FEDERAL COURT OF AUSTRALIA

NBLC v Minister for Immigration & Multicultural & Indigenous Affairs

NBLB v Minister for Immigration & Multicultural & Indigenous Affairs

[2005] FCAFC 272

MIGRATION – refugee application – proper construction of s 36(3) of the *Migration Act 1958* (Cth) – application to applicants of s 36(3) and (4) of *Migration Act* – meaning of persecution in s 36(4) of the Act – meaning of words "all possible steps " to avail himself or herself of right to enter and reside in South Korea – whether the s 91R definition of persecution applies to s 36(4) of the Act – Tribunal found two North Korean applicants to have a well-founded fear of persecution on the basis of political opinion if returned to North Korea – relevance of South Korean policy of allowing settlement of North Korean refugees

WORDS AND PHRASES – "persecution" in s 36(4) of the *Migration Act* – "all possible steps" in s 36(3) of the *Migration Act*

Migration Act 1958 (Cth) ss 36, 91R
Migration Legislation Amendment Act (No 6) 2001 (Cth)
Border Protection Legislation Amendment Act 1999 (Cth)

NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 213 ALR 668

Explanatory Memorandum of the *Migration Legislation Amendment Bill (No 6) 2001*
Minister's Second Reading Speech on the *Migration Legislation Amendment Bill (No 6) 2001*
The Convention relating to the Status of Refugees as amended by the Refugees Protocol

NBLC v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS AND REFUGEE REVIEW TRIBUNAL
NSD 1443 OF 2005

NBLB v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS AND REFUGEE REVIEW TRIBUNAL
NSD 1444 OF 2005

WILCOX, BENNETT AND GRAHAM JJ
23 DECEMBER 2005
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 1443 OF 2005**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**NBLC** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **FIRST RESPONDENT**
	REFUGEE REVIEW TRIBUNAL **SECOND RESPONDENT**
JUDGES:	**WILCOX, BENNETT AND GRAHAM JJ**
DATE OF ORDER:	**23 DECEMBER 2005**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent's costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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SECOND RESPONDENT

JUDGE: **WILCOX, BENNETT AND GRAHAM JJ**

DATE: **23 DECEMBER 2005**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

WILCOX J:

1 I have had the advantage of reading in draft form the reasons for judgment of Graham J. His

Honour has set out the facts of these two appeals and the relevant legislation and extrinsic materials. I need not repeat any of that.

2 As Graham J points out, there are two issues common to both appeals and an additional issue in *NBLC*. It is convenient for me to say immediately that I agree with Graham J in respect of the first of the common issues. The words 'all possible steps' in s 36(3) of the *Migration Act 1948* (Cth) ('the Act') ought to be interpreted as meaning exactly what they say. Especially having regard to the context in which s 36(3) was enacted, as evidenced by the extrinsic materials, it is not possible to conclude that Parliament intended the words to require decision-makers to take into account the consequences to the person of entering or residing in the relevant third country, except as specifically provided in subss (4) and (5) of s 36. If the appellants' argument in relation to s 36(3) were correct, subss (4) and (5) would be otiose. Given that subs (4) commences with the word 'However', and subs (5) with 'Also', those subsections can hardly be regarded as insertions for more abundant caution.

3 However, I differ with Graham J in respect of the second common issue: whether the concept invoked by the word 'persecuted' in s 36(4) is limited to 'persecution', as defined in s 91R of the Act.

4 I find the extrinsic materials equivocal on this issue. As Graham J notes, the Minister's Second Reading Speech contains the sentence: 'The bill will define the fundamental convention term, persecution, as an appropriate test of serious harm.' However, that sentence was used in the context of the following statement of the bill's objective:

> *'The bill will also stop the refugees' convention being interpreted so broadly that people who were never envisaged to be refugees manage to obtain refugee protection in Australia.'*

A little later, the Minister said:

> *'Persecution is a key concept in considering claims for refugee status and it is not defined in either the convention or Australian legislation.'*

5 It will be noted that both these passages evince a concern that people are being too readily accepted in Australia as refugees. In that context, it was logical for Parliamentary counsel to frame s 91R in such a manner as notionally to amend Article 1A(2) of the *Refugees Convention (the Convention relating to the Status of Refugees) as amended by the Refugees*

Protocol (together "the Convention"), in relation to the application of the Act and Regulations to a particular person. Article 1A(2) of the Convention is the gateway through which all applicants for refugee recognition must pass. By raising the threshold of what constitutes 'persecution' within the meaning of Article 1A(2), as applied to that person, the amending legislation was achieving the Minister's stated purpose of weeding out unworthy applicants for recognition. However, that purpose has no relevance to s 36(3), a provision that is concerned with people who have already satisfied Article 1A(2), as notionally amended by s 91R, and whose only reason for not being entitled to an Australian visa is that they have a right of residence in another country.

6 Both the primary judge and Graham J have criticised what they call the inelegant drafting of s 91R. However, the defect is not merely one of elegance. Section s 91R(1) would simply be inadequate. In order to achieve the objective assumed by their Honours, it would not be enough notionally to amend Article 1A(2). That is because Article 1A(2) is irrelevant to a determination under s 36(4); the relevant person has already passed through the (s 91R(1) affected) Article 1A(2) gateway. In order to achieve the objective assumed by my colleagues, it would have been necessary for the drafter to reword s 91R(1) in such a way as to relate satisfaction of paras (a), (b) and (c) to **any** determination of 'persecution' for the purposes of the Act or Regulations.

7 Subsections (3), (4) and (5) of s 36 were inserted into the Act in 1999, some two years before s 91R was added to it. It would not be right to assume that the existence of these subsections was overlooked by Parliamentary counsel or that counsel would have been incapable of framing s 91R(1) in such a manner as to make it apply to an evaluation required for the purposes of s 36(4), if that had been the intention.

8 In s 91R, as in relation to s 36(3), I think Parliament should be taken to have meant what it said. In my opinion, s 91R had no application to the question, under s 36(4), that the Tribunal had under consideration in these cases. It follows that, in treating the word 'persecuted' as being limited by the requirements of s 91R, the Tribunal erred in law. As that error went to the heart of its decision, the error was one that attracts prerogative relief.

9 Having regard to that conclusion, it is not necessary for me to reach a view about the additional issue which arises in *NBLC*.

10 I would order the issue of writs of prohibition directed to the Minister, prohibiting her from acting upon the Tribunal's decisions, and writs of certiorari and mandamus directed to the Tribunal, quashing each of the Tribunal's decisions and requiring redetermination of the applications for review according to law. The Minister should pay the applicants' costs, both before the primary judge and of the appeals.

I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wilcox.

Associate:

Dated: 23 December 2005

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 1443 OF 2005**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

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APPELLANT

AND: **MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS**
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REFUGEE REVIEW TRIBUNAL
SECOND RESPONDENT

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REFUGEE REVIEW TRIBUNAL
SECOND RESPONDENT

JUDGES: **WILCOX, BENNETT AND GRAHAM JJ**

DATE: **23 DECEMBER 2005**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

BENNETT J

11 I have had the benefit of reading in draft the reasons of each of Wilcox and Graham JJ.

Graham J has set out the facts, legislation and extrinsic materials relevant to these appeals. I gratefully adopt those parts of his Honour's reasons and repeat them only to the extent necessary.

12 I agree with Wilcox J and Graham J on the interpretation of "all possible steps" in s 36(3) of the *Migration Act 1958* (Cth) ('the Act'). I also agree with Graham J that "persecution" in s 36(4) of the Act has the same meaning as that defined in s 91R. However, I have come to this conclusion by a somewhat different approach to that of his Honour. I should add that I endorse the observations made by the primary judge and by Wilcox and Graham JJ about the difficulties that arise from the drafting of s 91R and the effect of its inclusion on s 36(4).

13 Section 36 of the Act relevantly provides:

> *'(2) A criterion for a protection visa is that the applicant for the visa is:*
>
> *(a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or*
>
> *(b) a non-citizen in Australia who is the spouse or a dependant of a non-citizen who:*
>
> *(i) is mentioned in paragraph (a); and*
> *(ii) holds a protection visa.*
>
> *(3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national* ('third party right').
>
> *(4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.'*

14 The effect of the section is that, in order to be eligible for a protection visa, the applicant for the visa:

- is a non-citizen in Australia
- to whom Australia has protection obligations under *the Refugees Convention (the Convention relating to the Status of Refugees) as amended by the Refugees Protocol*

(together "the Convention").

The latter is owed to persons who have '*a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*'. The protection obligations owed to the non-citizen in Australia are owed under the Convention because, inter alia, the non-citizen is a refugee within the meaning of Article 1A(2) of the Convention.

15 In order to satisfy the criterion for protection obligations under the Act:

- the person must have taken all possible steps to avail himself of any third country right
- unless the person has '*a well-founded fear of being persecuted in* [that] *country for reasons of race, religion, nationality, membership of a particular social group or political opinion*'.

16 The coincidence of language in the Convention and in s 36(4) is worth noting.

17 It can be seen that the subject of the section is the person, the applicant. It is not the case that the applicant simply needs to establish a well-founded fear in his or her country of nationality. The "gateway", to adopt the language of Wilcox J, is a composite test that precedes the application of s 36(2). As the primary judge put it at [38], s 36(3) is a qualification of s 36(2) and s 36(4) is a qualification to that qualification.

18 That means that protection obligations under the Convention, including Article 1A(2), are only owed to a person who has the well-founded fear in his or her country of nationality **and** has taken all possible steps to avail himself or herself of any available third country right unless he or she has a well-founded fear in that third country.

19 Section 91R(1) provides:

> *'(1) For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:*
>
> *(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and*

(b) the persecution involves serious harm to the person; and

(c) the persecution involves systematic and discriminatory conduct.'

20 Turning to s 91R, it can be seen that, again, the object of the section is the '*particular person*', the applicant. Further, the section deals with the **application** of Article 1A(2) of the Convention **in relation to persecution**; s 91R does not merely define the term persecution within Article 1A(2).

21 When the effect of the sections are relevantly considered:

- Section 91R provides that for the purposes of the application of the Act, (including s 36(2) (3) and (4)) to a person, Article 1A(2) only applies to that person (ie. he or she is a refugee) in relation to persecution if, relevantly, that persecution involves serious harm.
- Section 36 provides that the applicant must establish a well-founded fear of persecution for Article 1A(2) of the Convention to apply so that protection obligations are owed under the Convention.
- The persecution that the applicant must establish is persecution in each of the country of nationality and the third country.
- The persecution to which the application of Article 1A(2) and the Convention relates is both the persecution feared in the country of nationality and the persecution feared in the third country.
- They are both persecution for one or more of the reasons mentioned in Article 1A(2).
- Accordingly, a person is not a refugee under Article 1A(2) unless he or she has a well-founded fear of persecution amounting to serious harm in his or her country of nationality and in the country in which he or she has a third party right.

22 The persecution relevant to each applicant before satisfying the test for application of the Convention is both persecution in the country of nationality and persecution in any available third country. They both precede the application of the Convention. They are both persecution to which the Convention, as applicable under the Act, relates.

23 In support of this interpretation I note the consistency of language of Article 1A(2) of the Convention and s 36(4). It would not be appropriate or at least it would be confusing, in

describing the qualification for application of the Convention to a person, to describe what is feared in the third country as persecution for a Convention reason. Section 36(4) deals not with the granting of a protection visa under the Convention but with an exclusion from that grant. As set out by Graham J at [25], the Supplementary Explanatory memorandum states, with respect to the new subsections (3), (4) and (5) of s 36:

> *'3. New subsection 36(3) is an interpretative provision relating to Australia's protection obligations. This provision provides that Australia does not owe protection obligations to a non-citizen who has not taken all possible steps to avail him or herself of a right to enter and reside in another country.*
>
> *4. Proposed subsection 36(3) does not apply in relation to a country in respect of which the non-citizen has a well-founded fear of being persecuted, or of being returned to another country in which he or she has a well-founded fear of being persecuted, for reasons of race, religion, nationality, membership of a particular group or political opinion (new subsections 36(4) and s 36(5)).*
>
> *5. The purpose of proposed subsections 36(3), (4) and (5) is to ensure that a protection visa applicant will not be considered to be lacking the protection of another country if without valid reason, based on a well-founded fear of persecution, he or she has not taken all possible steps to access that protection.'*

24 In the Minister's Second Reading Speech on the *Migration Legislation Amendment Bill (No 6) 2001* which inserted the new s 91R, he said '*Persecution is a key concept in considering claims for refugee status and it is not defined* ***in either the convention or Australian legislation****… Providing a definition of persecution in the legislation will ensure that the level of harm necessary to constitute persecution will be at a level intended by the refugees convention*'.

25 This is consistent with the intention to define persecution for all purposes in the Act. In particular, where the nature of persecution in the Act equates with the words of the Convention, it means that the level of harm necessary to constitute persecution in the third country will be at a level intended by the Convention.

26 Putting the sections together, for the purposes of determining whether Australia has protection obligations to each appellant, who has a third country right, he must establish a well-founded fear of persecution both in his country of nationality and the third country.

Both are relevant for the determination of the application of the Convention to him. In both cases, the persecution must involve serious harm.

27 The primary judge's conclusion was that the concept of persecution that is found in s 36 is '*a single and consistent concept*'. I respectfully agree with that conclusion.

28 As to the additional submissions advanced by NBLC, I agree with Graham J for the reasons that he gives that as, the primary judge found, the Tribunal made findings of fact and there is no reason for the Court to interfere.

29 I agree that the appeal in each matter should be dismissed with costs.

I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bennett.

Associate:

Dated: 23 December 2005

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JUDGES: **WILCOX, BENNETT AND GRAHAM JJ**

DATE: **23 DECEMBER 2005**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

GRAHAM J

30 These appeals, which were heard together, raise the following issues which are common to

both matters:

(a) What is meant by the expression "all possible steps to avail himself … of a right to enter and reside in" another country in s 36(3) of the *Migration Act 1958* (Cth) ("the Act");

(b) Does persecution to which the expression "well-founded fear of being persecuted … for reasons of race, religion, nationality, membership of a particular social group or political opinion" in s 36(4) of the Act applies extend to include persecution to which Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply by dint of s 91R of the Act.

31 Each of the Appellants is a non-citizen in Australia.

32 They are both citizens of North Korea. The Appellant known as NBLC was born in North Korea on 13 March 1970. He escaped from the orphanage in which he was then living and fled to China when he was apparently 12 years old. On 15 November 1996 he arrived in Australia from China as a stowaway on a ship.

33 On 19 June 2000 NBLC was granted a Subclass 785 (Temporary Protection) Visa which was valid for 3 years or until an application by him for a permanent visa was finally determined, whichever happened sooner.

34 On 11 February 2003 he lodged an application with the Department of Immigration and Multicultural and Indigenous Affairs for a permanent Protection (Class XA) Visa.

35 On 10 June 2004 the Minister's Delegate refused that application.

36 On 15 July 2004 NBLC applied to the Refugee Review Tribunal ("the Tribunal") for review of the Minister's Delegate's decision. By a decision dated 9 February 2005, which was handed down on 1 March 2005, the Tribunal affirmed the decision of the Minister's Delegate not to grant the Applicant a Protection Visa.

37 An Amended Application filed 24 May 2005 for the issue of constitutional writs in respect of the decision of the Tribunal came before the primary judge on 20 June 2005 along with a like

application by the Appellant known as NBLB. On 1 August 2005 each application was dismissed with costs.

38 NBLB was born in North Korea on 2 December 1959. He "sneaked out" of North Korea, moving into China in December 1997. In about December 2000 he returned to North Korea to collect his wife and two sons and, together, they fled from North Korea to China. With the assistance of a people smuggler NBLB left China in August 2003, arriving in Australia on 15 October 2003 via Hong Kong, Malaysia, Vietnam and New Zealand. He left his wife and children in China.

39 On or about 10 January 2005 NBLB lodged an application with the Department of Immigration and Multicultural and Indigenous Affairs for a Protection (Class XA) Visa. That application was refused by the Minister's Delegate on 12 January 2005.

40 On 17 January 2005 he applied to the Tribunal for review of the Minister's Delegate's decision. By a decision dated 24 February 2005 the Tribunal affirmed the decision of the Minister's delegate not to grant a protection visa.

41 A Further Amended Application filed 20 June 2005 for the issue of constitutional writs came before the primary judge on 20 June 2005 and, as indicated above, was dismissed with costs on 1 August 2005.

42 In each application for review in the Tribunal, the Tribunal was constituted by the same member.

43 In each matter a notice of appeal from the decision of the primary judge was filed on 19 August 2005.

44 It is common ground that each Appellant is a person to whom the term "refugee" applies within the meaning of Article 1A(2) of the *Refugees Convention (the Convention relating to the Status of Refugees) as amended by the Refugees Protocol* (together "the Convention"), as modified in its application to Australia by s 91R of the Act. Each of them is "outside the country of his nationality", that is to say North Korea, and owing to "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social

group or political opinion" is "unwilling to avail himself of the protection of that country"; the relevant reasons for the fear of persecution were the essential and significant reasons for the persecution, the relevant persecution involved serious harm to the Appellants and also involved systematic and discriminatory conduct.

45 It is common ground that, at all material times, each of the Appellants had the right to enter and reside in South Korea.

46 Under s 65(1) of the Act the Minister is required to grant a visa after considering a valid application for same if satisfied of a series of matters including that "the … criteria for it prescribed by this Act or the regulations have been satisfied". A criterion for a protection visa was relevantly prescribed by s 36(2)(a) of the Act as follows:-

> "*36(2) A criterion for a protection visa is that the applicant for the visa is:*
>
> *(a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; …"*

47 Notwithstanding the manner in which this criterion is expressed it is significantly qualified by s 36(3) of the Act which in turn is qualified by s 36(4) and (5). These subsections relevantly provide:-

> "*36(3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself … of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.*
>
> *(4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.*
>
> *(5) Also, if the non-citizen has a well-founded fear that:*
>
> *(a) a country will return the non-citizen to another country; and*
>
> *(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;*

> *subsection (3) does not apply in relation to the first-mentioned country."*

48 Whether Australia has protection obligations to any particular non-citizen will depend firstly upon whether that non-citizen comes within the reach of s 36(3) of the Act and, if not, whether Australia has protection obligations to that non-citizen under the Convention as modified in its application to Australia by s 91R of the Act.

49 In considering whether a non-citizen in Australia was a person to whom Australia had protection obligations under the Convention under a former s 36, Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ said in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 213 ALR 668 ("*NAGV*") at 671-673:-

> *"[13] Something first should be said respecting the means by which consideration of the Convention has been drawn into Australian municipal law.*
>
> *[14] First, customary international law deals with the right of asylum as a right of states not of individuals; individuals, including those seeking asylum, may not assert a right under customary international law to enter the territory of a state of which that individual is not a national.*
>
> *[15] Secondly, the Convention is an example of a treaty which qualifies what under classical international law theory was the freedom of states in the treatment of their nationals; but the Convention does not have the effect of conferring upon the refugees to which it applies international legal personality with capacity to act outside municipal legal systems.*
>
> *[16] Thirdly, the Convention was negotiated and agreed between the relevant contracting states and obligations are owed between those states, not to refugees, so that it is at a state level that the Convention has to be understood. Fourthly, the Convention has been construed by the House of Lords and the Supreme Court of the United States as not detracting from the right of a contracting state to determine who should be allowed to enter its territory. Fifthly, the text of the Convention speaks, as Brennan J pointed out in* Minister for Immigration and Ethnic Affairs v Mayer, *indifferently of a person who is 'considered a refugee' and of one to whom the 'status of refugee [is] accorded' for the purposes of the Convention.*
>
> *[17] Sixthly, Gibbs CJ and Brennan J in* Mayer *and Stephen J in* Simsek v Macphee *pointed out that the determination of the status of refugee is a function left by the Convention to the competent authorities of the contracting states which may select such procedures as they see fit for that purpose; as will appear, the procedures adopted by Australia have varied from time to*

time.

[18] Other contracting states in their migration laws have adopted in different ways criteria drawn from the Convention. The legislative methods adopted in New Zealand, Canada, the United Kingdom and the United States, which differ each from the others and from that of Australia, may be seen respectively from the reports of Attorney-General v Refugee Council of New Zealand Inc, Pushpanathan v Canada (Minister for Citizenship and Immigration), T v Home Secretary *and* Sale v Haitian Centers Council, Inc. *It appears that in at least some of these countries the legislation has been amended since the decisions in the above cases by specific provision respecting 'safe third countries'.*

[19] Seventhly, as the title to the Convention suggests, the Convention details the status and civil rights to be afforded within contracting states to those accorded the status of refugee. These matters are to be seen from the detail in Ch 2 (Arts 12-16, headed 'Juridicial Status'), Ch 3 (Arts 17-19, headed 'Gainful Employment'), Ch 4 (Arts 20-24, headed 'Welfare') and Ch 5 (Arts 25-34, headed 'Administrative Measures'). Chapter 5 deals with such matters as the issue of identity papers (Art 27) and travel documents (Art 28).

[20] However, the contracting states accept significant obligations under Art 32 (headed 'Expulsion') and Art 33 (headed 'Prohibition of Expulsion or Return ('Refoulement')'). Article 32(1) states:

> The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

Article 33(1) states:

> No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

[21] In Sale, *the Supreme Court of the United States construed Art 33(1) by reading 'expulsion' as referring to a refugee already admitted into a contracting state and 'return' as referring to a refugee already within the territory of a contracting state but not yet resident there. On the other hand, Professor Shearer has emphasised the distinction between the two articles, writing:*

> These Articles are of a distinctly different character. The first assumes the prior admission of the refugee to a status of lawful residence, and refers to expulsion per se, and not to the institutionalised procedure of extradition. The second, however, not only applies to refugees whether lawfully or unlawfully within the host territory, but also embraces all measures of return, including extradition, to a country where their lives or freedom would be threatened."

(See also the judgment of Emmett J in *NAGV* in the Full Court (2003) 202 ALR 1 at [56]-[61])

50 In *NAGV* Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ said at 675:-

> *"[31] … as Emmett J correctly emphasised in the Full Court, a perusal of the Convention shows that, Art 33 apart, there is a range of requirements imposed upon contracting states with respect to refugees some of which can fairly be characterised as 'protection obligations'. Free access to courts of law (Art 16(1)), temporary admission to refugee seamen (Art 11), and the measure of religious freedom provided by Art 4 are examples.*
>
> *[32] …Section 36(2) does not use the term 'refugee'. But the 'protection obligations under [the Convention]' of which it does speak are best understood as a general expression of the precept to which the Convention gives effect. The Convention provides for contracting states to offer 'surrogate protection' in the place of that of the country of nationality of which, in terms of Art 1A(2) the applicant is unwilling to avail himself. That directs attention to Art 1 and to the definition of the term 'refugee'.*
>
> *[33] Such a construction of s36(2) is consistent with the legislative history of the Act. This indicates that the terms in which s36 is expressed were adopted to do no more than present a criterion that the applicant for the protection visa had the status of a refugee because that person answered the definition of 'refugee' spelled out in Art 1 of the Convention."*

51 After the applications for protection visas in *NAGV* were lodged, new subsections (3) – (7) of s 36 were inserted into the Act by the *Border Protection Legislation Amendment Act 1999* (Cth) (see, relevantly, paragraph 18 above), which in relation to the new subsections commenced on 16 December 1999. These subsections were included as part of "Part 6 – Amendments to prevent forum shopping". Another provision inserted into the Act as part of Part 6 was s 91M which formed part of a new "Subdivision AK – Non-citizens with access to protection from third countries". That section provided:-

> *"91M This Subdivision is enacted because the Parliament considers that a non-citizen who can avail himself or herself of protection from a third country, because of nationality or some other right to re-enter and reside in the third country, should seek protection from the third country instead of applying in Australia for a protection visa, or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8."*

52 The legislative purpose recorded in s 91M is consistent with the legislative intention which is

evident in s 36(3) of the Act i.e. to tighten up the circumstances in which non-citizens in Australia may become entitled to the grant of a protection visa.

53 When the Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs introduced the amendments contained in Part 6 into the Parliament a "Supplementary Explanatory Memorandum" was tabled and a "tabling speech" was incorporated into Hansard.

54 The Supplementary Explanatory Memorandum contained the following provisions in respect of the introduction of the new subsections (3), (4) and (5) of s36 of the Act:-

> *"3 New subsection 36(3) is an interpretative provision relating to Australia's protection obligations. This provision provides that Australia does not owe protection obligations to a non-citizen who has not taken all possible steps to avail him or herself of a right to enter and reside in another country.*
>
> *4 Proposed subsection 36(3) does not apply in relation to a country in respect of which the non-citizen has a well-founded fear of being persecuted, or of being returned to another country in which he or she has a well-founded fear of being persecuted, for reasons of race, religion, nationality, membership of a particular group or political opinion (new subsections 36(4) ands 36(5)).*
>
> *5. The purpose of proposed subsections 36(3), (4) and (5) is to ensure that a protection visa applicant will not be considered to be lacking the protection of another country if without valid reason, based on a well-founded fear of persecution, he or she has not taken all possible steps to access that protection"*

55 The tabling speech included the following:-

> *"The amendments that I place before the chamber today are part of a package of tough new measures that the Minister for Immigration and Multicultural Affairs announced on the 13th of October 1999.*
>
> *These measures are aimed at curbing the growing number of people arriving illegally in Australia, often through people smuggling operations.*
>
> *The Refugees Convention and Protocol have, from inception, been intended to provide asylum for refugees with no other country to turn to.*
>
> *Increasingly, however, it has been observed that asylum seekers are taking advantage of the convention's arrangements.*
>
> *Some refugee claimants may be nationals of more than one country, or have*

rights of return or entry to another country, where they would be protected against persecution.

Such people attempt to use the refugee process as a means of obtaining residence in the country of their choice, without taking reasonable steps to avail themselves of protection which might already be available to them elsewhere.

This practice, widely referred to as 'forum shopping', represents an increasing problem faced by Australia and other countries viewed as desirable migration destinations.

…

Domestic case law has generally re-inforced the principle that Australia does not owe protection obligations under the refugees convention, to those who have protection in other countries.

It has also developed the principle that pre-existing avenues for protection should be ruled out before a person's claim to refugee status in Australia is considered."

56 Subsequent to the insertion into the Act of subsections (3) – (7) of s 36 a further relevant amendment to the Act was made by the *Migration Legislation Amendment Act (No 6) 2001* (Cth) which commenced on 1 October 2001. That Act inserted a new s 91R which provided as follows:-

"91R(1) For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:

(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and

(b) the persecution involves serious harm to the person; and

(c) the persecution involves systematic and discriminatory conduct.

(2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of **serious harm** *for the purposes of that paragraph:*

(a) a threat to the person's life or liberty;

(b) significant physical harassment of the person;

(c) significant physical ill-treatment of the person;

(d) significant economic hardship that threatens the person's capacity to subsist;

(e) denial of access to basic services, where the denial threatens the person's capacity to subsist;

(f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

(3) For the purposes of the application of this Act and the regulations to a particular person:

(a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;

disregard any conduct engaged in by the person in Australia unless:

(b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol."

57 Some assistance as to the intended reach of s 91R is provided by the Minister's Second Reading Speech in the House of Representatives on 28 August 2001 and the Explanatory Memorandum circulated in respect of the *Migration Legislation Amendment Bill (No 6) 2001*.

58 In the Minister's Second Reading Speech he said:-

"This bill is aimed at addressing two critical challenges facing Australia's refugee protection arrangements and our ability to effectively contribute to international efforts to protect refugees.

First, the continuing influx of unauthorised arrivals to this country is a tangible indicator of increasingly sophisticated attempts to undermine the integrity of Australia's refugee determination process.

…

The second major challenge lies in the increasingly broad interpretations being given by the courts to Australia's protection obligations under the refugees convention and protocol.

The convention does not define many of the key terms it uses.

In the absence of clear legislative guidance, the domestic interpretation of our obligations has broadened out under cumulative court decisions so that Australia now provides protection visas in cases lying well beyond the bounds originally envisaged by the convention.

These generous interpretations of our obligations encourage people who are not refugees to test their claims in Australia, adding to perceptions that Australia is a soft touch.

…

Our action in legislating on the application of the refugees convention is consistent with the principles recognised in international law that states have the right to define how they will implement their obligations under international treaties.

…

The bill will also stop the refugees convention being interpreted so broadly that people who were never envisaged to be refugees manage to obtain refugee protection in Australia.

The government has been concerned for some time that the refugees convention has become so widely interpreted that it is in danger of failing the very people that it was designed to protect.

…

The bill will define the fundamental convention term, persecution, as an appropriate test of serious harm.

…

Persecution is a key concept in considering claims for refugee status and it is not defined in either the convention or Australian legislation.

Our legislation should reinforce the basic principles of persecution under the convention – that for a person to require protection the persecution must be for a convention reason, and the persecution must constitute serious harm.

The legislation will also prevent people obtaining protection in particular circumstances where there is no real fear of persecution for a convention reason.

The fundamental intention of the convention is to provide protection to those who fear persecution so serious that they cannot return to their home country.

It was not intended to protect people facing discrimination or hardship in comparison to life enjoyed by us in Australia.

The legislation will define elements of serious harm as including a threat to the person's life or liberty, significant physical harassment or ill-treatment, and other events that threaten a person's capacity to subsist.

Providing a definition of persecution in the legislation will ensure that the

level of harm necessary to constitute persecution will be at a level intended by the refugees convention.

The legislation will also provide that to invoke protection the convention reason must be the essential and significant reason for the persecution.

The convention was not designed to protect people who fear persecution for personal reasons that have little or nothing to do with the convention – for example, because they have failed to pay their family's debts.

…

The legislation will also prevent people from using elaborate constructs to claim that they are being persecuted as a member of a family and thus under the convention ground of a particular social group, when there is no convention related reason for the persecution.

This will remove a potential avenue for criminal families to claim protection on the basis of gang wars – not those that the government would see as warranting international protection.

…"

(emphasis added)

59 The Explanatory Memorandum contained the following in relation to the proposed new s 91R:-

"17. This item inserts new section 91R into the Act which deals with 'persecution'.

…

19. Claims of persecution have been determined by Australian courts to fall within the scope of the Refugees Convention even though the harm feared fell short of the level of harm accepted by the parties to the Convention to constitute persecution. Persecution has also been interpreted to be for reason of the above Convention grounds where there have been a number of motivations for the harm feared and the Convention-based elements have not been the dominant reasons for that harm. Taken together these trends in Australian domestic law have widened the application of the Refugee Convention beyond the bounds intended.

20. ***New subsection 91R(1) contains a definition of 'persecution' for the purposes of the application of the Act or the regulations.*** *It provides the Refugees Convention will apply only to persecution for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention if it satisfies the requirements of new paragraph 91R(1)(a), 91R(1)(b) and 91R(1)(c).*

…

23. The above ***definition of persecution*** *reflects the fundamental intention of the Convention to identify for protection by member states only those people who, for Convention grounds, have a well founded fear of*

> *harm which is so serous that they cannot return to their country of nationality, or if stateless, to their country of habitual residence. These changes make it clear that it is insufficient to establish an entitlement for protection under the Refugees Convention that the person would suffer discrimination or disadvantage in their home country, or in comparison to the opportunities or treatment which they could expect in Australia.* ***Persecution must constitute serious harm****. The serious harm test does not exclude serious mental harm. Such harm could be caused, for example, by the conducting of mock executions, or threats to the life of people very closely associated with the person seeking protection. In addition, serious harm can arise from a series or number of acts which, when taken cumulatively, amount to serious harm of the individual.*
>
> …"
> (emphasis added)

60 In NBLC's case the Tribunal found that he had not taken all possible steps to avail himself of a right to enter and reside in South Korea. In NBLB's case the Tribunal made a similar finding. It also found that a shift in government policy in South Korea in respect of North Koreans that may have led to discrimination against North Koreans in terms of access to employment and exposure to social stigma and a further shift in policy that may have led to a reduction in financial aid to North Koreans living in South Korea did not "erode the right of the Applicant to enter and reside in South Korea".

61 The Appellants' submitted that "possible steps" should be construed as "reasonably available steps" or "reasonably practicable steps" or "reasonably possible steps" and that in this regard the Tribunal misconstrued s 36(3).

62 In dealing with this issue the primary judge said, in my view correctly, "Section 36(3) directs attention at taking steps **to avail oneself of a right to enter and reside in a country**. [It] is not directed to the consequences of entering and residing in a country".

63 The relevant right in respect of which a non-citizen must take all possible steps to avail himself is the bare right, if it exists, to enter and reside in a country, not a right to enter and reside comfortably in a country.

64 I am disinclined to the view that "all possible steps" should be construed as "all steps reasonably practicable in the circumstances", "all reasonably available steps" or "all reasonably possible steps". Indeed, I would conclude, given the object underlying the Act,

that "all possible steps" means what it says and should not, in the context, be read down in any way.

65 Section 15AA(1) of the Acts Interpretation Act 1901 (Cth) provides:-

> *"15AA(1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."*

In s 4 of the Act which records the object of the Act it is indicated that the Parliament intended that it should be the only source of non-citizens' rights to enter or remain in Australia. Given the progressive tightening of the terms of the Act and the extrinsic material referred to above it is evident that a strict approach should be adopted to the construction of s 36(3).

66 If (say) a human variant of avian bird flu broke out in South Korea with the consequence that all possibilities of travelling to that country by sea or air were closed off one could well understand that inaction by a non-citizen in Australia may equate to having taken all possible steps to avail himself of a right to enter and reside in that country, but that is not the case here. Here there was no evidence of any steps being taken by either of the Appellants to avail themselves of their respective rights to enter and reside in South Korea.

67 This brings me to a consideration of whether a fear of being persecuted in a country, in this case South Korea, should be addressed under s 36(4) of the Act by giving the concept of persecution in that subsection a restricted meaning as required by s 91R of the Act in relation to persecution under Article 1A(2) of the Convention.

68 It is clear that in the Tribunal the view was taken that persecution would only amount to persecution for the purposes of s 36(4) if it satisfied the tests contained in s 91R. In the case of NBLC the Tribunal said:-

> *"… the Tribunal does not accept that his residing in South Korea will evoke psychological reactions of a degree or kind that could be classified as serious harm or that would lead the Applicant to jeopardise his security."*

In the case of NBLB the Tribunal said:-

> *"The Tribunal notes the suggestion from the adviser post hearing that the country information indicates that recent arrivals from North Korea to South*

> *Korea can experience difficulties in adjusting to a more modern lifestyle and face social stigma and discrimination. The Tribunal accepts this country information … however the Tribunal does not accept that this level* [of] *discrimination is of a nature or degree that amounts to serious harm as indicated … by section 91R of the Act …"*

69 To the extent to which s 91R is intended to be a definition of "persecution" for all purposes, it is somewhat inelegantly expressed. In terms s 91R(1) provides direction as to how persecution is to be assessed for the purposes of Article 1A(2) of the Convention. However, when one has regard to the Minister's Second Reading Speech and to the Explanatory Memorandum and, in particular, to those passages to which emphasis has been added above, it seems clear that the legislature intended the "definition" to cover all situations where persecution fell to be considered under the Act.

70 Before the primary judge NBLB contended that s 36(4) should not be interpreted in a manner that would be more restrictive of Australia's obligations than those envisaged by the Convention itself. He said that the importing of the concept of "serious harm" into the concept of persecution, for the purposes of the application of Article 1A(2) to a particular person, narrowed the concept of persecution, as that concept was picked up by s 36(2). NBLB submitted that there was no reason to narrow the term "being persecuted" in s 36(4) in the same way.

71 His Honour dealt with this submission in his reasons for judgment in NBLB as follows:

> *"38. Sections 36(3), 36(4) and 36(5) have no independent effect or operation. They operate only as qualifications of s 36(2). That is to say, s 36(3) is a qualification of s 36(2) and s 36(4) and s 36(5) are qualifications on that qualification. While s 91R(1) refers only to Article 1A(2), it is clear enough that ss 36(3), 36(4) and 36(5) are intended to operate only within the context of s 36(2). It would be an anomalous construction to treat the concept of persecution in ss 36(4) and 36(5) as being different from the concept of persecution imported into s 36(2) by s 91R(1).*
>
> *39. Certainly, the drafting approach of s 91R is somewhat curious. Section 91R(1) assumes that there can be persecution that does not involve serious harm to the person. Thus, the intent of s 91R(1) appears to narrow the operation of Article 1A(2). Australia is only to have protection obligations to a person who has a well-founded fear of persecution that involves serious harm. If the applicant's construction of s 36(4) is accepted, a person who has a well-founded fear of persecution that does not involve serious harm will not be entitled to a*

> *protection visa. However, where a person, who has a well-founded fear of persecution that involves serious harm, has not taken all possible steps to avail himself or herself of a right to enter and reside in a country, Australia will be taken not to have protection obligations to that person, unless the country is one in which the non-citizen has a well-founded fear of persecution that does not necessarily involve serious harm.*
>
> *40. I consider, on balance, that the preferable construction of s 36, as a whole, is to treat the concept of persecution that is found in s 36 as a single and consistent concept. That being so, the Tribunal made no error in enquiring as to whether any discrimination that might be suffered by the applicant would involve serious harm."*

72 I respectfully agree with the primary judge's reasoning which is entirely consistent with the Minister's Second Reading Speech and the Explanatory Memorandum in relation to the *Migration Legislation Amendment Bill (No 6) 2001*.

73 In *NBLC* the primary judge adopted his reasoning in *NBLB* in deciding the proper meaning to be given to s 36(4).

74 In the case of NBLC an additional error on the part of the Tribunal was alleged. NBLC contended that the Tribunal failed to address his claim that he would attract a profile in South Korea because, without there being any language barrier, he would more freely and widely discuss his story and possibly attract media attention. He argued that the Tribunal only considered the psychological evidence that was addressed to the issue of psychological harm.

75 Before the Tribunal NBLC gave the following evidence:

> *"Q. … if you went to South Korea, you're fearful that you might be discriminated against, and you're also fearful that you might be targeted by North Korean spies because your parents were guilty of treason.*
>
> *A. Yes.*
>
> …
>
> *Q. So you mean you fear discrimination in that people look down on you as a lower-class person.*
>
> *A. Not only that, but fearful of getting targeted by the North Korean spies.*
>
> …
>
> *Q. …I'm still at a little bit of a loss to understand how necessarily you*

would be a target by North Korea spies.

A. In Australia, because of the language barrier, I only can speak at the tribunal through the interpreter's help, but if I go to South Korea I can communicate with people and I will – and I think I may have the opportunity to have interview with the media. Then I will be forced to tell them about my story and naturally I will criticise the North Korean – in North Korea for what had happened and, yes, that will bring me the – the region to be targeted by the North Korean spies."

76 After the Tribunal hearing NBLC's migration agent lodged a further submission with the Tribunal which included the following:-

> *"Since the hearing on 27.1.2005, we have arranged a psychological assessment for* [NBLC] *as he showed an intense level of anxiety. The purpose of this psychological assessment was to analyse his fear of persecution and assess whether his fear would be productive of a political noise enough to attract an attention from North Korean agents operating in South Korea for a real chance of receiving serious harm which would amount to persecusion* (sic)*."*

77 The psychological report so obtained included the following:-

> *"…The purpose of this report is to look at* [NBLC's] *current mental health state and how he handles fears and depression. In fact, he was very anxious and depressed when he came to see me.*
> …
> *…it is quite understandable that* [NBLC] *has primordial fears (which are related to the survival struggles of his biological past) about what will happen to him should he meet defectors in South Korea; his repressed fears of being persecuted and harassed will be elicited by such an experience.*
> …
> *Having assessed* [NBLC], *I am concluding that going to South Korea will elicit repressed fears about his safety and security. Meeting defectors from North Korea will the* (sic) *catalyat* (sic) *for this process and his repressed fears (from his past) will come to the fore."*

78 NBLC's migration agent used this report and a sequel to it to develop a submission as follows:

> *"Having read the psychological assessment report, the writer of this submission has had a verbal discussion in great interest with the psychologist … whether it is plausible for* [NBLC] *with his past experience ('having been told of his parents being persecuted') to* ***openely*** (sic) ***express his anger*** *towards North Korean regime that has persecuted his beloved parents if he goes to South Korea and meet North Korean defectors, which is reported to elicit his repressed fear to the surface.* [The psychologist] *said to me that the*

other side of fear is anger as well and such course of action is quite plausible.

*Having said that, one of the critical Issues would be his would-be behaviour in the event that he is forced to go to South Korea. Given his past experience and in the light of the psychologist's report, it seems reasonable to foresee that he may either attempt to hide from North Korean defectors which would elicit his repressed fears, or openly express his anger towards North Korean authority that has persecuted his beloved parents. We submit that both options are open to him. Whilst the first option is more likely, it is '**NOT farfetched and fanciful**' for him to contemplate to choose the second option. If he chooses to make a political noise by openly expressing his deep-seated anger towards North Korean regime, it is also 'NOT farfeched* (sic) *and fanciful' to foresee a real chance for North Korean agents operating in South Korea to closely **monitor** his behaviour and movement which **would include the possibility of kidnapping**."*

79 In the Tribunal's reasons the Appellant's submissions in this regard were dealt with as follows:-

"The Applicant claims that he may when in South Korea voice his opposition to the North Korean regime. In this regard the Tribunal notes the suggestion by the psychologist and the adviser that the Applicant may when in South Korea as part of a psychological reaction to his past openly express anger towards the North Korean regime which could then bring him to the attention of North Korean spies in South Korea who might then attempt to kidnap or assassinate him.

The Applicant also claims that he would face psychological harm should he reside in South Korea by reason of the fact of the proximity of South Korea to North Korea and the Applicant's unpleasant memories of North Korea.

The Tribunal acknowledges that the Applicant may have certain psychological reactions as a result of his life experiences. However the Tribunal does not accept that residing in South Korea would intensify the Applicant's psychological state resulting in displays of anger or evoking repressed unpleasant memories. The Tribunal did not find psychologist report to be convincing on these points.

Further the Tribunal notes that on the Applicant's own evidence he has here in Australia associated with the Korean community both in terms of his living arrangements and his recreational activities. Given that the Applicant has not dissociated himself from his Korean past the Tribunal does not accept that his residing in South Korea will evoke psychological reactions of a degree or kind that could be classified as serious harm or that would lead the Applicant to jeopardise his security.

Accordingly the Tribunal does not accept that the Applicant has a well-founded fear of being persecuted in South Korea for reasons of race, religion, nationality, membership of a particular social group or political opinion."

80 In relation to this aspect of NBLC's case the primary judge said:-

> *"24. The Tribunal, after referring to the additional claim that the applicant would face psychological harm should he reside in South Korea, made its observations that it did not find the psychologists report to be convincing. The Tribunal made an express finding of fact that the applicant's residing in South Korea would not evoke psychological reactions of a degree or kind that would lead the applicant to jeopardise his security. The Tribunal clearly dealt with the claim fairly and adequately. This ground is not established."*

81 In relation to the possibility of the appellant NBLC telling the media his story, criticising North Korea and thereby becoming a target for North Korean spies within South Korea, his case was presented to the Tribunal on the basis that given his psychological state it was reasonably foreseeable that he may openly criticise North Korea and expose himself to danger. As indicated in the passage from the Tribunal's reasons quoted above the Tribunal did not find the psychologist's report to be convincing on this aspect of NBLC's case. It did not accept that residing in South Korea would intensify the Appellant's psychological state resulting in displays of anger or evoking repressed unpleasant memories.

82 The Tribunal clearly addressed the issue which was tendered by the Appellant for its consideration and made its finding of fact upon it. In the circumstances, it would be inappropriate for the Court on an application for review to interfere with that finding.

83 The appeal in each matter should be dismissed with costs.

I certify that the preceding fifty-four (54) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Graham.

Associate:

Dated: 23 December 2005

Counsel for the Appellants: R T Beech-Jones

Solicitor for the Appellants: Legal Aid Commission of New South Wales

Counsel for the Respondents:	R J Bromwich
Solicitor for the Respondents:	Clayton Utz
Date of Hearing:	22 November 2005
Date of Judgment:	23 December 2005