CONFERENCES

13 - 15 May 2002
Media and the Law
Alice Springs, NT
Tel: 08 8946 9500
Fax: 08 8946 9505
lawasia@lawasia.asn.au

20 - 22 May 2002
Plastic Card Fraud
Sydney, NSW
Tel: 02 9923 5090
Fax: 02 9959 4684
info@iir.com.au
Website: www.iir.com.au

23 - 24 May 2002
Biometrics Security 2002
Sydney, NSW
Tel: 02 9080 4307
Fax: 02 9290 3844
registration@informa.com.au
Website: www.ibcoz.com.au

6 - 7 June 2002
5th AIJA Tribunals Conference
Melbourne, Victoria
Tel: 03 9347 6600
Fax: 03 9347 2980
c.crawford@unimelb.edu.au

19 - 21 June 2002
Law Reform Agencies in the 21st Century
Darwin, NT
Tel: 08 8981 1875
convention.catalysts@norgate.com.au

7 - 10 July 2002
ABA Conference
Paris, France
Tel: 07 3236 2477
Fax: 07 3236 1180
mail@austbar.asn.au

7 - 13 July 2002
XV World Congress of Sociology
Brisbane, Qld
Tel: +61 3 9417 0888
Fax: +61 3 9417 0899
sociology@meetingplanners.com.au
Website: www.sociology2002.com

11 - 14 July 2002
ANZAPPL Conference
Darwin, NT
Tel: 08 8212 7583
Fax: 08 82312621

26 - 31 August 2002
40th Annual Congress of the International Association of Young Lawyers
Lisbon
Tel: 02 9385 1035
Fax: 02 9313 6658
a.mcnaughton@unsw.edu.au

2 October - 6 October 2002
8th International Criminal Law Congress
Melbourne
Jon Tippett
Tel: 08 8981 6833
Fax: 08 8981 6837
jcat@octa4.net.au
Suzan Cox
Tel: (08) 8999 3000
Fax: (08) 8999 3099
suzan.cox@ntlac.nt.gov.au

13 - 17 April 2003
13th Commonwealth Law Conference
Melbourne, Australia
Tel: 03 9820 9115
Fax: 03 9820 3581
comlaw@mcigroup.com

NOTICEBOARD

WORK HEALTH COURT MEMORANDUM TO PRACTITIONERS

It has come to the notice of the Court that practitioners are becoming less diligent in their compliance with the rules of court regarding the filing of the required documents before the first Directions Conference.

Practitioners are reminded that they are to file an Index of Documents with copies all medical reports ,certificates, claim form, form 5 etc attached when filing the Application / Appearance. If the documents are not filed it is not possible for the presiding officer to be properly prepared for the Directions Conference. (see rules 5.02 & 5.03)

It is also noted that practitioners acting for the Employers are failing to file Appearances which set out what issue if any is taken with the contents of the Worker's claim form. In cases where the liability has been denied that failure again makes it impossible for the presiding officer to work out the issues before the Directions conference.(see rule 5.06(2))

Practitioners are aware that the first Directions Conferences are scheduled in half hourly sessions. We presently find that when time is spent at the Directions Conference defining the issues because of a failure by a party to comply with the above Rules, matters take longer than half an hour. This causes inconvenience to everyone involved and to those waiting their turn.

If the failure to file a list of documents and / or a properly drafted Appearance continues, practitioners are warned that they may face orders for adjournments and orders for costs. It is anticipated that those costs orders will be significantly larger than those awarded to date.

Judicial Registrars
25 March 2002

FEDERAL COURT OF AUSTRALIA

A Full Court of the Federal Court of Australia will be sitting on two Northern Territory appeals in Darwin from 28 to 31 May 2002.

The Full Court, which will be sitting in the Supreme Court Building, will be constituted by his Honour Chief Justice Black and their Honours Justice Drummond and Justice Kiefel.

SUPREME COURT OF NEW SOUTH WALES

Please be advised that due to the swearing in of Mr Gzell as a judge of the Supreme Court of New South Wales, his Honour's new address will be as follows: The Honourable Justice Gzell, Judge's Chambers, Supreme Court of New South Wales, Queens Square, NSW 2000.

NOTICEBOARD

LEGISLATIVE ASSEMBLY SITTINGS FEBRUARY/MARCH 2002 INTRODUCED AND PASSED LEGISLATION

Bills Introduced

- Classification of Publications, Films and Computer Games Amendment Bill 2002 (Serial 34)
- Police Administration Amendment Bill 2002 (Serial 37)
- Witness Protection (Northern Territory(Bill 2002 (Serial 37)
- Workmen's Liens Amendment Bill 2002 (Serial 33)
- Corporations (Financial Services Reform Amendments Bill) 2002 (Serial 46)
- Penalties Amendment Bill 2002 (Serial 42)
- Interpretation Amendment Bill 2002 (Serial 43)
- First Home Owner Grant Amendment Bill 2002 (Serial 41)
- Statute Law Revision Bill 2002 (Serial 47)
- Meat Industries Amendment Bill 2002 (Serial 39)
- Racing and Betting Amendment Bill 2002 (Serial 35)

Bills Passed

- Public Trustee Amendment Bill 2001 (Serial 27)
- Administration and Probate Amendment Bill 2001 (Serial 26)
- Anti-Discrimination Amendment Bill 2001 (Serial 28)
- Coroners Amendment Bill 2001 (Serial 29)
- Criminal Code Amendment Bill (No 5) 2001 (Serial 23)
- Cullen Bay Marina Amendment Bill 2001 (Serial 24)
- Unit Titles Amendment Bill (No 2) 2001 (Serial 25)
- Juvenile Justice Amendment Bill (No 3) 2001 (Serial 31)
- Police Administration Amendment Bill (No 2) 2001 (Serial 32)
- Classification of Publications, Films and computer Games Amendment Bill 2002 (Serial 34)

Federal Court Notes April 2002

Prepared for the Law Council of Australia and its Constituents by Thomas Hurley, Barrister, Vic., NSW, ACT

(Editor, Victorian Administrative Reports)

Migration - Privative Clause - Whether decision in breach of "indispensable condition"
In *Wang v MIMA ([2002] FCA 167; 27.2.2002)* a visa granted to the applicant for employment skills in March 2001 was cancelled under s.128 of the *Migration Act* in July 2001. Mansfield J found the letter to the migration agent advising the cancellation did not contain the notice or particulars required to be given by s.129(1)(b) *Migration Act.* He concluded this requirement was an "indispensable condition" to the valid cancellation of a visa under s.128 of the *Migration Act* and therefore the privative clause provisions in s.474 of the *Migration Act* did not prevent the court declaring under s.39B of *Judiciary Act* that a decision under s.131 in October 2001 declining to revoke the cancellation of the visa was invalid and of no affect.

Migration - Privative clause
In *NAAX v MIMA ([2002] FCA 263; 15.3.2002)* Gyles J concluded that the Hickman doctrine required identification of a jurisdictional error other than breach of natural justice before constitutional writs would issue to quash a decision protected by the privative clause in s.474 of the *Migration Act.* He concluded breach of the "statutory natural justice" provisions found in the *Migration Act* did not warrant grant of relief under *Judiciary Act s.39B.*

Migration Act - Privative clause
In *Ratumaiwai v MIMA ([2002] FCA 311; 20.3.2002)* Hill J concluded that s.474 of the *Migration Act* would preclude the Federal Court from making an order for prohibition absolute where there had been a denial of natural justice and considered what errors of law or fact or both could constitute such "jurisdictional error". He concluded that it was unlikely Parliament intended the Federal Court to assume a jurisdiction to set aside orders for breach of natural justice after 2 October 2001 when it had been denied this jurisdiction before hand.

Migration - Decision of Minister to set aside AAT decision
In *Lam v MIMA ([2002] FCA 175; 1.3.2002)* a Full Court agreed with the primary judge that the Minister could set aside a decision of the AAT which favoured the grant of a visa notwithstanding that the AAT decision did not effect the grant of a visa and that this result was required by subsequent amending legislation.

Migration - Whether notice "specified" agencies
In *NAAO v Secretary DIMA ([2002] FCA 292; 20.3.2002)* a Full Court concluded that a notice in the Gazette which specified any agency in each country in the world involved in law enforcement as a possible source of protected information did not "specify" particular agencies as required by s.503A(9) of the *Migration Act.*

Migration - Refugee application - Death of applicant
In the *V120/00A v MIMA ([2002] FCA 264; 15.3.2002)* Kenny J concluded that when the principal applicant for a protection visa died the "secondary" family members were not able to be granted a protection visa as none of them had made "specific claims" under the Refugees Convention.

Migration - Refugee status - Outdated country information
In *VAO v MIMA ([2002] FCA 161; 27.2.2002)* a Full Court concluded that the primary judge did not err in rejecting the submission that the RRT erred in referring to outdated country information.

Trade Practices - When foreign corporations carries on business in Australia by sending instructions to subsidiary
In *Bray v F. Hoffman-La Roche Ltd ([2002] FCA 243; 13.3.2002)* Merkel J concluded, in a representative proceeding alleging an international price fixing cartel in the pharmaceutical industry in contravention of s.45 of the *TP Act*, that whether or not the international corporations carried on business in Australia was a question of fact. He considered the evidence did not establish the foreign respondent carried on business in Australia through their subsidiaries and consider the inferences to be drawn from receipt in Australia of e-mail and other electronic communications from overseas parents to officers in Australian subsidiaries. He concluded evidence that instructions by e-mail etc. from overseas corporations were implemented in Australia could be evidence that those corporations carried on business in Australia [147] notwithstanding that the business was not carried out by subsidiary corporations.

Trade Practices - Misleading conduct - Defamation
In *Versace v Monte ([2002] FCA 190; 8.3.2002))* Tamberlin J considered whether a private investigator who traded as such through a company published a book concerning his exploits at a promotion for his business and therefore in trade in commerce [109]. He concluded the book was misleading and deceptive, and not published a prescribed information provider within s.65A of the *TP Act*, as well as being defamatory.

NOTICEBOARD

Contracts - Application for admission to ASX - Whether implied term application would be processed in a bona fide manner

In *Wenzel v Australian Stock Exchange Ltd ([2002] FCA 95; 15.2.2002)* Sundberg J considered whether an application by a person for membership of the ASX created a first preliminary contract as to how the application would be processed prior to the creation of the principal contract of membership. He considered whether any agreement contained an implied term of fair dealing.

Legal practitioners - Former client seeking to restrain solicitor from acting as an opposing party to litigation.

In *Waiviata Pty Ltd v New Millenium Publications Pty Ltd ([2002] FCA 98; 15.2.2002)* Sundberg J considered a claim by a former client seeking to restrain solicitors from acting for the opposing party in subsequent litigation. He concluded that as there was no claim the solicitors were misusing confidential information, or otherwise in breach of the duty to the former client, there was no reason why they should be prevented from acting.

Income Tax - Assessable income - Dispute between tax payer and its contractors

In *BHP Petroleum (Bass Strait) Pty Ltd v Commissioner of Taxation ([2002] FCA 189 5.3.2002)* Kenny J considered when the assessable income of a tax payer was "derived". The Commissioner had assessed income as at the date petroleum and gas products were supplied by the tax payer notwithstanding a dispute between the tax payer and its customers concerning that supply was not resolved by commercial arbitration for some time and the agreements between the parties contained an arbitration clause as a condition precedent to the tax payer suing for the funds.

Patents - Inventiveness - Nature of appeal proceedings

In *E I Dupont de Nemours & Company v Imperial Chemical Industries PLC ([2002] FCA 230; 12.3.2002)* Branson J considered whether a patent for a vapor compression refrigeration system was valid and the nature of the appeal against the decision under s.59 of the *Patents Act 1990 (Cth)* of a delegate that opposition to the grounds of a patent be dismissed.

Income Tax - Deductions -Deduction incurred after business ceased

In *C of T v Jones ([2002] FCA 204; 8.3.2002)* a Full Court concluded the tax payer was entitled to deductions for interest paid after the business in question had ceased. The tax payer and her former husband had entered into financial arrangements which penalised them for early repayment. The husband died and the business ceased. The tax payer entered into other financial arrangements to satisfy the first which involved her entering into a commitment which continued after the business ceased.

Industrial Law -Union rules - Enforcement - Unreasonable directions

In *Micallef v Donnelly ([2002] FCA 221; 12.3.2002)* Finkelstein J concluded that notwithstanding he had found that a direction given by one union official under its rules was unreasonable and therefore not lawful he declined to grant interim relief because of the failure of the applicant to assist the respondent's enquiries into the breach of the rules.

Bankruptcy - Validity of Notice of Objection to Discharge

In *Prentice v Wood ([2002] FCA 214; 8.03.02)* a Full Court considered whether a Notice of Objection to Discharge from bankruptcy meant the mandatory requirements provided in s.149C(1) of the *Bankruptcy Act 1966 (Cth).* The Full Court considered the obligation on a Trustee to state reasons for the objection in the Notice as required by s.149C(1).

Social Security - Preclusion - Special circumstances

In *Secretary, DFCS v Chamberlain ([2002] FCA 67 18.2.2002)* Kiefel J considered when "special circumstances" could be established to alter the effect of the lump sum preclusion period established by s.1165 of *Social Security Act 1991 (Cth).*

Administrative law - Natural justice - Failure to warn witness not believed

In *Lidono Pty Ltd v C of T [2002] FCA 174; 28.2.2002) Gyles J* concluded the AAT did not err in finding the principal witness of a tax payer unreliable and finding that a witness had duped a collaborative witness without giving the tax payer notice of this.

Industrial law - Certified agreement - Construction - Extrinsic evidence

In *Moshirian v University of NSW ([2002] FCA 179; 1.3.2002)* Moore J had regard to evidence of negotiations prior to, and evidence of conduct of the parties subsequent to, the negotiation of a certified agreement.

Federal Court - Jurisdiction - Matter

In *von Arnim v Group 4 Correctional Services Pty Ltd ([2002]) FCA 310; 20.3.2002)* Kenny J concluded the Federal Court had jurisdiction to decide whether a person detained in a State penal system pursuant to orders made under the *Extradition Act 1988 (Cth)* had rights under the State law which were being denied.

Evidence - Whether administrative decision based on without prejudice negotiations void

In *Brown v C of T ([2002] FCA 318; 21.3.2002)* a Full Court considered whether a decision of the Commissioner of Taxation to remit penalty was void when the decision maker used material provided in the course of without prejudice negotiations between the decision maker and the tax payer.

High Court Notes May 2002

Administrative law - Whether statutory decision maker has power to voluntarily set aside decision based on error of decision maker

In *MIMA v Bhardwaj ([2002] HCA 11; 14.3.2002) the Migration Act 1958 (Cth)* required the Immigration Review Tribunal ("the IRT") to review certain decisions and provided that the IRT was not bound by technicalities, was required to act according to the substantial justice of the case (s.353(2)) and was required to give an applicant an opportunity to appear (s.360(1)). Due to illness the respondent was not able to attend the IRT hearing of his application. The letter to the IRT advising of the illness did not reach the IRT member who decided the matter in September 1998 adversely to the respondent. On discovering why the respondent had not appeared a new hearing was arranged and in October 1998 the IRT allowed the review. The Minister sought review by the Federal Court contending the IRT had no jurisdiction to make the October 1998 decision. This contention was dismissed by the primary judge, the Full Court of the Federal Court by majority and by the High Court: Gleeson CJ; Gaudron with Gummow JJ; McHugh; Hayne J; Callinan J; contra Kirby J. The majority concluded the IRT was authorised to correct a decision based on an "error in fact" [14] or jurisdictional error so as to be a nullity [51], [63], [149] and [163]. In dissent Kirby J

concluded the scheme of the Act excluded a residual power in the IRT to revoke an earlier decision [115], [123] and relief Could only have been granted by the Federal Court against the first decision. Appeal dismissed.

Criminal Law - Manslaughter - Accessory before the fact - Mental element

In *Q v Chai ([2002] HCA 12; 14.3.2002)* C was convicted of manslaughter for having procured other persons to assault "gangsters" who died as a result of the beating. The Court of Criminal Appeal NSW allowed his appeal on the basis that the charge by the trial judge to the jury referred to the intended "assault" in a way which could encompass a technical or trivial assault which though unlawful was not objectively dangerous so as to foreseeably result in death. The appeal by the prosecution to the High Court was allowed in a joint judgement: Gleeson CJ, Gummow, Kirby , Hayne, Callinan JJ. The High Court concluded that construed in the context of the evidence before the jury the direction of the trial judge was not in error. Appeal allowed.

Contract - Employment - Whether engagement of Archbishop by Church "a contract of employment"

In *Ermogenous v Greek Orthodox Community of SA Inc ([2002] HCA 8; 7.3.2002)* the Appellant served as an Archbishop in the Greek Orthodox faith in South Australia from March 1970. In September 1994 he made a claim in the Industrial Relations Court of SA for long service leave alleging he had been employed under a "contract of employment" within s.8 of the *Industrial and Employee Relations Act 1994 (SA).* He named the corporate respondent as the respondent but other Greek Orthodox Communities (some incorporated and some not) were added as respondents. The Industrial Magistrate found the respondent liable. This conclusion was upheld by a judge of the Industrial Relations Court SA and the Full Court of that Court. On appeal the Full Court of the Supreme Court (SA) concluded there had been no intention to create legal relations in the appointment and maintenance of the appellant. His appeal to the High Court was allowed: Gaudron, McHugh, Hayne, Callinan JJ Kirby J sim.. The majority observed that while the relationship between clergy and church was pre-eminently spiritual there were aspects of the relationship which could give rise to legally enforceable rights [38] and the Industrial Magistrate had not erred in finding the relationship between the appellant and the main respondent to be a contract of employment. Appeal allowed.

Negligence - Occupier's liability - Indoor cricket - Failure to warn of eye injury

In *Woods v Multi-Sport Holdings Pty Ltd ([2002] HCA 9; 7.3.2002)* W suffered an eye injury while batting in a game of indoor cricket conducted at the respondent's premises when the ball ricocheted off his bat and hit him in the eye. His action for damages before a judge alone in the District Court of WA was dismissed. The trial judge found that while the respondent owed the appellant a duty of care as an occupier the duty was not breached by failure to warn of specific risk of eye injury or provide a helmet together with gloves etc. This conclusion was upheld by the Court of Appeal (WA). The appellant's appeal to the High Court was dismissed by majority. : Gleeson CJ; Hayne J; Callinan J: contra McHugh J; Kirby J. The majority concluded the trial judge did not err in finding the risk was so obvious as to not require a warning. Consideration by McHugh J of when courts may take judicial notice of notorious facts and statistics. Appeal dismissed.

Private International Law - Choice of forum

In *Regie National des Usines Renault SA v Zhang ([2002] HCA 10; 14.2 2002))* the respondent was injured in 1991 in a motor vehicle accident involving a Renault vehicle while he was in New Caledonia. In 1994 the Respondent issued proceedings in the NSW Supreme Court claiming damages for personal injury arising out of the accident. He alleged the motor vehicle was negligently designed and manufactured by various of the Renault companies. Because these companies did not have a presence in Australia, the Respondent served them out of the jurisdiction as provided in Part 10 of the *Supreme Court Rules 1970 (NSW).* The Renault companies moved in March 1996 for the proceeding to be stayed as provided in Part 10 r6A of the rules. The primary judge ordered the NSW proceedings be stayed on condition the Renault companies submit to the jurisdiction of the courts of New Caledonia. The respondent's appeal against this decision was allowed by the Court of Appeal NSW on the basis the Renault companies had not established that NSW was a "clearly inappropriate forum". The appeal by the Renault companies to the High Court was dismissed by majority: Gleeson CJ, Gaudron, McHugh,Gummow, Hayne JJ contra Kirby J,Callinan J. The majority concluded the Court of Appeal had erred in concentrating on the significance of NSW law as the determinative law of the rights of the parties [77]. However the majority concluded the result was not in error as the Renault companies had not demonstrated that a trial in NSW would be unjust, oppressive or vexatious [82]. Appeal dismissed.

Migration - Refugee status - Exclusion for serious non-political crime

In *MIMA v Singh ([2002] HCA 7; 7.3.2002)* S claimed to be a member of the Sikh KLF group in India and to have been involved in gathering information upon which KLF members acted to kill an Indian police officer who was said to have tortured another KLF member. S's application for refugee status was refused on the ground that he had been involved in a "serous non-political crime" within Article 1F(b) of the *Refugees Convention.* This conclusion was upheld by the AAT. The primary judge of the Federal Court dismissed a review brought by S. This decision was reversed by the Full Court of the Federal Court. The Minister's appeal to the High Court was dismissed by majority: Gleeson CJ; Gaudron J, Kirby J; contra McHugh J; Callinan JJ . The majority concluded the AAT had erred by assuming that there was antithesis between violent retribution and political action [20]. Appeal dismissed.

Migration - Refugees - Natural justice - Country information

In *Re MIMA Ex parte "A" ([2001] HCA 77 21.12.2001)* Kirby J concluded the use made by the RRT of Foreign Affairs cables giving "country information" concerning the political situation in Burma did not establish a breach of the rules of natural justice nor a failure to provide information as required by *s.424A Migration Act 1958 (Cth).*