

Australian Institute of International Affairs – ACT Branch

Interacting with Diversity: Australian Judges and Regional Courts

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Introduction

There was a time when Australia was culturally an island unto itself. An Anglo Saxon fear of being overwhelmed from the north by people of different colour, cultures and values informed a restrictive and racially-based immigration policy designated, without apology, as the "White Australia Policy". Concerns about people of the Asian Pacific region already within Australia at the time of Federation contributed to the provision in our Constitution of a power in the Commonwealth Parliament to make laws with respect to "... the people of any race for whom it is deemed necessary to make special laws ...". The first immigration law provided mechanisms by which the White Australia policy could be upheld. Alfred Deakin, introducing it, spoke of the desire "that we should be one people and remain one people without the add mixture of other races ... The unity of Australia is nothing if it does not imply a united race."

Much changed from the mid twentieth century to the present time in terms of our attitude to admitting people into Australia with a variety of national and ethnic origins, including people from many countries in our region. In the second half of the twentieth century the White Australia policy diminished and effectively vanished. There were waves of immigration from different parts of the world which brought with them a rich diversity of cultural heritage. Today, nearly one quarter of the people living in Australia were born overseas. Forty three per cent of Australians were either born overseas or

have at least one parent who was born overseas. In recent years migrants to Australia have come from over 180 different countries. Many have come from countries in the Asia Pacific region. At the same time there has, been much development in Australia's interaction with countries in the region in trade, tourism, cultural and educational exchange. One area of interaction perhaps less well known and publicised than others is that of judicial visits and exchanges.

There is a plethora of programs involving Australian judges visiting courts and judges in the region and judges from the region visiting courts and judges in Australia. The objects of such visits are various. They include the sharing of information and experience about practical matters such as case management, information technology and the conduct of trials. They may extend to areas of substantive law in which Australian judges have had particular experience which they can share with judges in the region dealing with newly established legal regimes. There are also more fundamental discussions concerning issues of judicial independence and the separation of powers.

Let me first of all say a few things about Australia's judiciary. Each State and Territory in Australia has its own judicial system. Each State and Territory has a Supreme Court and a Magistrates Court. A number of States have intermediate trial courts, referred to as the District Court in Western Australia, South Australia, New South Wales and Queensland, and as the County Court in Victoria.

The final court of appeal for each State and Territory is the Court of Appeal of the Supreme Court in New South Wales, Victoria, Queensland, Western Australia, the Northern Territory and the Australian Capital Territory. It is the Full Court of the Supreme Court in South Australia and Tasmania. The final court of appeal for each

3.

State and Territory after its own appellate processes are exhausted, is the High Court of Australia. That is provided for in Ch III of the Constitution. Using its legislative powers under the Constitution, the Federal Parliament has also created three major federal courts under the High Court. They are the Federal Court of Australia, the Federal Magistrates Court and the Family Court of Australia. Overall Australia had some 991 judicial officers as at March 2009.

The State courts tend to handle the bulk of criminal law, as well as a wide range of civil litigation. The Federal Court of Australia deals with matters arising under federal law such as taxation, intellectual property, competition law, trade practices, bankruptcy, native title and administrative law. The Federal Magistrates Court has similar jurisdictions, but deals with the less complex cases in the areas in which it has jurisdiction. The Family Court of Australia deals, as you might imagine, with family law matters. These include divorces, custody issues and property division.

A number of Australia's courts have developed relationships with particular countries and been involved in programs directed towards strengthening the rule of law and deepening legal expertise and mutual understanding among the judiciary in our region. There is something of an embarrassment of riches in the diversity of the interactions. In my opinion the time has come for a more coherent coordinated national approach, perhaps through the National Judicial College of Australia, than presently exists. This is an important national activity and a national approach would hopefully reflect a coherent policy framework that identifies priorities.

A brief and necessarily incomplete overview of judicial engagement in the region will give you some idea of its extent and diversity. Let me begin with the National Judicial College of Australia (NJCA). It is funded to provide ongoing

education to judges in Australia. That is its primary task. It is also a member of the International Organisation for Judicial Training. That organisation comprises a large number of member nations. In October last year the NJCA hosted its fourth conference in Sydney. It was partly funded by AusAID, a funding aid arm of the Federal Government, to enable judges and judicial educators from Asia Pacific countries to attend the conference. The NJCA encourages judges from Asia Pacific countries to attend its Australian judicial programs. Judges from Papua New Guinea, the Solomon Islands and from Singapore have attended a National Judicial Orientation Program, a training course for newly appointed judges, conducted by the NJCA. The NJCA also regularly receives requests to meet with visiting delegations of judicial officers who are interested in judicial education in Australia. Such meetings have been held with delegations from China, Vietnam, Brunei, India, Singapore and East Timor. Later this month Chief Justice Wayne Martin, who is the Chair of the NJCA Council, will speak on Faculty Development programs at the biennial conference of the Commonwealth Judicial Education Institute in Malaysia. This conference will be attended by judges and judicial educators from Commonwealth countries in the region.

AusAID, which I have already mentioned as a funding agency, provides law and justice assistance in the Pacific area. It co-funds the Pacific Judicial Development Program in which NZAid, its equivalent agency in New Zealand, is the lead donor. The Pacific Judicial Development Program aims to strengthen the capacity of judicial and court officers in the Pacific through training and skills development. The program comprises four components; access to justice, governance, systems and processes and professional development.

The Asia Pacific Judicial Reform Forum (APJRF) is a network of 49 superior courts and justice sector agencies in the Asia Pacific region which have come together

to contribute to judicial reform in the region. It resulted from the 2005 Manila Declaration on Judicial reforms. That Declaration called for a judicial knowledge and technique sharing network. The purpose of the Forum was to create a network to support jurisdictions in the Asia Pacific region which are committed to advancing judicial reform. Coordination is provided by a secretariat chaired by Justice Kenneth Hayne of the High Court of Australia. It includes representatives from Australia, the Supreme Court of the Philippines and the United Nations Development Program's regional centre in Bangkok. Administrative support for the Forum is currently provided by the High Court of Australia, the Federal Court of Australia, the Supreme Court of New South Wales and the Judicial Commission of New South Wales. In 2009, the APJRF completed a judicial reform publication with funding from the United Nations Democracy Fund. The publication entitled *Searching for Success in Judicial Reform – Voices from the Asia Pacific Experience* was published by Oxford University Press in early 2009. It is being used to inform judicial reform initiatives in the region. The Forum also held a Roundtable Meeting in Singapore in January 2009, chaired by Justice Hayne and attended by senior judicial officers and administrators from throughout the region. It produced a number of important papers on judicial reform.

Under the Pacific Judicial Development Program between 2006 and 2008 the Federal Court was involved in providing for specialist experts to assist the Pacific Islands in areas including ethical and integrity frameworks and codes, leadership skills, policy and procedures to deal better with "family and the law" issues, human resource and financial management and inter-agency communication and coordination. They also provided expertise in connection with the streamlining of administrative systems and processes, the provision of training in criminal and civil law and procedure, and in decision making and judgment writing, as well as the use of evidence and training trainers.

The Human Rights and Equal Opportunity Commission has become involved in a number of judicial exchange programs with China and Vietnam. Since 2005, these programs, have involved Australian judges visiting China and Vietnam, with reciprocal visits from Chinese and Vietnamese judges. The programs involving the Supreme Court of China have included a compensation law, a juvenile justice design visit, a Juvenile Justice Workshop, and a mediation seminar and judicial accountability study visit. There has also been a Peoples' Assessor Research Seminar conducted with the National Judges College of China. With the Supreme Peoples' Court of Vietnam, there have been access to justice seminars and study visits. Australian judges and retired judges have been involved in these activities

At the level of individual courts, there has been a plethora of programs and exchanges. The High Court itself receives a number of international visitors, including delegations of judges, senior lawyers and court administrators. In the year 2008/2009 the Court received delegations of judges, senior lawyers and court administrators from China, Indonesia, Iraq, Taiwan, Thailand, Japan, Korea, The Russian Federation, South Africa and Tonga.

For four weeks commencing in late February 2009 under the auspices of the Indonesia/Australia Legal Development Facility, a post graduate student and member of staff on the Constitutional Court of Indonesia worked with Justices, Registry and Chambers staff in the High Court and also in the Federal Court of Australia on a project which was designed to assist the Indonesia Constitutional Court to develop its administrative and registry practices.

The High Court hosted a Forum in Canberra in June 2009 with the Supreme Court of India. These Forums are held every two years. The 2009 meeting covered themes of federalism in the Supreme Court of India and the High Court of Australia, and Codification and the Common Law of Evidence in India and Australia. It was attended by the Chief Justice of India and two other Justices of the Supreme Court, along with Mr Gopal Subramaniam, who is now Solicitor-General of India.

The Federal Court of Australia has had a close relationship with judges and courts across the region since it was established in 1977. It has played a role in the provision of development assistance in some 35 countries, including 15 Pacific Island countries. In 2009, the Chief Justice of the Federal Court signed a Memorandum of Understanding on judicial cooperation with the Chief Justice of the Supreme and National Courts in Papua New Guinea. That Memorandum of Understanding formally recognises the relationship between the two courts and provides a basis for ongoing development assistance. The assistance will focus on the establishment of a system of court-annexed mediation and the development of the PNG court's capacity for efficient and effective management of cases. An officer of the Federal Court designed a five-year plan for the PNG judiciary in those areas which is being used as a blueprint for that court's reform. The Federal Court has also worked closely with the Supreme Court of Tonga to assist in the reduction of its case backlog and the time taken to resolve disputes. Part of the program included training judges and staff in the use of a basic computer-based case management system. In the event, the Supreme Court's case backlog was eradicated.

The Court is also working with Samoa and the Federated States of Micronesia, with the establishment of systems of court-annexed mediation. This has involved the facilitation of informal and accredited training and the development of regulatory

regimes, administrative processes and public awareness to support the uptake of mediation. Last year in the Land Court in Samoa more than 2,700 cases were mediated and more than 2,000 of those were settled. The Court has worked with the Chief Justices of the Solomon Islands, the Marshall Islands and Vanuatu, who are also establishing mediation in their courts.

The Federal Court has a Memorandum of Understanding with the Supreme Court of Indonesia which was signed in 2004 and renewed in 2008. Its assistance has included backlog reduction, the design and delivery of training to more than 750 judges in a broad range of areas, and implementing budgeting and financial management programs. The court has been involved in developing the first official benchbook for the Supreme People's Court of Vietnam and providing advice and support in relation to legal developments in China concerning competition law, labour law and maritime law. There have also been interactions with India, the Philippines and Thailand.

Judges of the Federal Court have, over the years, been involved with projects which the Court is not directly managing but concerns the provision of training and advice in countries, including Pakistan and East Timor.

A number of judges of the Court have sat on, or continue to sit on, Pacific courts. Retired judges of the Court sit on the Supreme Courts of Samoa, Tonga and Vanuatu. Former Chief Justice Jeffrey Miles is a Judge of the National Court of Papua New Guinea. Serving Justices Spender and Moore are both members of the Tongan Court of Appeal. Justice Mansfield sits as a member of the Court of Appeal in Vanuatu.

The Family Court has an ongoing relationship with the Supreme Court and Religious Courts of Indonesia. Judges from the Family Court have visited Indonesia

and there have been many visits by members of its administration. Judges from the Religious Courts and the Supreme Court of Indonesia have visited the Family Court. The outcomes attributable to these interactions include:

- (a) Assistance to provide internet and mobile phone communication between Religious Courts across the archipelago and the central administration;
- (b) Encouragement and assistance to run the first court survey ever conducted by an Indonesian court into the needs of court users. Following the survey, an amount of about \$5 million was made available from the budget of the Indonesian Supreme Court to the Religious Courts to assist with the provision of extra circuits to remote areas and also a fee waiver program.
- (c) Religious Courts, following the example of the Family Court, undertook an immediate program to publish its judgments. A Memorandum of Understanding was entered into between the Indonesia courts, the Federal Court, the Family Court and the website ASIANLii to include reports of Indonesian Religious Courts on its site. This was followed up by the Supreme Court publishing its judgments on ASIANLii.

Some of the State Supreme Courts are also involved in the region. The Supreme Court of New South Wales is active in this regard. With the High Court of Hong Kong, it jointly hosted a judicial seminar on commercial litigation in Sydney in April 2008 to exchange ideas on judicial best practice in dealing with the challenges of commercial litigation. Judges from Bangladesh, India, Japan, Malaysia, Papua New Guinea, The Peoples' Republic of China, the Philippines, Singapore and South Korea all attended. Discussion included such subjects as expert evidence, running long and complex cases, corporate insolvency, documentary materials and alternative dispute resolution. The Supreme Court of New South Wales has also cultivated friendly relations with the

Supreme Court of Japan. Chief Justice Spigelman led a delegation of Australian judges to visit the Supreme Court of that country in 2006.

The Supreme Court of Queensland has provided assistance to the Pacific region on an ad hoc basis. For many years a judge of the Supreme Court has sat, as required, on the Solomon Islands Court of Appeal. Judges of the Court have contributed to legal education in the region in areas such as ethics and criminal law and judgment writing. The Court has also assisted the Courts of the Solomon Islands with the provision of computer equipment and advice when sought.

The Supreme Court of the Australian Capital Territory has participated in the Pacific Judicial Conference which brings together Chief Justices and their representatives from all over the Pacific. It has received quite a number of visitors from the region over the last ten years.

I mentioned earlier the importance of trade and commerce in the Asia Pacific region to Australia. There is, of course, a degree of diversity between national laws in the region which affect the conduct of business within our neighbouring countries. There are, however, developing areas of commercial regulation which have the possibility, if not of harmonisation, at least of a degree of convergence based on important common underlying principles. One area in which judicial exchange may be of significance in the future is the development of competition laws in the region. There are a number of countries in our region who have only recently adopted new competition laws. These include India, China, Singapore, Vietnam and Papua New Guinea. Hong Kong has been debating a new competition law in the last year or two. The development of judicial expertise in handling the interaction between legal and economic concepts that is characteristic of common law is not done overnight. For

Australian judges it has been a long learning curve. No doubt the same will be true for those who have to adjudicate competition law questions in the region. Australian judges experienced in this area of the law are well placed to assist with the sharing of experience in this area within the region.

It is, of course, necessary in any judicial exchange program to take account of the very different cultural settings, constitutional and organisational arrangements, and resource limitations that may exist in some countries in the area. However, despite the caveats arising out of disparities within the region and the harsh modesty that should attach to Australian judicial offerings to other countries, there is undoubtedly value in these exchanges. As my predecessor, Chief Justice Murray Gleeson, observed in a paper delivered to the Australian Bar Association in 2002:

These activities receive little public notice. But they represent an important form of engagement between the Australian judiciary and the judiciary of other nations, especially in the Asia Pacific region. Engagement of that kind enhances the level of performance of Australian judges. It also fosters, internationally, values of judicial independence, competence and integrity. The importance of these values is now widely accepted. A number of countries in our region have active programs of judicial reform; and Australia accepts an obligation to contribute to these. We also accept that there are valuable lessons for us to learn from others.

The time has now come to maximise the benefit of these programs by a coordinated approach to them which makes the most efficient use of national resources, both financial and human.