



## **The Centre for Democratic Institutions**

### **PHILIPPINE JUDICIAL STRENGTHENING: PHILIPPINE JUDICIAL EXCHANGE WITH THE FEDERAL COURT OF AUSTRALIA SYDNEY AND MELBOURNE, OCTOBER 2002**

The Philippine legal system has experienced a steady increase in litigation. The courts are clogged and delays can be lengthy. One of the reasons for this situation is the low settlement rate of civil matters before the courts. While the settlement rate of civil matters in Australia is above 70%, in the Philippines it is below 30%. Determined to improve the rate of cases being settled before final determination, the Philippine judiciary has been encouraging alternative dispute resolution (ADR) processes within the courts. The Philippine Judicial Academy has played a leading role in training mediators for this purpose.

To strengthen their understanding of ADR, the Philippine Judicial Academy requested CDI to focus the 2002 judicial visit to Australia on issues of ADR and mediation. The participants for this year's exchange visit consisted of six members including three Supreme Court Justices:

- *Senior Associate Justice Josue N. Bellosillo* of the Supreme Court, Head of the delegation. Author of a book on Pre Trial.
- *Justice Antonio T. Carpio* of the Supreme Court, Member
- *Mme Justice Ma. Alicia Austria-Martinez* of the Supreme Court, Member
- *Mme Justice Delilah V. Magtolis* of the Court of Appeals, Member. Active in the pilot project on mediation in the Court of Appeals.
- *Professor Pacifico A. Agabin*, Chair of the PHILJA Department of Constitutional Law, and member of the PHILJA ADR sub-committee.
- *Judge Ralph S. Lee*, of the Metropolitan Trial Court, Quezon City, Branch 38. Active in the Philippine mediation project in the 1st level courts.

The Federal Court hosted the visit and devoted considerable time and effort to making it a fulfilling experience for the visitors. Chief Justice Michael Black and Justices Susan Kenny, Bryan Beaumont and Arthur Emmett were heavily involved in the preparation and running of the exchange visit. Registrars John Mathieson, Jamie Wood and John Efthim also took on a great deal of responsibility for the visit. The program in Sydney and Melbourne dealt with many aspects of the Australian judicial process with a special emphasis on mediation issues both as part of the court processes and independently of the courts.

## **The Sydney Program**

### *The Federal Court*

The Sydney program revolved around discussions with several members of the Federal Court and in particular Justices Bryan Beaumont, Arthur Emmett, Margaret Stone, Peter Jacobson and James Allsop. Discussion ranged over a broad area covering issues of pre-trial and directions hearings, trial management techniques, the docket system developed by the Federal Court and managing complex commercial litigation. The delegation was also privileged to meet Justice Andrew Rogers (retired) who was one of the pioneers in developing the adversarial processes in Australian courts to bring the court's focus on the key issues under dispute in complex commercial litigation. There are both similarities and differences between the two jurisdictions and these were the subject of considerable discussion. There is perhaps greater emphasis in Australia on oral argument and the delegation was able to sit in on cases being argued before the bench.

The Sydney program also dealt with a number of specific topics. Stephanie Kavallaris explained to the delegation the history of the Federal Court's Native Title jurisdiction and the particular difficulties the court faced in exercising it. The need to determine indigenous people's continuing connection to the land required great sensitivity in taking evidence. Accordingly, the court had developed the capacity to hold hearings in 'the bush' supported by appropriate technology. Aboriginal witnesses were therefore able to appear before the court without being confronted with the need to travel to the city and cope in a difficult urban environment.

Presentations were also made by Bruce Finlay on video conferencing, by Imelda Payne on electronic search and retrieval techniques and by Phillip Kellow on the processes of developing the e-court capacity. The technology involved was certainly available to a country like the Philippines but there was a need to develop the best software for local purposes. The Federal Court was still working on aspects of the processes for electronic filing, electronic payment of fees and electronic searching of court records to make them more user-friendly while retaining the necessary security and confidence in the system.

### *Alternative Dispute Resolution*

In view of the emphasis on ADR, CDI engaged LEADR, one of Australia's leading mediation specialists to deliver a one-day course in Australian ADR innovations. The delegation was most fortunate to meet former NSW Chief Justice Sir Laurence Street who gave the opening address. Sir Laurence stressed the need to ensure mediators had the right personal qualities such as the humility to be non-judgmental and the readiness to empathise with the parties.

Dr Tom Altobelli, a leading academic on issues surrounding family law, presented the processes available to parties in Australia in divorce, child custody and property settlement situations. While the Philippines did not have the same family law provisions in Australia, the interesting aspect was the involvement of the Family Court in ADR. Most of the cases were settled this way leaving only the most intractable matters for the court to decide.

Ms Nina Harding, a leading mediator, presented the group with a wealth of information on mediation best practice and conducted a lively dialogue with the participants. Scott Pettersson from LEADR also participated actively in the discussion. There was also a presentation by Dr Gabriel Fleming, Deputy President of the Workers Compensation Commission on an innovative new process to incorporate ADR techniques to settle workers compensation matters.

#### *New South Wales Judicial Commission*

The delegation spent a half day at the NSW Judicial Commission where the Mr Ernie Schmatt, Chief Executive, explained its functions. The Commission's principal functions are assisting the courts to achieve consistency in sentencing, organisation and supervision of an appropriate scheme of continuing education and training of judicial officers and the examination of complaints against judicial officers.

The Commission's objectives in the area of sentencing are to improve sentencing efficiency and to reduce the number of appeals against sentences, thereby releasing valuable resources which can be redeployed to reduce court delays. The Commission has three major strategies for achieving its objectives in relation to sentencing consistency through the Sentencing Information System, a computerised sentencing database developed by the Commission, by undertaking original research into topics of assistance to sentencers, in particular the use of alternatives to custodial sentences and by publishing collated statistical data on aspects of sentencing. Philippine judges have far less discretion in sentencing and follow a fairly strict formula.

Mr Schmatt also explained the procedure for handling complaints and the role of the Judicial Commission to undertake an initial examination. Ultimately, the process of dismissing a judicial officer for cause must go to Parliament under the Australian system. In the Philippines, on the other hand, the Chief Justice of the Supreme Court had far greater disciplinary powers over members of the bench and employees of the judicial system. Hearing cases involving employees took up valuable court resources and the delegation was interested in looking for other means of dealing with this issue.

#### **Melbourne Program**

The program at the Federal Court in Melbourne also focused on the theme of alternative dispute resolution or mediation. Justice Anthony North presented an overview of the role of mediation within the Federal Court with an emphasis on the Melbourne registry's approaches. He described how according to the Federal Court's docket system the judge makes an assessment of the case based on the case file as soon as it appears on his docket. The Federal Court Justice in charge of the case then has the option of either sending the case directly to mediation or commencing the directions hearing and later sending the case to mediation.

#### *The Role of the Registrars*

The bulk of mediation at the Melbourne registry is handled by two registrars, Jamie Wood and John Efthim. Justice North explained arrangements surrounding

confidentiality of mediation so as not to compromise the position of the sitting judge. Registrars Wood and Efthim then explained in detail the rules governing mediation and the powers of mediators delegated by the judge or the court. They placed the growth of mediation in historical context and gave recent examples of mediated resolutions to disputes. Matters most commonly dealt with are to do with migration, taxation, administrative review, intellectual property and human rights. 70% of cases before the Federal Court in Melbourne are resolved in mediation.

The visiting judges were interested in various procedural aspects of the process. Mediation in the Philippines had suffered due to questionable probity of some of the officials administering the processes around mediation. Discussions surrounded what measures the Federal Court takes to avoid similar problems. The broad role of the registrars and their similarity to delegated court commissioners in the Philippine system, was also a recurring theme in several sessions.

### *The Australian Legal System*

During the session on the Australian constitution and legal system with Professor Cheryl Saunders of Melbourne University, the visitors found many parallels to their own system, both having been influenced by the American system. They were particularly interested in hearing how the differences were borne out in practice. Prof Saunders discussed several important cases including McBain v Victoria, a recent controversial case involving a single woman being refused fertility treatment by a Victorian fertility clinic. Another was the Mabo case and the resultant Native Title Act. Louise Anderson, the Native Title Registrar, and Andrew Gilbert were able to elaborate on some of the relevant issues in a dedicated session on the administration of justice with respect to Native Title.

The group also discussed other aspects of Australian law in various sessions. Justice Raymond Finkelstein discussed corporations law with the group but also engaged closely with them on the Philippine approach to extradition law, to inform his understanding of non-Australian approaches to it. Justice Alan Goldberg briefly introduced the delegation to the Trade Practices Act. Justice Mark Weinberg discussed with the delegation the application of the contempt of court rules in the Australian system, its common law origins and its statutory provisions.

Justice Ron Merkel gave an engaging talk about Australia and its adoption of the Statute of Rome for the International Criminal Court. He highlighted how much of the law within the statute had traditionally been resisted by Australia, but had simply and quietly been incorporated into Australian law with the adoption of the Statute in 2002.

The delegation also received briefings on internet based legal resources from Petal Kinder and John Botherway of the Federal Court Library and Information Service; a briefing on the use of technology in the Federal Court by Jamie Wood and Prabha Kutty; and a briefing on the court's public affairs processes by Bruce Phillips.

The delegation was also fortunate to have two brief cross jurisdictional visits. One to Justice Sally Brown in the Family Court of Australia, and another to the Victorian Supreme Court hosted by Justice Marilyn Warren.

### Program - Sydney

<b>TUESDAY 8 OCTOBER 2002 (Level 17 Conference Room)</b>		
<b>Time*</b>	<b>Activity</b>	<b>Presenter</b>
9.30	Welcome	Justice Beaumont
9.45	Introduction to the Federal Court	John Mathieson
10.00	Introduction to the NSW Registry	John Mathieson
10.10	Court Observation	Proceed to Court 23D, Justice Beaumont
10.15	Court Observation	Justice Beaumont
11.15	Morning Tea	
12.00	Paper/Discussion – Topical Issues in Judicial Administration	Justice Beaumont
13.00	Lunch	Own arrangements
14.15	Introduction to the Australian Legal System	Justice Emmett
15.15	Afternoon Tea	
15.30	Videoconference demonstration	Bruce Finlay
16.00	Native Title Powerpoint presentation	Stephanie Kavallaris
16.30	Close	
16.45	Drinks	Justice Beaumont's Chambers
<b>WEDNESDAY 9 OCTOBER 2002 (Levels 21 &amp; 22 Conference Rooms)</b>		
<b>Time*</b>	<b>Activity</b>	<b>Presenter</b>
9.30	Debrief	Justice Beaumont
10.00	Library – research and electronic retrieval	Imelda Payne
11.00	Morning Tea	
11.30	Aspects of Constitutional Interpretation in the Australian Federal System	Justice Stone
12.30	E-Court	Phillip Kellow
13.00	Lunch	Sydney Judges
14.30	Managing complex commercial litigation case as practitioner and as judge	Justice Jacobson
15.30	Debrief	Justice Beaumont & John Mathieson
16.00	Close	
<b>THURSDAY 10 OCTOBER 2002 (Level 21 Conference Room)</b>		
<b>Time*</b>	<b>Activity</b>	<b>Presenter</b>
09.00	ADR - The Court Perspective	Justice Beaumont
09.15	ADR - General principles	Sir Laurence Street
11.00	Morning Tea	
11.15	ADR - Family Court	Mr Tom Altobelli
13.00	Lunch	Hosted by LEADR
14.30	ADR - Workers compensation commission	Dr Gabriel Fleming
15.30	ADR - Best practice	Ms Nina Harding, Mr Scott Pettersson
16.30	Debrief	Justices Beaumont & John Mathieson
17.00	Drinks	LEADR, Philippine delegates

## Program - Melbourne

Monday 14 October		
9.00	Arrival in foyer & orientation to building & chambers	District Registrar & Director, Court Services
9.30 – 10.00	Welcome by Chief Justice, introduction to Judges	Chief Justice, Judges
10.30 – 1.00	Alternative Dispute Resolution	Justice North & registrars
1.00 – 2.00	Lunch with Judges	
2.15 – 4.15	The Australian Legal System	Professor Cheryl Saunders
Tuesday 15 October		
9.15 – 1.00	Presentation in Library (Level 11) and Intranet / IT Library	Petal Kinder & John Botherway
1.00 – 2.00	Lunch (own arrangements)	
2.15 – 4.15	Corporations Law Intellectual Property	Justice Finkelstein
Wednesday 16 October		
9.00 – 10.30	Visit to Family Court	Justice Brown
11.00 – 1.00	Case management	Registrar Efthim and Jamie Woods
1.00 – 2.00	Lunch (own arrangements)	
2.00 – 2.30	Trade Practices (Part IV TPA)	Justice Goldberg
3.00 – 3.45	Use of technology in the Federal Court	Jamie Wood & Prabha Kutty
4.00 – 5.00	International Criminal Court (Human Rights)	Justice Merkel
Thursday 17 October		
9.00 – 10.30	Enforcement of Orders	Justice Weinberg
11.00 – 1.00	Native Title and remote hearings	Louise Anderson & Andrew Gilbert
1.00 – 2.00	Lunch (own arrangements)	
2.00 – 3.00	Federal Court public affairs	Bruce Phillips
4.00	Farewell and final discussions with judges	Hosted by Justice Ryan
4.30 – 5.30	Visit to Supreme Court	Justice Warren