

# CONFERENCES

2 October - 6 October 2002  
8th International Criminal Law

Congress  
Melbourne  
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10- 12 October 2002  
PIAA International Section  
Conference 2002

Sydney, NSW  
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Fax: 02 9954 0666  
PIAA@dcconferences.com.au

17 - 18 October 2002  
Detention, Decisions &  
Dilemmas

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Fax: 03 9509 7151  
conorg1@optushome.com.au

20 - 22 October 2002  
3rd AIJA Technology for Justice  
Conference

Sydney, NSW  
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Fax: 02 9251 3552  
techjust@icmsaust.com.au

26 October 2002  
Medico-Legal Conference

Gold Coast, Qld  
Tel: 07 3365 1492  
m.moriarty@law.uq.edu.au

26 - 31 October 2002  
Youth + Family

Melbourne, Vic  
Tel: 03 9417 0888  
Fax: 03 9417 0899  
youthandfamily@meetingplanners.com.au

27 - 31 October 2002  
Union Internationale des  
Avocates (UIA) 46th Congress

Sydney, NSW  
Tel: 02 9241 1478  
Fax: 02 9251 3552  
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13 - 17 April 2003  
13th Commonwealth Law  
Conference

Melbourne, Australia  
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29 June - 5 July 2003  
Criminal Lawyers Association of  
the Northern Territory  
9th Biennial Bali Conference

Bali  
Tel: 08 8981 2549  
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1 - 5 September 2003  
18th LAWASIA Biennial  
Conference

Tokyo, Japan  
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# NOTICEBOARD

## Federal Court Notes October 2002

Prepared for the Law Council of Australia and its constituent bodies by Thomas Hurley, Barrister, Vic., NSW, ACT (Editor, Victorian Administrative Reports)

### Migration - Validity and operation of s476 of Migration Act

In *NAAV v. MIMIA* ([2002] FCAFC 228; 15.08.2002) a Full Court of five justices considered the validity and operation of the privative clause enacted in October 2001 in s474 of the *Migration Act 1985 (Cth)*. All five justices concluded that s474 was not invalid for restricting access to the Courts or usurping judicial power. The Court generally observed the provision would protect a decision of the MRT which involved an error of law such as the definition of "special need relative" provided the Hickman principles were satisfied. However the Court, by majority, held that the provisions of the Act concerning cancellation of visas contained inviolable requirements which if not followed would not be protected from judicial review by s474.

### Migration - Tribunal - Misapprehension of Applicant's case

In *W217/01A the MIMA* ([2002] FCA 892; 1.08.2002) Lee J concluded the RRT erred in concluding an Applicant had fabricated birth certificates without sighting them. He

concluded the RRT misunderstood the Applicant contended he had converted to Islam when the Applicant's case was that the authorities would regard him as such. Application allowed.

### Procedure - Representative proceeding - Individual settlement offers

In *Courtney v. Medtel P/L* ([2002] FCA 597; 1.08.2002) Sackville J concluded the provision for representative proceedings in Part IVA of the *Federal Court Act* did not envisage the Court having a role in endorsing or approving any settlement offer made by a Respondent to an individual member of the representative group.

### Income tax - Deduction - Compound interest in split loan

In *Hart v. Commissioner of Taxation* ([2002] FCAFC 222; 26.07.2002) the taxpayer financed the purchase of a new residence by a mortgage which capitalised interest on the former residence which was retained as an investment property. The primary Judge found that while the interest paid on the global mortgage was deductible the arrangement was subject to the anti-avoidance provision in Part IVA of the ITAA. This conclusion was reversed by the Full Court on appeal and the taxpayer allowed the full deduction.

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# NOTICEBOARD

## Trade practices - Misleading conduct - Comparative advertising

In *Gillette Australia P/L v. Energiser Australia P/L* ([2002] FCAFC 223; 26.07.2002) the Full Court considered comparative advertising and whether a party in litigation had been denied natural justice because of a misunderstanding as to which affidavits were to be considered.

## Federal Court - Role of appellate court - Patent infringement

In *Bartlem P/L v. Cox Industries (Australia) P/L* ([2002] FCAFC 224; 31.07.2002) a Full Court considered the role of the Full Court as an Appellate Court in correcting error at first instance and the need for the parties to demonstrate error. The Court concluded the conclusions of the Trial Judge on patent infringement ought not be disturbed.

## Income tax - Deduction - Contribution to non-complying superannuation fund

In *Harris v. C of T* ([2002] FCAFC 226; 8.08.2002) a Full Court dismissed an appeal where a taxpayer claimed as a deduction a sum of money paid to a non-complying superannuation fund under Div 3 of Part III of ITAA.

## Migration - Detention - No prospects of removing detainee - Whether detention lawful

In *Al Masri v. MIMIA* ([2002] FCA 1009; 15.08.2002) Merkel J ordered that a non-citizen be released from migration detention. The Applicant was a Palestinian who had in December 2001 requested removal from Australia. The Respondent was unable to secure passage for him to Gaza. Merkel J concluded that the Migration Act only authorised detention for the purposes of removing non-citizens from Australia. He concluded the detention of the Applicant in circumstances where he wanted to leave Australia but could not was unlawful.

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## HUMAN RIGHTS ACT AMENDED - FROM HREOC

On 13 April 2000, the *Human Rights Legislation Amendment Act (No.1) 1999 (Cth)* (HRLAA) commenced operation. This legislation was introduced to ensure enforceability of determinations under Federal anti-discrimination law by providing access to the Federal Court and Federal Magistrates Court for complainants who had their complaint terminated.

The changes were also seen as having a potentially negative impact on HREOC's conciliation process in that due to apprehension about the costs of court action, complainants would have decreased bargaining power in conciliation and would therefore be forced to accept lower outcomes at conciliation or withdraw their complaint.

In light of community concerns and broader interest in the impact of the changes, HREOC considered it would be beneficial to conduct an initial review of the impact of the procedural changes as soon as possible after commencement of HRLAA, with this review providing the framework for future additional reviews as required. This

initial review sought to assess complaint related data for the calendar year after the introduction of HRLAA to examine:

- what, if any, impact the procedural changes have had on the number of complaints lodged under Federal anti-discrimination law;
- the number of complainants pursuing matters to determination before the court;
- what, if any, concerns complainants and respondents had about a court determination process; and
- what, if any, impact the procedural changes have had on complaint outcomes and the relative position of complainants in the complaint process.

The review also analysed the approach of the Federal Court and Federal Magistrates Court to costs awards over a twelve month period from the date of the first decision in the new jurisdiction.

The key findings of the review can be summarised as follows:

- Comparative data indicates that in the calendar year following the commencement of HRLAA (2001) there was no decrease in the number of complaints brought under Federal anti-discrimination law.
- A significant number of complainants are utilising the new determination process. Statistics for 2001 indicate that approximately 23 percent of terminated matters proceeded to an application in the Federal Court or FMS and approximately 46 percent of surveyed complainants whose matters could not be resolved by conciliation indicated that they had lodged, or intended to lodge an application with the Federal Court or FMS.
- Comparative data indicates that in 2001 there was a rise in the percentage of complaints that were conciliated, an increase in the conciliation success rate and a decrease in the percentage of complaints that were withdrawn. Survey data from parties who participated in conciliation in 2001 shows that complainants had high levels of satisfaction with conciliation settlement terms and complainants and respondents had similar levels of concern about proceeding to court determination.
- For the review period, the Federal Court and the FMA approached the award of costs differently. Costs generally followed the event in the Federal Court; that is, the successful party had an order made in its favour. In the FMS, however, while successful applicants were generally awarded costs, applicants whose claims were dismissed were most likely to have no costs order made against them or parties were ordered to bear their own costs.

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## FROM THE CENTRE FOR ELDER LAW

The Elder Law Review invites papers for the next issue of the Review to be published in February 2003. The theme of this issue will be *Elders - Care and Accommodation Agreements*. For further information email [k.geore@uws.edu.au](mailto:k.geore@uws.edu.au) or go to the website [www.uws.edu.au/law/elderlaw/](http://www.uws.edu.au/law/elderlaw/)