstrations in Gia Lai and Dak Lak provinces in February 2001.* ***Alleged group leader Y Thuon Nie, 30, was sentenced to 10 years in jail, while the other seven men were given eight years each at the one-day trial. They were also given four years of house arrest after their jail terms. They were accused of "organizing illegal migration to Cambodia" and "undermining state and Communist Party policy"*** *and contacting former members of the guerrilla group FULRO, Front Unifie de Lutte des Races Opprimes, to "sow disunity" among the hill tribes in the Central Highlands."* [emphasis added]

A Human Rights Watch Briefing Paper of January 2003 entitled *New Assault on Rights in Vietnam's Central Highlands Crackdown on Indigenous Montagnards Intensifies*[6] ("HRW Illegal Migration Report") states:

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[5] Accessed at http://www.achrweb.org/features/ACHRF28-04PF.htm on 19 September 2004. See also UN Sub-Commission on the Promotion and Protection of Human Rights, Agenda Item 5: Prevention of Discrimination - *Oral intervention of Mr Suhas Chakma, Director of Asian Indigenous and Tribal Peoples Network*, delivered 9 August 20004, accessed at http://www.unpo.org/print.php?arg=02&par=1051 also on 19 September 2004.

6 Accessed at http://www.hrw.org/backgrounder/asia/vietnam/vietrights.pdf on 19 September 2004. See also *Vietnam jails 8 from hill tribes Group had tried to reach Cambodia* in the San Francisco Chronicle, dated 28 December 2002; and *Hanoi Represses its Minorities* in Kashmir Times, 4 June 2003.

"On Christmas day the Dak Lak Provincial People's Court handed down lengthy prison sentences to eight highlanders who had been forcibly deported from Cambodia after attempting to reach a refugee camp there. They were ***convicted on charges of "illegal migration" and opposing the policy of state and party unity.***[3]*"*

"[3] The highlanders were part of a group of 167 people who attempted to seek asylum in Cambodia in December 2001 but were forcibly returned to Vietnam by Cambodian and Vietnamese police on December 27, 2001.While many members of that group subsequently returned to their villages, ***at least eleven were later sentenced to prison terms of between eight and ten years on charges of "organizing illegal migrations".*** *As many as sixty members of the group are thought to remain in prison or are missing from their home villages. For further background, see "****Vietnam sentences eight men from ethnic minority for organizing exodus****," Associated Press, December 26, 2002; "8 Vietnamese receive jail sentences for undermining unity policy," Xinhua, December 25, 2002.*

"Ongoing rights violations in the Central Highlands include:"

"Harsh prison sentences of up to twelve years for at least seventy highlanders convicted for alleged involvement with the 2001 protests or for trying to flee to Cambodia. More than 100 others have been detained, although it is unclear whether they have been tried. ***Those who have been convicted have been sentenced on charges of undermining the policy of state and party unity (article 87 of Vietnam's Penal Code) or having "illegally migrated abroad to act against the people's authorities" (article 91). Some have also been charged with undermining public security (article 89). All of the trials have been closed to the public and not publicized in advance."***

"Seeking Asylum a National Security Offense

More than 1,000 highlanders who have tried to cross the border to seek asylum in Cambodia have been forcibly returned to Vietnam since 2001, where many were subsequently detained or arrested. Some were eventually released, but ***at least eighteen were sentenced to prison terms of up to ten years on charges of "organizing illegal migrations" or enticing or guiding others to flee to Cambodia—allegedly to undermine the Vietnamese government's policy of state unity."***

"Highlanders known to have been convicted in 2002 after being forcibly returned from Cambodia include:

· ***Four highlanders in Cu Se district****, Gia Lai (Siu Beng, Siu Be, Hnoch, and Kpa Hling)* ***sentenced on January 25, 2002 to prison terms of up to six and a half years for "organizing illegal migrations."*** *The state media reported that the men had been deported from Cambodia in April and May 2001.60 [60 "Four Defendants Receive Jail Terms for Organizing Illegal Migrations," Vietnam News Agency, January 27, 2002.]*

· *Rlan Loa, an ethnic Jarai from Krong Pac district, Gia Lai province, sentenced in October to nine years in prison for having* ***"illegally migrated abroad to act against the people's authorities".*** *Rlan Loa was part of a*

group of 167 asylum seekers who were arrested in Cambodia and forcibly deported to Vietnam in December 2001.61".

The HRW Illegal Migration Report provides a list of persons currently imprisoned or detained in Vietnam, including those imprisoned/detained for "organizing illegal migrations". A copy of the said list is enclosed and the relevant sections highlighted.

In addition we enclose a copy of an article, published by the Vietnamese authorities state-run media, which was included in the HRW Illegal Migration Report entitled *Four receive jail terms for organising illegal migrations.*

A Montagnard Foundation Media Release of March 2002 *entitled VIETNAM AND CAMBODIA OPENLY DEFY THE UNITED NATIONS REFUGEE AGENCY (UNHCR) AND FORCIBLY RETURN MONTAGNARDS: URGENT HELP NEEDED TO PREVENT THEM FROM BEING TORTURED LIKE THE OTHERS* states:

> *"... **the Vietnamese government repeatedly saying our people who run to Cambodia for their lives are "illegal migrations" not refugees.** We would like to remind the viewers that on January 25, 2002, the people's court of Cu Se district of Central Highlands sentenced, Siu Beng and Siu Be, resident of Ia Hru commune, Hnoch and Kpa Hling, resident of Ia Bang commune of Cu Se district **ranging from three to six and a half years to prison with the charge of "organizing illegal migration"** right after the agreement of UNHCR, Cambodia and Vietnam for voluntary repatriation of Montagnard refugees in Cambodia.*
>
> *Earlier the same day, at 8:30 AM another 61 Montagnards were "voluntarily repatriated" from Ratanakiri UNHCR site, in a bilateral action by Cambodia and Vietnam, with no UNHCR participation. These were part of the original group of 109 who have wanted to repatriate for some time now. The trucks arranged by the Cambodian authorities did not technically enter the site. A Cambodian Capt. Phen reportedly accompanied the 61 Montagnards who wanted to repatriate walked off of the site and forced them to get on the trucks to Vietnam. **These refugees are also considered by the Vietnamese government as "illegal migrations".***

A United Nations Commission for Human Rights report entitled *Human Rights of Persons Seeking Political Asylum*[7] states:

> *"While many of the human rights issues in the area of political asylum have a constant presence in societies, certain situations in the recent past are important in exemplifying many of the failures of the current systems of granting political asylum. Most of these are due to specific migrations of populations from one country to another because of violence or repressive conditions in the home countries of these persons. Some of the more recent examples are discussed below.*
>
> ***In Vietnam**, within the past two years, more than 200 people have been imprisoned for mounting peaceful protests against the government. These people either have not had trials or have had rushed trials lasting only one day. Additionally, there have been very harsh prison sentences – **people have been sentenced to prison for twelve years for such offenses as***

[7] Accessed at http://www.munuc.org/old/2003pdf/CHR_UpdateB.pdf on 19 September 2004.

***illegal migration to other countries**, suggesting that the process of a fair trial is not being implemented."*

Should the above information not satisfy Member [redacted] and/or [redacted] that the Applicants face a risk of persecution, on return to Vietnam, for reasons of being implicated in people smuggling we request that they access the following files from DIMIA and provide a copy of the same to the Applicants for further comment[8]:

PCF2001/000083	BORDER CONTROL - Enforcement - removal - Viet Nam: Memorandum of Understanding on Deportations
PCF2001/000355	BORDER CONTROL - Enforcement - removal - Viet Nam: Memorandum of Understanding on Deportations
OPF2001/006034	BORDER CONTROL - Policy - amendment - Re-entry to Australia of UA's removed to Vietnam (under the 2001 MOU).
ADF2001/000577	BORDER CONTROL - Policy - records - People smuggling-sentencing guidelines [sic]
ADF2001/000578	BORDER CONTROL - Policy - records - People smuggling-sentencing guidelines

5. Radio Interview – further sur place claim

A number of the Applicants have been further interviewed by Ms Bau Khanh of Vietnam Sydney Radio.

We will endeavour to provide the RRT with a copy of the transcript of the said radio interview(s) as soon as possible.

6. Further Summonses

The Primary Material includes copies of summons issued by the Vietnamese authorities to members of the RF following their departure from Vietnam.

Since the Applicants' original RRT applications, further summons have been issued to particular RF members, including:

i. summons issued to [redacted] on 11 December 2003;

ii. summons issued to [redacted] on 11 December 2003;

iii. summons issued to [redacted] on 11 December 2003;

iv. summons issued to [redacted] on 11 December 2003;

v. summons issued to [redacted] on 26 December 2003; and

vi. summons issued to [redacted] on 6 July 2004.

Certified copies and translations of the above (were available) are enclosed.

Most of the above mentioned further summonses, refer to Article/Section 80 as the relevant provision under which the relevant Applicants are to be prosecuted.

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[8] See http://www.immi.gov.au/department/files/files0101.htm, accessed 20 September 2004.

On 24 September 2003 we made a submission to the Department of Immigration and Multicultural and Indigenous Affairs ("DIMIA") in support of the RF ("Sep 03 Submission").

Pages 7 to 8 of the Sep 03 Submission state:

> ***"2.3.2 Loosely worded legislation***
>
> *According to both [Amnesty International] and the ... UNHCR"), Vietnam's "loosely worded national security legislation" allows for people such as those noted above and others in a similar or even dissimilar predicament to be branded "spies".* ***Under the discretionary provisions of Article 80 of Vietnam's Criminal Code:***
>
> ***"Those who commit one of the following acts shall be sentenced to between twelve and twenty years of imprisonment, life imprisonment or capital punishment:***
>
> ***c. Supplying or collecting [sic] for the purpose of supplying State secrets to foreign countries; gathering or supplying information and other materials for use by foreign countries against the Socialist Republic of Vietnam".***
>
> ***According to AI:***
>
> ***"Vietnamese law is clearly and deliberately drafted to criminalize the right to freedom of expression. Anyone whose political views differ from those of the [CPV], and who dares to say so, has committed a criminal offence in Viet Nam".***
>
> *In this regard AI quotes, the official Voice of Viet Nam website as stating:*
>
> *"Taking advantage of the information super highway, reactionaries in Viet Nam transferred incorrect information on democracy in Viet Nam abroad. As a result, anti-Viet Nam forums and organizations' evidence of Vietnamese violations of democracy is nothing but a hoax, revealing their intentions to impose western-style freedom of democracy and a US attitude towards religious and human rights issues.* ***The goal in spreading doctrines on freedom of democracy, ideas unfamiliar to the history and culture of Viet Nam and the socialist nature of the country is to erode local Vietnamese people's confidence in the socialist path*** *and ruin belief in the homeland's future for more than two million overseas Vietnamese. Some overseas organizations and anti-Viet Nam media agencies praised certain agitators as 'democracy supporters', their discordant voices represent nobody but themselves" [emphasis added].*
>
> *And thus it appears that through the loosely worded provisions of the Criminal Code, the CPV "criminalizes activities which are regarded as perfectly legal under international law and in most countries of the world".*
>
> ***2.3.3 Loosely interpreted legislation***
>
> *Regrettably, it appears that Vietnam's Criminal Code is not only "loosely worded" but also loosely interpreted. As noted above,* ***Article 80 specifies "the involvement of a foreign country" and "State secrets". It is***

noteworthy that, according to AI, the indictments prepared for the above individuals make no mention of the involvement of a foreign government, nor is mention made of "State secrets" passed to a foreign power.

On the above basis, we submit that DFAT's assertion that RF members "appear to be expressing discontent locally" would be irrelevant to their likely fate upon a forced return to Vietnam. Regardless of whether the CPV perceives the Distribution to be motivated by economic or other factors, it is likely that the RF members will face a degree of persecution for, inter alia, their political opinions, and/or imputed political opinions.

Just like the RF, those organisations/persons which the CPV labels "reactionary"[9] merely "advocate democracy, peaceful political change and human rights". They are neither armed or call for the overthrow of the CPV, nor do they pass state secrets to foreign governments. Nonetheless such entities and those in contact with such entities are deemed "spies" pursuant to Article 80 of the Criminal Code and treated accordingly." [emphasis added]

Our submission to the RRT of 8 January 2004 in support of RF contains further discussion on Article 80.

Clearly, the fact that (at least) certain members of the RF are going to be prosecuted for political activism should lead to the grant of refugee status to all members of the RF.

7. Removal from household register

A number of the Applicants have been removed from their respective household registers and/or had their household registration cancelled.

A claim which was not addressed by the Members who decided the Applicants' original RRT applications is that the timing of the Applicants' loss of household registration indicates that such a loss was due to the Applicants' political opinion (or imputed political opinion) and not due to normal administrative procedure.

Further to the Primary Material, we enclose extracts from various members of the RF's Family Registration Book (HO KHAU) which further confirm that the following members of the RF have also been officially "removed from Family Registration" after having "Fled to Australia":

i. [redacted];

ii. [redacted];

iii. [redacted];

iv. [redacted];

v. [redacted];

vi. [redacted]

[9] EG, the Committee of Religious Freedom in Viet Nam, Radio Que Huong, and Thong Luan.

vii. [redacted].

With regards to the timing of Vietnamese authorities action in relation to the Applicants' household registration, the RRT decision relating to Amy Tran (N04/49908 of 13 January 2005), being a newly child of an RF member who was found by the RRT to be a refugee, provides the following country information:

> *"Household registration*
>
> *Article 1 of Decree No. 51-CP of May 10, 1997 on Household Registration and Management states the purpose of household registration is to "determine the citizens' place of residence, ensure the exercise of their rights and obligations, enhance social management, and* ***maintain political stability, social order*** *and safety." (Vietnam – Decree No. 51-CP of May 10, 1997 on Household Registration and Management" 1997, Vietnam Official Gazette, 30 June).*
>
> *Article of the same decree states that when a person is permitted to go abroad for* ***at least 12 months*** *or when a baby is born "the person affected by the change must go through the procedure of supplementary registration or amendment at the police where his/her permanent residence is registered. (Vietnam – Decree No. 51-CP of May 10, 1997 on Household Registration and Management" 1997, Vietnam Official Gazette, 30 June).*
>
> *Article 16 states that an unauthorised absence of* ***more than 6 months*** *results in the loss of household registration and citizens "must re-apply for registration of their permanent residence as stipulated" once they return to Vietnam ("Vietnam – Decree No. 51-CP of May 10, 1997 on Household Registration and Management" 1997, Vietnam Official Gazette, 30 June).*
>
> *Andrew Hardy, southeast Asian Studies Program, Faculty of Arts and Social Sciences, National University of Singapore, conducted an assessment of the ho khau system in Vietnam. He found the ho khau (household registration) still remains the basis for identification and is "****indispensable****" for the issuance of ID cards, passports and birth, marriage and death certificates:*

In Vietnam everyone has to be recorded as belonging to a household (ho). The name of every household member (khau) has to be entered, at declaration of birth, in a booklet, registered at a particular place. The administration of the rules governing household registration (ho khau) has had wide-ranging consequences for Vietnamese citizens. Instituted in the 1950s, the rules in question governed where Vietnamese people live. These rules presented many restrictions on freedom ...

... you still need a ho khau if you want to buy land or build a house. In other words, ***household registration remained the necessary condition to access housing*** *... Legal ownership of land was conditional on presentation of the ho khau booklet ...*

The ho khau remains the basis for identification (according to the ho tich [a statistical record of births, marriages, and deaths], although reference to ***the ly lich [compiled secretly by the Ministry of Interior the ly lich constituted a record not only of people's political activities, but also of their family backgrounds]*** *...*

... Some people simply ignore the rules. It is often on registry that the consequences of this become apparent. The declaration requires presentation of four documents. These include a medical "witness of birth" form, a certificate of marriage, the family ho khau, and the ID card of the person making the declaration. The child's existence may be recorded at the place of the mother's household registration, or at the place of birth. In circumstances where the mother does not have permanent household registration, the certificate of temporary registration (tam tru) may be presented instead. For families resident at their place of household registration, these formalities require little navigation. For the thousands of spontaneous migrants who are now a feature of Vietnam's social landscape, however, ***they pose great problems.***

Hardy found that children can be refused registration by the authorities if their parent's papers are not in order, or they have relocated without permission, and those children "have to forgo certain services*, or use market resources to go to school or hospital, to obtain a ho khau or identity card, or register their marriage". The author found that ... [ho khau] is still used to control citizens"* [emphasis added]

"(Hardy, Andrew 2001, "Rules and Resources: Negotiating the Household Registration system in Vietnam, under Reform", Sojourn, Vol. 16, No/ 2, 1 October pp 187-212)".

The US Department of State Country Reports on Human Rights Practices 2003 reports the ***Ministry of Public Security maintains the system of household registration "to monitor the population concentrating on those suspected of engaging, or being likely to engage in, unauthorized political activities;*** *however, this system has become less obvious and pervasive in its intrusion into most citizens' dily lives" (US Department of State 2004, Country Reports on Human Rights Practices 2003 – Vietnam, 25 February, Sections 1f).*

Human Rights Watch reported that ***"inscription on a household registry document (h khau) is essential not only to legally reside in one's home, but to legally hold a job, collect grain rations, attend public school, receive public health care (which includes all forms of hospitalisation), travel, vote, or formally challenge administrative abuses"*** *(Human Rights Watch 2002, Repression of Montagnards – Conflicts over Land and Religion in Vietnam's Central Highlands, April).*

Humand Rights Watch, also reported that many Vietnamese repatriated from Hong Kong during the 1990s found it difficult to obtain household registration (Human rights Watch 1997, "Repatriation", Hong Kong Abuses Against Vietnamese Asylum Seekers in the Final Days of the Comprehensive Plan of Action, Vol 9, No 2 (C), Part IV, March);" [emphasis added].

The above is relevant because many of the RF had their household registration cancelled less than 6 months or 12 months after their departure from Vietnam thus indicating that such a removal was for non-administrative reasons and as a result of their political activities etc;

Further in this regard, the Primary Material includes source materials which indicate that Vietnamese authorities are unable to keep up with requests by citizens for alteration of their household registration record (or issue of new household registration). The fact in spite of the authorities being unable to process such requests is in stark contrast to the Vietnamese authorities swift cancellation of the RF's household registrations and again suggests that such cancellation was motivated on the part of the Vietnamese authorities by the RF's political acts.

We disagree with the suggestion of some that, in the case of adults, the cancellation of household registration may not amount to persecution. However, even if this was the case, such politically motivated cancellation suggests that worse treatment awaits the RF on return to Vietnam.

8. N04/49908 of 13 January 2005: denial of household registration = persecution for children

The RRT recently found a newly born daughter of one of the RF Members, [redacted] was recently found to be a refugee: see N04/49908 of 13 January 2005 ("Amy's Decision").

In [redacted]'s Decision, the RRT states:

"The applicant's father claims the applicant will be declined basic human rights by the authorities in Vietnam because of her family background. He claims that she will not be registered by authorities in Vietnam and as an unregistered child she will be denied rights and privileges commonly available to children in Vietnam. He claims the applicant will not have access to education, medial care, or other government assistance, and without these services she will not have the means to survive in Vietnam. He claims she will be particularly vulnerable to exploitation and abuse by authorities. The applicants father claims that his household's registration has been cancelled by authorities in Vietnam. He also claims he has been summoned by the village president to answer charges of "reactionary activities against the government" (tribunal file NO4/49908, Part 2, Folio 289). He claims the family will not be registered by authorities in the reasonably foreseeable future because he has been implicated in activities against the government.

The Tribunal accepts the father's claims that he has been removed from the household's register. Information from external sources indicates citizens of Vietnam are routinely removed from Household registers if they are away from their registered address, without permission, for six months.

The Tribunal also accepts the father's claim that his family will be denied household registration by the authorities in Vietnam because he has been accused by local authorities of "reactionary activities against the government". Information summarised above regarding the ho khau system indicates that persons implicated in political activities against the government have either been denied a ho khau or had their attempts to attain one frustrated by local authorities ... the Tribunal is satisfied the applicants family will be discriminated against, and denied ho khau, because of her father's political opinion or the political opinion attributed to him by authorities in Vietnam, and she will be denied a ho khau because she is a member of that family.

The Tribunal is satisfied that without a ho khau the applicant will be denied fundamental government services, including medical care and other government support programs. The Tribunal accepts the father's claim that a young person as the applicant will have difficulty surviving in Vietnam without access to government services. The Tribunal finds this to be differential and discriminatory treatment against the applicant, by the state, which amounts to persecution.

The Tribunal is also satisfied the applicant will be subjected to circumstances amounting to persecution for a Convention reason. The Tribunal has already found the applicant's family will be denied registration by authorities in Vietnam because of the father's political opinion. It has indicated that the applicant, as a member of that family is a particular social group for Convention purposes and she is a member of that group. The Tribunal is satisfied s.91S of the Act does not apply as the family will be targeted for a Convention reason, the father's political opinion.

Accordingly, the Tribunal finds the applicant has a well-founded fear of persecution, denial of registration by the authorities in Vietnam, for reasons of membership of a particular social group being her family. [emphasis added]

We submit that Amy's circumstances are the same as the children of all RF members and so:

i. children of RF members in Australia should be granted refugee status and so should their guardians currently in Australia; and

ii. RF members with children in Vietnam should be granted refugee status as a result of the serious psychological harm they will endure in Australia due to the harm they fear their children in Vietnam will suffer due to their association with the RF.

9. Inability to repatriate RF members

We understand that DIMIA may have made unsuccessful attempts to repatriate one member of the RF, being [redacted]

[redacted] who due to circumstances beyond his control, had decided to return to Vietnam, discontinued his appeal to the Federal Court in relation to the decision of the RRT to affirm the decision of DIMIA to not grant him a protection visa: see N03/47657.

Thereafter, DIMIA was apparently unable to repatriate [redacted] to Vietnam and subsequently requested our assistance in recommencing [redacted] Federal Court appeal which we have.

To confirm DIMIA's inability to repatriate [redacted] we have lodged a Form 424 (Request for access to documents) with DIMIA, a copy of which is enclosed.

The inability to repatriate RF members is highly relevant to a finding in relation to whether or not Australia owes protection obligations to the Applicants.

Accordingly, we request your assistance in: (1) exercising your summons powers to obtain the relevant information from [redacted] DIMIA file; or (2) not making any unfavourable decision in relation to the Applicants until we have been granted access to the relevant documents by DIMIA and had an opportunity to provide the same for your consideration.

10. Further Leaflet Distributions

We also enclose a copy of the relevant leaflet which has been reproduced by the RF in their current place of detention.

We understand that the RF are making further attempts to have these leaflets distributed.

11. Exploitation of children and/or women

11.1 Exploitation of children

With regards to whether children can apply for a Protection visa we refer to the Full Federal Court of Australia's comments in *Al Raied v Minister for Immigration and Multicultural Affairs [2001] FCA 313*:

> ***"CAN A CHILD APPLY FOR A VISA?***
>
> *36. Before concluding however, we should discuss two related aspects of these proceedings that warrant comment although they do not concern issues directly raised in the appeal. The first is whether the legislative regime created by the Act enables a child of three months to apply for a visa, and, in particular, a protection visa. Section 45 provides that a non-citizen who wants a visa must apply for it. "Non-citizen" is defined to mean a person who is not an Australian citizen. Thus, in terms, any person (whether a child or not) can apply for a visa. Section 46 specifies what is a valid visa application. That section does not, in terms, preclude the making of an application by an infant. Similarly Division 2.2 of the Migration Regulations does not, in terms, limit who may make an application though reg 2.07 provides that the form is to be completed by the applicant.*

37. *Regulations 2.08 and 2.08A deal, expressly, with the circumstances of children. Regulation 2.08A enables, but does not appear to require, an applicant to add to an application for a visa of the specified type as additional applicants, dependent children and a spouse. Regulation 2.08 deals with the circumstances of a newborn child who is born to an applicant for a visa between the time the application is made and the time it is decided. That is, before the application is decided. Such a child is taken to be combined with the parent's application and the regulation does not appear to require that any steps be taken by the parent applicant for this to occur. However, it may be that the expression "before the application is decided" is to be treated as a reference to the time the delegate of the Minister decides the application: see the discussion by Weinberg J in Peniche v Minister for Immigration & Multicultural Affairs (1999) 59 ALD 485 concerning reg 2.08A and especially par 38. However Weinberg J. did observe:*

> *I note that an argument can be put that reg 2.08 which deals with applications by newborn children, operates in a different manner, and may be invoked even after the Minister has rendered the primary decision. The language of reg 2.08 is, however, significantly different from that of reg 2.08A. No reference is made in reg 2.08 to the Minister receiving any request in writing prior to "the decision" being made. In any event, I am not persuaded that reg 2.08A should necessarily be construed in exactly the same manner as reg 2.08 in this regard.*

38. *Whether a child or infant can invoke a right, pursue a remedy or seek a benefit conferred or provided by a statue (and whether they can do so in their own name) is ultimately a matter of statutory construction: see Haines v Leves (1987) 8 NSWLR 443. We note that in certain circumstances the Minister is the guardian of a child who is a non-citizen: see s 6 of the Immigration (Guardianship of Children) Act 1946 (Cth) and see also X v Minister for Immigration & Multicultural Affairs (1999) 92 FCR 524.*

39. *The Act and regulations do not appear to provide a cohesive and comprehensive scheme which makes clear the position of children, and an infant in particular, to apply for a protection visa in their own right or be added to an application of a parent and the position of the child at the various stages of administrative decision making and review. Huang v Minister for Immigration and Multicultural Affairs [2000] FCA 820 illustrates the problems that may arise in relation to the position of children. It is possible that a relevant provision has been overlooked by us given that these comments are made about a matter that was not in issue in this appeal and was not the subject of detailed submissions. However if a relevant provision has not been overlooked then it may be desirable for the statutory scheme to be reviewed and the position clarified.*

CAN A CHILD BE A REFUGEE?

40. *The second matter concerns whether a child of three months can be a refugee. A broadly similar situation arose in Chen Shi Hai (an infant) by his next friend Chen Ren Bing v The Minister for Immigration and Multicultural Affairs (Federal Court of Australia, French J, 5 June 1998,*

unreported). In that matter a child born on 11 July 1996 had made an application (lodged by his father) on 20 February 1997 for a protection visa. French J said:

> *"I should add that a contention was advanced for the respondent that the applicant would not qualify for refugee status because being a young child it lacked the awareness to have a well founded fear of persecution. In my opinion that very literal construction of the words of the Convention should be rejected. Although a well founded fear in a subjective sense is necessary, it can, in the case of a child, in my opinion, be derived from the fear held for the child by his or her parents. To conclude otherwise is to exclude from the protection of the Convention those who might in some cases be most in need of its protection including young children and the intellectually disabled."*

41. *On appeal, the members of the Full Court were divided on this question. O'Loughlin and Carr JJ said:*

> *"There remains one further matter which, in our opinion, proffers some support for the view that we have taken. The appellant is a child who, because of his tender years, would have no knowledge of, or comprehension of 'the one child policy'. This did not stop the learned judge in the Court below from holding that such a person could have the necessary subjective fear by virtue of the subjective fear of one or other of his parents. This is a very obvious attitude to adopt; to limit oneself to the fears of the individual child would otherwise deny children of tenders years the benefits of the Convention: see the remarks of Guy S Goodwin-Gill in his work 'The Refugee in International Law' 2nd Ed p 357:*
>
> *'If the head of the family is recognised as a refugee then, all things being equal, the dependants are normally granted refugee status according to the principle of family unity: UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status (1978) paras 181.8, 184'*
>
> *However, in this particular case, both parents sought, but were refused, refugee status. Hence, it must follow as a matter of logic, that if the parents cannot claim refugee status, then their child (who, in this particular case, is dependent upon their fears for his status) cannot succeed in a claim for refugee status."*

However Nicholson J, who dissented on this and other issues, said on this question:

> *"French J held that in the case of a child a well-founded fear could be derived from the fear held for the child by his or her parents. The appellant does not challenge that conclusion. That approach is consistent with par 185 of the UNHCR Handbook on Procedures, Ch V1. See Goodwin-Gill, The Refugee and International Law (Clarendon 2nd ed 1996) at 356-358."*

42. *The matter was ultimately heard by the High Court: see Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 74 ALJ 775. It is apparent that there was then no issue about the question of the child holding a subjective fear. In the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ , their Honours said:*

> *"No point has been taken that, by reason of his age and circumstances, the appellant, himself, lacks the fear necessary to bring him within the Convention definition of 'refugee'. Rather, it is accepted that his parents' fears on his behalf are sufficient.*

43. *Nonetheless this question was addressed by Kirby J at pp 789 and 790. His Honour made it plain that, in his view, a child such as the applicant in that matter could be a refugee. His Honour does not expressly address the question of how one goes about dealing with the subjective element of the "well-founded fear of persecution" though observations in par 77 suggest that the subjective fear of the parents is to be imputed to the child. This was a question that appears to have troubled the primary judge in the matter we are presently dealing with in this appeal. It probably has to be treated as an open question that may have to be determined on some future occasion. However, it must be acknowledged that in Chen Shi Hai v Minister for Immigration and Multicultural Affairs the High Court set aside the orders of the Full Court of this Court and, in lieu, ordered that the appeal to the Full Court be dismissed. These orders reinstated the order of French J remitting the matter to the Tribunal to be dealt with on the basis that the applicant was entitled to refugee status."*

11.1.1 Particular social group of children born into families in difficult circumstances

We submit that the children of the RF fall into a particular social group of children born into family in difficult circumstances ("Social Group").

The leading case on "particular social group" is the High Court decision of *Applicant A v Minister for Immigration* (1997) 190 CLR 225 ("*Applicant A*"). Proceeding on the basis that the term "particular social group" is indeterminate and flexible[10], *Applicant A* provides that for the purposes of the Refugees Convention ("Convention")[11] a group will constitute "a particular social group" where:

i. There is a common unifying element, characteristic, attribute, activity, belief, interest or goal which unites its members (per Dawson J at 241, McHugh J at 264, 266); and

ii. It is cognisable within the relevant society, that is, there is recognition/perception within the society that the collection of individuals is a group that is set apart from the rest of the community by reason of those shared characteristics (per Dawson J at 241, McHugh J at 264, 266); and

iii. It is not defined by persecution suffered or a common fear of persecution (per Dawson J at 242, McHugh J at 263, Gummow J at 285-6).

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10 *Applicant A*, per McHugh J at 259

11 That is, the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees. Refer clause 866.211 of the *Migrations Regulations* 1994.

In relation to the latter criteria McHugh J explains (at 264):

> *"While persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left handed men are not a particular social group. But, if they were persecuted because they were left handed, they would no doubt become quickly recognisable in their society as a particular social group. Their persecution for being left handed could create a public perception that they were a particular social group. But it would be the attribute of being left handed and not the persecutory acts that would identify them as a particular social group."*

Based on the above criteria numerous groups have been recognised by the Australian courts as being *a particular social group*. For instance:

- In *Chen Shi Hai v Minister for Immigration*, the High Court found that children born in breach of the Chinese one child policy could constitute a particular social group.

- In *Khawar v Minister for Immigration* (2002) 187 ALR 574 it was accepted that married women in Pakistan without the protection of a male relative constituted a particular social group.

- In *VFAY v Minister for Immigration* [2003] FMCA 35 (27 March 2003)12 it was held that the RRT erred in its interpretation of the phrase "membership of a particular social group" and thereby made a jurisdictional error13. The applicant in *VFAY* was an Afghan of Hazara ethnicity, who at the time of the RRT decision was an unaccompanied minor held in detention. It was submitted by counsel for the Applicant that unaccompanied minors of Hazara ethnicity from Afghanistan; and separated children were social groups for the purpose of the Convention.

We contend that the Social Group proposed above also fulfils the *Applicant A* criteria.

That is, children born into family's in difficult circumstances constitute a particular social group and are unified by various factors, including 1 or more of the following:

- Their place of origin being the country/rural parts of Vietnam.
- Their young age and general naivety; and
- The fact that they are born into poor or otherwise disadvantaged families.

The above factors will set such children apart from the rest of the community and make them a target for persecution in the form of sexual/physical abuse/exploitation (including prostitution, trafficking, and forced labour).

It is not the persecution (or fear thereof) that will define the Social Group but rather the unifying factors noted above.

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12 http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/FMCA/2003/35.html?query=%7e+vfay.

13 In this regard the RRT had found that children or unaccompanied young people did not share characteristics which make them recognisable or cognisable as a social group set apart from the rest of the community and that their "vulnerability and fear of coming to harm" is what defines the group.

With regards to the persecution of children in Vietnam we enclose for your review and consideration:

i. The United Nations' report entitled *Sexually Abused and Sexually Exploited Children and Youth in Viet Nam – A qualitative assessment of their health needs and available services in selected provinces*, New York, 2000, ST/ESCAP/2078; and

ii. The International Labour Organization ("ILO") report entitled *Viet Nam – Children in Prostitution in Hanoi, Hai Phong, Ho Chi Minh City and Can Tho: A Rapid Assessment*, By Le Bach Duong, July 2002, Geneva.

We note that one of the provinces on which the above reports focus on is Can Tho. Can Tho's is the province in which many of the RF were born and lived prior to fleeing Vietnam.

We also invite your attention to the:

i. UK Home Office Vietnam Country Report of April 2004, particularly paragraphs 6.102 to 6.108, 6.167 to 6.169, and 6.172 to 6.175; and

ii. The US State Department Country Report of Human Rights Practices for Vietnam dated 25 February 2004, particularly the section headed "Children".

Please also find enclosed a 1 December 2004 submission in support of Amy Tran prepared by Dr Mary Crock.

11.2 Exploitation of women

The US Department of State (see report mentioned below) indicates that women in Vietnam are subject to trafficking and exploitation.

Such information is relevant to female RF members who, according to the US Department of State, seem to be at risk of, inter alia, *"trafficking ... for the purpose of forced prostitution ..."*.

12. Recent Reports

Further in support of the RF please find enclosed copies of:

iii. UK Home Office Vietnam Country Report of October 2004; and

iv. The US State Department Country Report of Human Rights Practices for Vietnam dated 28 February 2005.

* * * *

Please contact me on (02) 9283 4755 if you have any queries in relation to the above.

Yours sincerely
CRADDOCK MURRAY NEUMANN

Farid Varess
LAWYER

Enc

- End of Submission -