

New Legislative Agendas, Legal Professionals and Dispute Resolution in Australia and Japan: 2009-2010

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Abstract: This paper is the third in a series of edited and updated selections of my postings to the 'East Asia Forum' blog (indicated with a double asterisk in the Table of Contents below) and my partly-overlapping 'Japanese Law and the Asia-Pacific' blog. They mainly cover developments from mid-2009 through to mid-2010, with a focus on law and policy in Australia and Japan in a wider regional and sometimes global context.

Half of the postings introduce some new policy and legislative agendas proclaimed by the then Prime Ministers of Australia (Kevin Rudd, in late July 2009) and Japan (Yukio Hatoyama, through the Democratic Party of Japan [DPJ] which he led to a remarkable general election victory in late August 2009). Both had resigned by mid-2010, indicating some of the difficulties involved in implementing ambitious reforms in both countries. All the more so, perhaps, if innovative measures are to be added to both countries' Free Trade Agreements (FTAs) in order to foster more sustainable socio-economic development in the aftermath of the Global Financial Crisis (GFC).

The remaining postings end by introducing Australia's regime for international (and domestic) commercial arbitration enacted in mid-2010, centred on a United Nations Model Law — like Japan's *Arbitration Act* of 2003. However it sets these enactments in broader context by focusing on legal professionals — lawyers, judges and specialists in Alternative Dispute Resolution (ADR) — as well as aspects of the legal education systems in both countries. Those systems will need to gel better as well for both Australia and Japan to achieve the 'cultural reform' needed to generate sustainable critical mass in commercial (and investor-state) arbitration activity.

The order of postings has been changed somewhat in this paper to create more of a 'chain novel' narrative effect. However, as with the previous two papers, readers may still prefer to move around the topics in a different order.

Keywords: Japanese law, Australian law, Asian law, comparative law, international trade and investment law, Australia-Japan bilateral relations, regional economic integration, arbitration, ADR, legal profession, consumer law

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A. New Legislative Agendas**1. The New DPJ Government in Japan: Implications for Law Reform**

(originally published on 1 September 2009)

Mainstream Australian media provided distressingly meager coverage of Japan's exciting general election for the more powerful lower House of Representatives on Sunday 30 August 2009, which saw a remarkable about-face.¹⁾ The centrist Democratic Party of Japan (DPJ) went from 115 to 308 seats, with allies SDP (the small leftover of the once-powerful Social Democratic Party) and the New Party Nippon taking another 7 and 3 seats respectively. Overall, these and other former Opposition parties took 340 seats, whereas the conservative ruling coalition suffered a massive defeat. The Liberal Democratic Party (LDP) dropped to 119 seats, from 300 before the election (and 296 in 2005, the previous election called by Junichiro Kozumi who then retired as Prime Minister). The Komeito dropped from 31 to 21 seats, meaning that the former ruling coalition now only has 140 seats. In short, the tables

1) 'In Landslide, DPJ Wins over 300 Seats: LDP Crushed; Hatoyama Set to Take Power' (31 August 2009) *The Japan Times Online* <<http://search.japantimes.co.jp/cgi-bin/nn20090831x2.html>> (accessed 25 July 2010).

had turned almost completely since 2005, in a country (in) famous for its aversion to abrupt changes in direction.*

Newspaper coverage in English tends to suggest that this is the first time the LDP has really lost power since 1955. Commentators usually do mention its loss in 1993, but add that this was only for a year. This overlooks that the fact that the SDP led a coalition incorporating the LDP from 1994-6, which saw some significant political developments (for example, a major settlement of the long-running Minamata Disease litigation). More importantly, the year the LDP was completely out of power generated important legislation ranging from measures promoting transparency in administrative procedures through to strict liability for defective products. It also laid the groundwork for further substantive law reforms in similar areas, such as the *Official Information Disclosure Act* 2001 and the *Consumer Contracts Act* 2000 (compared in Part 5 below).

Most importantly, the LDP's fall from power in 1993 made them and the bureaucracy reassess their close relationship. LDP politicians realised that even once back in power, they might lose again. From that perspective, a political process more open to diverse stakeholders — including 'opposition' interests — became more attractive. As part of this ongoing rethink, from the late 1990s the 'deliberative council' system for law reform certainly became more transparent, and alternative law-making processes developed as well (for example, private Members' Bills).

The LDP, prompted also by the Komeito, also began incorporating many centrist policies into its own program — trying to steal the DPJ's thunder. Such developments provide a partial explanation for the counter-intuitive situation of a conservative coalition pressing ahead with major judicial reforms from 2001. These covered not just for civil justice (which at least some business interests also wanted), but also criminal justice (including the new quasi-jury system, discussed in Part 2 below).

These shifts — accommodating concerns of a wider voter base, in a more porous process serving as a back-up plan in case the LDP lost power again — seemed to be working out quite well, especially as the Japanese economy finally returned to a growth path from 2002-7. But then came the Global Financial Crisis (GFC) and economic stagnation potentially far worse than during Japan's 'lost decade' of the 1990s, because it was driven by the world-wide collapse of all Japan's major markets for both exports and investment (including even China). Those who had already suffered from major socio-economic reforms and Japan's banking crisis in the late 1990s became increasingly concerned about the LDP's capacity to address these even larger challenges. One such group comprised the burgeoning numbers of 'involuntary non-regular workers', young men and others who no longer had the option of one day joining the elite 'lifelong employee' cadre rather than deliberately choosing not to

* In July 2010, however, LDP regained significant ground in elections for the upper House of Councilors. See 'DPJ, Kan in Hot seat as Diet Open: Party Keeps Upper House Helm but LDP Flexes New Clout' (30 July 2010) <<http://search.japantimes.co.jp/cgi-bin/nn20100730x1.html>> (accessed 11 August 2011).

take up that life. (This group was highlighted in a public lecture on ‘flexicurity’ presented at Sydney Law School by former University of Tokyo Dean of Law, Emeritus Professor Kazuo Sugeno.²⁾ Unsurprisingly, despite LDP-led law reform in 2007 aimed at part of this group, the DPJ was able to attract a much higher proportion of younger voters.

All this means that we may not witness now huge changes in both the style and substance of law reform in Japan. This will not (merely) be because the DPJ government is new and relatively inexperienced, or due to reactionary forces, but also because some significant changes were already afoot. It is interesting, for example, to compare the pre-election manifestos of the LDP and the DPJ (themselves one indication of broader transformations in Japanese politics over the last decade) and other policy statements. On the other hand, it is certainly worth examining the DPJ’s manifesto ‘promises’ to get a better idea of the new government’s likely legislative program for the next few years:

The DPJ’s policy summary (not necessarily identical to their manifesto distributed during the election campaign³⁾ is still currently only available in Japanese.⁴⁾ But it states policies from areas such as:

- Cabinet (for example, regarding the Ainu, now recognised as an indigenous people);
- Children and women (for example, work-life balance, or allowing married couples to retain separate surnames);
- Consumers (for example, strengthening local government Consumer Lifestyle Centres, dealing with huge volumes of complaints and requests for information);
- Administrative reform (for example, limits of ‘*amakudari* [descent from heaven]’, that is, retiring from government into private sector jobs, increasingly commonplace also in the US and Australia!);
- Local-central government relations (for example, greater devolution and citizen involvement in governance);
- Political reform (for example, reducing lower house numbers and limiting ‘political dynasties’);
- Legal affairs (rethinking the new ‘Law School’ and legal examination system introduced from 2004, criminal justice improvements such as videotaping interrogations and possibly life sentences instead of the death penalty, a second round of administrative litigation reforms, possible multiple nationality even after minority at least for children of international marriages);
- Foreign affairs and security (especially strengthening relations with Asia);

2) ‘Distinguished Speakers Program 2009: Professor Kazuo Sugeno’ *Sydney Law School* <<http://www.usyd.edu.au/news/law/457.html?eventcategoryid=41&eventid=4126>> (accessed 25 July 2010). See also Leon Wolff ‘The Death of Lifelong Employment in Japan?’ in Luke Nottage et al (eds) *Corporate Governance in the 21st Century: Japan’s Gradual Transformation* (Elgar, Cheltenham, 2008) 53.

3) ‘Manifesto’ <http://www.dpj.or.jp/special/manifesto2009/pdf/manifesto_2009.pdf> (accessed 25 July 2010).

4) ‘*Minshuto Seisakushu Index 2009* [DPJ Policy Summary Index 2009]’ <<http://www.dpj.or.jp/policy/manifesto/seisaku2009>> (accessed 25 July 2010).

- Finance (including a new law on publically listed companies);
- Tax (including reviews of alcohol and beer taxes, and tax litigation processes);
- Health and welfare (for example, possible no-fault compensation schemes, and measures for hepatitis victims);
- Labour (for example, securing better conditions for non-regular workers, preventing and resolving disputes based on the *Labour Contracts Act*);
- Agriculture (for example, a traceability system for food products, and linked quarantine inspections);
- Construction and transport (for example, a *Road Traffic Basic Law*);
- Environment (for example, measures to resolve some remaining Minamata and Kanemi Rice Bran mass claims, as well as ‘sick houses’ disputes and asbestos problems).

Later postings on the ‘Japanese Law and the Asia-Pacific’ blog – including several updated below for this paper – provide more detail, and report on how the new government did or did not follow up in these and other areas. But many of the topics just listed have already been introduced in previous postings on this blog,⁵⁾ the East Asian Forum blog,⁶⁾ or my other readily available work (for example, reproduced on the Social Science Research Network⁷⁾).

2. Japan’s New Quasi-Jury System and Video-Taping of Interrogations

(16 September 2009)

Japan has reintroduced a system involving lay participation in serious criminal trials. As discussed in several Australian Network for Japanese Law (ANJeL) events over recent years, this *saiban’in* system involves randomly selected ‘Lay Judges’ and professional career judges jointly assessing the facts to reach a verdict, as well as deciding on sentences.⁸⁾ The model is more Continental European than Anglo-American, but a shared concern is to bring the justice system closer to citizens’ everyday life — a guiding principle in the Judicial Reform Council’s Final Recommendations issued in 2001. Diverse dimensions to greater popular participation throughout Japan’s legal process, including also my study of how the Japanese government organises its litigation services beyond the criminal justice sphere, will be the subject of ANJeL’s third book published through Edward Elgar.*

5) See, for example, ‘Japanese Law and the Asia-Pacific’ <http://blogs.usyd.edu.au/japaneselaw/2009/08/law_public_policy_and_economic.html> (accessed 25 July 2010).

6) Available at <<http://www.eastasiaforum.org/author/lukenottage>> (accessed 25 July 2010).

7) Access via <<http://www.ssrn.com/author=488525>> (accessed 25 July 2010).

8) See ANJeL, ‘Past Events’ <http://www.law.usyd.edu.au/anjel/content/anjel_events_past.html> (accessed 26 July 2010).

* Leon Wolff, Luke Nottage and Kent Anderson (eds) *Who Judges Japan? Popular Participation in the Japanese Legal Process* (Elgar, Cheltenham, forthcoming in 2011). The first book was Luke Nottage, Leon Wolff and Kent Anderson (eds) *Corporate Governance in the 21st Century: Japan’s Gradual Transformation* (Elgar, Cheltenham, 2008) and the second was Takao Tanase (Luke Nottage and Leon ↗

Legislation establishing this *saiban'in* system was enacted in 2004, but implementation was delayed for five years to allow all stakeholders to get used to the idea and the many practical implications. (For example, many of the ANJeL Judges-in-Residence sent to Australia by the Supreme Court of Japan have carefully compared how this country manages jury trials, especially in connection with the media.⁹⁾ The enactment illustrates my previous point that the former LDP-led coalition had already shifted away from more conservative stances even before its dramatic loss of power in the general election on 30 August this year. Even more ironically, although the first *saiban'in* trial took place without apparent mishap earlier that month, campaigns by the DPJ and other then-Opposition parties drew on growing concerns among the general public about actually having to serve as Lay Judges.¹⁰⁾ Hopefully, however, Japan's experience will become similar to Australia's — where the general public is quite negative about serving on juries, but individual jurors afterwards report that it was a worthwhile experience. (A similar pattern is also observed in the US.¹¹⁾)

Below I first reproduce translations of DPJ policy statements promising to make the new *saiban'in* system more user-friendly in various ways.¹²⁾ Then I add its related policy statements about video-recording of interrogations of suspects undertaken by police or prosecutors in Japan.¹³⁾

As explained in a paper by Professor Makoto Ibusuki, a frequent visitor to Australia and a Program Convenor — ANJeL in Japan,¹⁴⁾ the new DPJ-led government seemed bound to enact legislation mandating full video-recording.¹⁵⁾ Some politicians within the LDP anyway may have been open to this sort of reform too, but the pace should pick up. This particular law reform is bound to please the retiring Director of Public Prosecutions in New

↘ Wolff trans and ed) *Community and the Law: A Critical Reassessment of American Liberalism and Japanese Modernity* (Elgar, Cheltenham, 2010). For the 2001 Final Report, see <<http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>> (accessed 11 August 2010).

9) See ANJeL, 'ANJeL Visiting Professionals Scheme' <http://www.law.usyd.edu.au/anjel/content/anjel_people_judge.html> (accessed 26 July 2010).

10) 'First Lay Judges Hand Killer 15-year term' (7 August 2009) *The Japan Times Online* <<http://search.japantimes.co.jp/cgi-bin/nn20090807a1.html>> (accessed 26 July 2010).

11) Setsuko Kamiya, 'Foreigners size up lay judge system' (16 August 2009) *The Japan Times Online* <<http://search.japantimes.co.jp/cgi-bin/nn20090816a6.html>> (accessed 26 July 2010).

12) Available at The Democratic Party of Japan, 'Minshuto Seisakushu Index 2009 — Homu [DPJ Policy Summary Index 2009 — Legal Issues]' <<http://www.dpj.or.jp/policy/manifesto/seisaku2009/07.html>> (accessed 26 July 2010).

13) Both are slightly edited from translations kindly prepared by Glenn Kembrey, Sydney Law School student intern (<http://www.law.usyd.edu.au/anjel/content/anjel_people_dir.html>, accessed 26 July 2010) for the Centre for Asian and Pacific Law (CAPLUS, <<http://www.law.usyd.edu.au/caplus/>>) who also assists with ANJeL activities.

14) See 'ANJeL Program Conveners' <http://sydney.edu.au/law/anjel/content/anjel_people_prog.html> (accessed 26 July 2010).

15) Makoto Ibusuki, 'Who Keeps Watch over Incidents Behind Closed Doors? The Japanese Way of Video Recording in the Interrogation Room' <http://blogs.usyd.edu.au/japaneselaw/IbusukiVideoRecording_LN03.pdf> (accessed 26 July 2010), p 6.

South Wales (NSW), Mr Nicholas Cowdery QC, a key person behind the International Bar Association's 2004 Report on 'Interrogation of Criminal Suspects in Japan' that recommended precisely this change.¹⁶⁾

(a) Smooth Implementation of the Lay Judge System

In May 2009, a Lay Judge system came into effect. While working towards increasing citizens' understanding of the system by continuing to disseminate public information, making the process visible through audio and visual recording, and disclosure of the entirety of evidence held by the public prosecutor and so on, we will quickly introduce the necessary environment for having fair trials while preventing an increase in the length of lay-judge trials.

In particular, the system will be quickly reviewed so as to decrease the burden on citizens who become lay judges. This will be achieved by adopting a flexible approach to those randomly selected citizens who present reasons for declining to serve as lay judges; by limits on the application of penal regulations for the breach of confidentiality obligations imposed on lay judges; by reviews of means for discussing the imposition of a death sentence; and by increasing the daily allowance paid to lay judges.

(b) Visualising Criminal Examinations, and Preventing False Charges through the Proper Disclosure of Evidence

Reforms will be carried out to achieve a fair and highly transparent criminal justice system, by aiming to achieve visualization through video recording of the entire examination process of a suspect by police, prosecutors and others.

The need for this has recently become clear through a succession of false accusations, such as the 'Toyama Himi Incident', 'Shibushi Incident' and 'Ashikaga Incident'. However, this large problem is still dealt with in closed-off rooms. To prevent false accusations on the basis of coerced confessions in [suspect] examinations, we will (1) require investigating authorities to use audio and visual recording of the entire process of suspect examinations so as to be able to determine the voluntariness of confessions, if in dispute at trial; (2) implement an amendment to the Criminal Procedure Code requiring the creation and disclosure of a table listing evidence held by the prosecutors and so on, to obtain thorough disclosure of evidence at criminal trials.

16) 'IBA Human Rights Institute Supports Calls for the Introduction of Electronic Recording in Japan's Police Interviews' <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=bea2ec34-5513-4991-8192-0e6ed5e70d9c>> (accessed 26 July 2010). Renowned for resisting political and media pressure to bring prosecutions, he retired in April 2010: see 'DPP Nick Cowdery Retires, But it Won't be Quietly' (15 April 2010) <<http://www.dailytelegraph.com.au/news/national/dpp-nick-cowdery-retires-but-it-wont-be-quietly/story-e6freuzr-1225853816850>> (accessed 11 August 2010).

3. 'Pain on the Road to Recovery' — So What, for Consumer (Credit) Law Reform for Australia (and Beyond)?

(28 July 2009)

The then Prime Minister of Australia, Kevin Rudd, contributed a long essay with this title to the *Sydney Morning Herald* on 25-6 July 2009.¹⁷⁾ Here are some extracts that should be connected to ongoing initiatives and discussions about consumer credit and consumer law more generally:

(a) Rudd's grand plan now for the forthcoming 'building decade':

It will take time to build the foundations of Australia's long-term global competitiveness. But we must take time to do it thoroughly. We must take time to invest in the infrastructure of the future, the skills of the future, the competitive tax system we need for the future, an ambitious agenda for competition and regulatory reform, and to maintain the best national balance sheet of major advanced economies.

(b) On 'causes of the current crisis':

Similarly to the US, 'Australian consumers also spent up big. Between 1996 and 2007 there was a 460 per cent increase in credit card debt, a 340 per cent increase in household debt, a 450 per cent increase in corporate debt and a 200 per cent increase in net foreign debt.

(c) On 'the ideological hypocrisy of the right':

As I have argued elsewhere, the boom-and-bust economic cycle of the past decade has been an unavoidable consequence of a decade of neo-liberal free market fundamentalism that reinforced a culture of corporate greed and excess in the financial sector. The central principles of this extreme form of capitalism are that markets are self-regulating; that government should get out of the road of the market altogether and that the state itself should retreat to its core historical function of security at home and abroad. This fundamentalist ideology of self-regulating markets has imploded comprehensively with the current crisis. We have seen spectacular market failure requiring equally spectacular government intervention in the economy to effectively save the system from itself.

(d) As for 'new challenges of recovery':

This crisis has shown we have reached the limits of a purely debt-fuelled global growth strategy. Not only will the neo-liberal model of the past not provide growth for the future, its after-effects will make recovery more difficult. Mountains of global public

17) See < <http://www.smh.com.au/national/pain-on-the-road-to-recovery-20090724-dw6q.html>>. In June 2010, however, Rudd was deposed by his Deputy Prime Minister, Julia Gillard: see <<http://www.smh.com.au/national/gillard--becomes-australias-first-female-prime-minister-as-tearful-rudd-stands-aside-20100624-yzvw.html>> (both accessed 11 August 2010).

and private debt, global imbalances, and a weakened global financial system will drag on global growth for a long time.

(e) Out of ‘five key areas to boost productivity’ and hence Australia’s new global competitiveness, First, regulatory and competition reform’ (plus Infrastructure, Innovation, Skills and Tax — then a broader reform agenda including savings and retirement income):... Competitive markets encourage business innovation and productivity. Sound regulation can bring many benefits to consumers and businesses by promoting employee welfare, consumer safety, fair competition and protecting property rights. Poor regulation, however, can damage wealth creation, stifle business innovation and hamper our ability to deliver core public services. Efficient regulation strikes a balance that encourages competition but protects employees, consumers, small businesses and macro-economic stability. That is why the Government has launched a comprehensive regulatory reform agenda under the Council of Australian Governments.

To my mind, it is heartening¹⁸⁾ that Rudd has not recanted from his critique of market fundamentalism in policy formation and implementation,¹⁹⁾ despite the considerable controversy it engendered.²⁰⁾ But ‘consumer safety’ gets only a bare mention from Rudd. And that comes in the context of the Council of Australian Government’s (CoAG’s) broader regulatory reform agenda (BRCWG). That agenda in fact looks rather like business as usual — ‘the reduction of the regulatory burden on businesses by accelerating and broadening the regulation reduction work program, and improving processes for regulation making and review’.²¹⁾ Especially since this BRCWG process also now includes a more conservative government in New Zealand.²²⁾

Rudd’s essay also does not mention unfair consumer contract terms legislation, perhaps because the *Trade Practices Amendment (Australian Consumer Law) Bill* was tabled already in late June.²³⁾ But we know from the Victorian state legislation from 2002 and the 1993

18) Luke Nottage, ‘Neoclassical and Chicago School Economics Keeps Coming to Japan(ese Law)’ (6 June 2009) <http://blogs.usyd.edu.au/japaneselaw/2009/06/neoclassical_and_chicago_school.html> (accessed 26 July 2010).

19) Kevin Rudd, ‘The Global Financial Crisis’ *The Monthly Magazine* <<http://www.themonthly.com.au/node/1421>> (accessed 26 July 2010).

20) For various more thoughtful responses, see the May 2009 issue of *The Monthly*, eg Robert Manne, ‘The Rudd Essay & the Global Financial Crisis’ <<http://www.themonthly.com.au/The-Rudd-Essay-and-the-Global-Financial-Crisis-Robert-Manne>> (accessed 26 July 2010).

21) Minister for Finance and Deregulation, ‘COAG Working Group kicks off Regulatory Reform Agenda for 2009’ *Media Release* (13 March 2009) <http://www.financeminister.gov.au/media/2009/mr_142009_joint.html> (accessed 26 July 2010).

22) Simon Power, ‘NZ Joins Australian Regulatory Reform Group’ (18 June 2009) <<http://www.beehive.govt.nz/release/nz+joins+australian+regulatory+reform+group>> (accessed 26 July 2010).

23) Gadens Lawyers, ‘Trade Practices Amendment (Australian Consumer Law) Bill 2009 — amends the Trade Practices Act 1974 and Australian and Investments Act 2001’ (July 2009) <<http://www.gadens.com.au/Publications-View.aspx?documentid=1487>> (accessed 26 July 2010). For subsequent ↗

European Directive that the success of such legislation is very dependent on commitment by regulators (and therefore their political masters and mistresses) to follow-up with publicity, guidance and enforcement activity. Even more surprisingly, Rudd doesn't mention the broader 'Australian Consumer Law' project led now by the Treasury, nor its National Consumer Credit Law proposal. The latter includes new 'suitability rules' for lenders that should significantly restrict their ability to take advantage of increasingly obvious psychological biases and heuristics that have underpinned the burgeoning consumer over-indebtedness highlighted again by Rudd in this essay.

Do such omissions mean that these reform initiatives already have so much backing from the Prime Minister and his Cabinet (including a new Consumer Affairs Minister) that the reforms are expected to be implemented without any problems? Or instead do the omissions indicate consumer law's low priority for this Government, as well as Howard's over 1996-2007, despite Rudd's renewed call now for a more level playing field in policy-making overall? We should be able to judge this better by the general election called for August 2010, by which time when the entire Consumer Law and consumer credit packages were to have been enacted. The answer has important repercussions not only for Australian consumers, businesses, and governments. It also matters to those close trading partners already increasingly integrated in regulatory harmonisation extending beyond the scope of classic WTO/FTA agreements (such as New Zealand) or potentially so (such as Japan²⁴).

4. Lessons for Australia – How (Japan and) Other Countries Are Dealing with Current Consumer Issues

(2 September 2009)

Tezukayama University Professor Michelle Tan spoke with me on this topic at the big SOCAP (Society of Consumer Affairs Professionals) conference in Sydney over 25-26 August.²⁵ Key conference themes were the impact of the GFC and world-wide recession, and the new nation-wide Australian Consumer Law reforms.²⁶ We emphasised the need for Australia to unify consumer nation-wide by 'trading up' not only to best practice from among its states and territories, but also to emerging global standards. Our presentation compared developments in consumer policy/administration generally, product liability and safety, consumer credit and unfair contract terms, collective redress and consumer ADR. (Powerpoints and a related Working Paper are online, drawing on my various Submissions to aspects of

↘ developments see also 'ACReN: Australian Consumer Research Network' <<http://acren.wordpress.com/>> and Parts 5 and 6 below.

24) See Luke Nottage, 'Taking the Australia-Japan FTA negotiations to new levels' (3 July 2008) <<http://www.eastasiaforum.org/2008/07/03/taking-the-australia-japan-fta-negotiations-to-new-levels/>> (accessed 26 July 2010) and Part 7 below.

25) 'SOCAP Australia' <<http://www.socap.org.au/>> (accessed 26 July 2010).

26) See also Part 3.

Australia's current consumer law reform program.²⁷⁾)

I suggested that Japan's experience shows how consumers have benefitted by firms generally provided excellent customer service, but that the burst of its own 'bubble' economy and consequent 'lost decade' of economic stagnation over the 1990s led to some (even large firms) cutting too many corners. Across most firms, however, the slowdown probably led to even greater attention to consumer service — unlike Australia at least until the GFC, where firms paid less attention when the economy was booming. And in Japan, those instances of corner-cutting generated growing momentum in consumer law reform, as more generally in the European Union. Belatedly, we may be seeing a similar phenomenon unfolding now in Australia.

Japan's experience is also instructive for another major reason. Significant consumer law re-regulation has occurred even amidst broader economic liberalisation — or perhaps precisely because of it. Indeed, it has occurred despite the government's judicial system reform initiatives designed to reduce *ex ante* regulation overall, in favour of greater market forces plus *ex post* compensation via private law claims — a model exemplified by the US, but also quite influential in Australia.²⁸⁾

Michelle Tan also presented the following general overview about developments in Japan – reproduced here with kind permission – which help explain some emphasis given to consumer issues in the election manifesto of the Democratic Party of Japan.²⁹⁾ It still remains to be seen how (quickly) some of those DPJ initiatives will be introduced, but already Japan's new Consumer Affairs Agency has commenced operations pursuant to legislation enacted under the former LDP-led coalition government.³⁰⁾ Indeed, the DPJ was unhappy with former

27) Luke Nottage, 'Consumer Law Reform in Australia: Contemporary and Comparative Constructive Criticism' (August 2009) <http://sydney.edu.au/law/scil/documents/2009/SCILWP24_Nottage.pdf>, further updated in special issue 9(2) *QUT Law and Justice Journal* (2009) available via <<http://www.law.qut.edu.au/ljj/editions/v9n2/index.jsp>> (both accessed 26 July 2010).

28) Luke Nottage, 'Who Defends Japan? Government Lawyers and Judicial System Reform in Japan and Australia' (13 July 2009) <http://blogs.usyd.edu.au/japaneselaw/2009/07/who_defends_japan_government_1.html> (accessed 26 July 2010).

29) See Part 1. Professor Tan comes from Brisbane and has lived in Japan for more than 20 years. She lives in Kobe and teaches at Tezukayama University in Nara. Michelle studied law at Queensland University before leaving for Japan where she obtained a PhD in Economic Law from Osaka University. Michelle has been teaching consumer protection policy and law at Tezukayama University since 1997. With Luke Nottage she co-teaches a 'Consumers and Law' module in the Kyoto Seminar course in Japanese Law accredited for Sydney Law School and taught intensively each February at Ritsumeikan Law School in collaboration with the Australian Network for Japanese Law (<<http://www.kyoto-seminar.jp/>> , accessed 26 July 2010). In recent years her research has focused on the role of soft law mechanisms such as internal/ external complaints handling, codes of conduct and standards in strengthening compliance and promoting consumer protection. Michelle has advised many governmental bodies, companies and consumers associations on consumer issues.

30) 'Consumer Agency Opens Sept 1' (12 August 2009) *The Japan Times Online* <<http://search.japantimes.co.jp/cgi-bin/nn20090812b2.html>> (accessed 26 July 2010).

Prime Minister Aso's selection of a former Cabinet Office top official to head the Agency³¹⁾ - although the new government ended up keeping him on.

* * *

The Japanese *Fundamental Act on Consumers*, which dates back to 1968,^{*} is an extremely important law that sets out the basic principles and framework of consumer protection in Japan — the 'Constitution' in the area of consumer protection. This framework sets out the roles of national and local government (as well as business and consumers) with respect to consumer protection. But even despite a major revision of the act about 5 years ago, until last year there had never been a serious attempt to establish a single administrative agency with primary responsibility for consumer affairs.

So the introduction of a Consumer Affairs Agency, overseen by the Cabinet Office, represents a complete upheaval of the current system. The Consumer Agency commenced operations on 1 September this year, somewhat earlier than the original plan for a October-November start. (This was a sudden decision, no doubt a result of pre-election jitters within the LDP and, more importantly, the bureaucracy — who wouldn't have wanted the inauguration date set back at this late stage.) The new agency has jurisdiction over laws covering most areas such as consumer transactions, food and product safety as well as having authority to regulate in areas where legislative gaps exist (for example, *konnyaku* jelly³²⁾). In addition, a new central product injury surveillance system is in the planning.

What is the background to such recent reforms in Japan? Japanese consumers have very high expectations of their companies. Companies are expected to deliver an extremely high level of customer service. And they are punished severely by consumers, and more recently, even by the law, if they don't deliver. Despite an extraordinarily high level of customer service, in recent years there have been a range of issues arising, notably involving food products (particularly sensitive) and product related injuries and deaths, and the current legal system just hasn't been able to provide an adequate response.

2000 was the year that started off a seemingly never-ending string of scandals in the food and product safety area, involving very famous Japanese companies. I think it was the food scandals which particularly angered the Japanese, for two reasons. Firstly, because we all have to eat, and therefore are all potential victims of any one

31) See <<http://www.jiji.com/jc/zc?k=200908/2009083101437&rel=j&g=soc>> (accessed 2 September 2009).

* The Act is available via 'Japanese Law Translation' <<http://www.japaneselawtranslation.go.jp/>> (accessed 26 July 2010).

32) Luke Nottage, 'A New Consumer Agency for Japan? Consumer Redress, Contracts and Product Safety' (30 October 2008) <http://blogs.usyd.edu.au/japaneselaw/2008/10/a_new_consumer_agency_for_japa.html> (accessed 26 July 2010).

of the frequently occurring scandals. Secondly, the companies did what they did purely for profit-making reasons, which the Japanese see as a complete betrayal of their obligations to society.

As a result of these scandals, which couldn't be prevented and couldn't be adequately dealt with afterwards, Japanese consumers have been feeling very 'insecure' and distrustful of companies. This is not a good way to feel in general, and in the Japanese context it tends to cause people to react very negatively or cynically to company's behaviour — be it good behaviour or otherwise.

One important effect of this general lack of trust in companies has been an enormous increase in the number of complaints that Japanese companies receive, and also an increase in the number of difficult complaints they receive. Especially since 2000, when there was a huge scandal involving out-of-date milk being taken back to the manufacturer (Snow Brand) and re-sterilised for re-sale. Unfortunately, the milk got contaminated in the process and about 10,000 people who drank Snow Brand milk got food poisoning.

One important role for the new Consumer Agency will be to ensure compliance with the law to restore consumer trust in companies and thus ensure the 'safety' and 'security' of Japanese consumers (Expressed as a single indivisible concept, '*Anzen, Anshin*' in Japanese. This expression is used frequently these days by all stakeholders.)

The *Fundamental Act on Consumers*, as amended a few years ago, now states that companies have a duty to respond to complaints in an appropriate and timely fashion. And this means that complaints handling and what's called the 'voice of the consumer' are considered, at the policy level, to be extremely important. Self-regulatory or soft law tools such as standards and codes of conduct are becoming increasingly important for Japanese companies as a way of ensuring that companies do respond to the consumer voice.

5. Unfair Consumer Contracts Law Reform in Australia (at last), Japan and Europe

(11 August 2009)

Compared to Australian and New Zealand legislation, Japan's *Consumer Contracts Act 2000* has quite narrow restrictions on the bargaining process leading up to the conclusion of contracts between consumers and commercial suppliers.³³⁾ But it adds a 'general clause' regulating unfair contract terms, voiding those that 'impair the interests of consumers unilaterally against the fundamental principle' of good faith under *Civil Code Art 1(2)*, as well as targeting some specific types of terms.³⁴⁾ The *Consumer Contracts Act* also extends to

33) The Act is available via 'Japanese Law Translation' <<http://www.japaneselawtranslation.go.jp/>> (accessed 26 July 2010). See also Luke Nottage, '*Nihon-Nyujirando Shohishakeiyakuho* [Consumer Contract Law in Japan and New Zealand]' (June 2000) 1620 *Toki no Horei* 4-5.

34) Luke Nottage, 'Form and Substance in US, English, New Zealand and Japanese Law: A ↗

all types of contracts (except employment contracts: Art 48), and defines ‘consumer’ broadly as any individual not contracting for a business purpose (Art 2).

This definition is similar to that of the 1993 EC Directive on unfair terms (93/13/EEC),³⁵⁾ which provided a major impetus to enactment in Japan (as did the 1985 Directive for Japan’s *Product Liability Act 1994*). However, Art 4(2) of the 1993 Directive excludes terms relating to ‘the definition of the main subject matter of the contract’ or ‘the adequacy of the price and remuneration ... in so far as these terms are in plain intelligible language’, with the Preamble specifically mentioning insurance contract premiums. The annexed indicative ‘grey list’ of clauses that may prove unfair also suggests that certain terms found in financial services contracts are likely to be acceptable. Article 3(1) voids ‘any contractual term which has not been individually negotiated ... as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer’.

Article 7 adds an important obligation on European member states to provide ‘adequate and effective means’ to prevent usage of unfair terms, including injunctions. Consumers were unable to obtain such provisions in Japan’s original Act, but they were added in 2006 and are already having some impact.³⁶⁾ By contrast, the EU was slower than Japan in harmonising controls focusing solely on the contract negotiation process. These came only in the 2005 Unfair Commercial Practices Directive (2005/29/EC). But that now includes quite general clauses prohibiting misleading conduct vis-à-vis consumers (Arts 6 and 7).

What about Australia? The *Trade Practices Act 1974* (Cth) or ‘TPA’ included a very broad prohibition on misleading and deceptive conduct in trade (s 52), which competitor firms as well as individual consumers and regulators could invoke. Part V Div 2 also voids attempts by corporations to limit specific statutory warranties (merchantable quality, fitness for purpose notified before supply, and so on) when supplying goods and services to ‘consumers’ as defined (for example, for goods) in s 4B(1):³⁷⁾

- (a) a person shall be taken to have acquired particular goods as a consumer if, and only if:
 - (i) the price of the goods did not exceed [\$40,000]; or
 - (ii) where that price exceeded [\$40,000] the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods consisted of a commercial road vehicle;

↘ Framework for Better Comparisons of Developments in the Law of Unfair Contracts’ (1996) 26 *Victoria University of Wellington Law Review* 247, also available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=842684> (accessed 26 July 2010).

35) ‘Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts’ <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:NOT>> (accessed 26 July 2010).

36) Nottage, above n 32.

37) Available via ‘Austlii’ <<http://www.austlii.edu.au>> (accessed 26 July 2010), along with the legislation as amended in 2010 to take effect from 2011.

and the person did not acquire the goods, or hold himself or herself out as acquiring the goods, for the purpose of re supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land.

In addition, for transactions under \$40,000 suppliers can limit (but not exclude totally) liability if this is 'fair and reasonable' and the goods are not ordinarily for personal use (s68A). Further, the obligation to take due care when providing services (s 74(1)) always excludes '(a) a contract for or in relation to the transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored; or (b) a contract of insurance' (s 74(3)). And the fitness for purpose obligation is excluded for 'services of a professional nature provided by a qualified architect or engineer' (s 74(2)).

The scope of application for these consumer protection provisions is therefore very convoluted and seemingly quite arbitrary, partly reflecting the lobbying power of certain professional groups in obtaining exclusions from TPA obligations. And the mandatory statutory warranties have been displaced in practice by retailers increasingly selling 'extended warranties', even though the mandatory warranties often would or should provide similar coverage anyway. Retailers and consumers also tend now to believe that the only really important thing is express warranties provided by manufacturers, even though the latter also owe statutory warranties similar to those of retailers (see Part V Div 2A, added in 1986). This confusion is not helped by the fact that there is no statutory requirement that such express voluntary warranties be in plain intelligible language, as under the 1999 EC Consumer Guarantees Directive (1999/44/EC). Such problems are highlighted in a Review of Statutory Implied Terms and Warranties initiated in late July 2009 by the Commonwealth Consumer Affairs Advisory Council.³⁸⁾ This is another part of the Australian government's review of consumer law and policy overall since February 2009, following a detailed Report of the Productivity Commission released in April 2008.³⁹⁾

Australia's legislation was likely to become even more complicated as a result of the federal Parliament introducing the *Trade Practices Amendment (Australian Consumer Law) Bill* on 26 June 2009.⁴⁰⁾ This laudably added a long-overdue missing link in Australia's

38) Australian Government — The Treasury, 'CCAAC Review of Statutory Implied Conditions and Warranties' <<http://www.treasury.gov.au/contentitem.asp?ContentID=1521&NavID=037>> (accessed 26 July 2010).

39) Australian Government — The Treasury, 'An Australian Consumer Law: Fair Markets — Confident Consumers — Consultation Paper' <<http://www.treasury.gov.au/contentitem.asp?NavId=&ContentID=1484>> (accessed 26 July 2010).

40) Parliament of Australia: Senate, 'Trade Practices Amendment (Australian Consumer Law) Bill 2009' <http://www.aph.gov.au/senate/committee/economics_ctte/tpa_consumer_law_09/index.htm> (accessed 26 July 2010). The final version of the Bill, as enacted, is also available via the Parliament's website or in the *Trade Practices Act* as amended available via <http://www.austlii.edu.au>.

consumer protection regime: broader restrictions on all unfair terms. These followed the lead of amendments to Victoria's *Fair Trading Act* in 2002, in turn based on the 1993 EC Directive. The Bill likewise applied to a 'consumer contract' defined as supply 'to an individual whose acquisition is wholly or predominantly for personal, domestic or household use or consumption' (that is, a non-business purpose). This is a partial throwback to a more subjective test than in the TPA prior to the recent amendments. But the latter's original definition (in 1974, before an amendment in 1977 generating s 4B above) had asked whether goods or services were ordinarily used for 'private use'. Even under the s 4B(4) of the TPA, 'commercial road vehicle' is defined more subjectively to the user: 'vehicle or trailer acquired for use principally in the transport of goods on public roads'. The *Contracts Review Act 1980* (NSW) also does not provide for relief from an 'unjust' contract 'in so far as the contract was entered into in the course of or for the purpose of a trade, business or profession carried on by the person or proposed to be carried on by the person, other than a farming undertaking' (s 6). Australian courts and others interpreting the Bill's unfair terms provisions may also be able to draw on similar wording delimiting the applicability of consumer credit legislation (itself under review since 2009).⁴¹⁾ The Bill's definition of 'consumer' also had the potential to displace at least some definitions within the original TPA, such as Part V Div 2; but a second Amendment Bill ended up not taking that route, instead largely retaining the old definitions.*

In addition, the Bill included financial services but specifically excludes charterparties and contracts for marine salvage, towage, carriage of goods by sea, and the constitution of a company, managed investment scheme or other kind of body. It also excluded a consumer contract term that 'defines the main subject matter of the contract, or sets the upfront price payable'. So this is likely to exclude insurance contract premiums, as under the 1993 EC Directive. The Bill was also similar in applying only to standard-form contract terms. This restriction reflects a strong outcry from business interests when the Treasury released a Consultation Paper in May 2009 containing an Exposure Draft providing for coverage not limited to standard form contracts (as still in Japan, following an older German law approach).

Thus, like the 1993 Directive, the Bill reflected partly still a 'procedural justice' model of consumer law, focused on transparency and the need to safeguard some consent, particularly with standard-form contracts. But also the Bill also partly suggested a 'commutative justice' model, focused on substantive balance or fairness.⁴²⁾

41) Luke Nottage, 'Responsible Consumer Lending Rules for Australia Too: Submission on the National Consumer Credit Protection Bill' (11 May 2009) <http://blogs.usyd.edu.au/japaneselaw/2009/05/responsible_consumer_lending_r.html> (accessed 26 July 2010).

* See Luke Nottage 'Second TPA Amendment Act Passed – But Applies to Different “Consumers” than First Act' (1 July 2010) <<http://acren.wordpress.com/2010/07/01/second-tpa-amendment-act-passed-%E2%80%93-but-applies-to-different-consumers-than-first-act/>> (accessed 11 August 2010).

42) Thomas Wilhelmsson and Chris Willett 'Unfair Terms and Standard Form Contracts' in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson (eds) *Handbook of Research on International* ↗

The biggest difference with the Directive, and Japan's Consumer Contract Act, lay in the Bill's definition of an 'unfair' term — if '(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and (b) it is not reasonably necessary to protect the legitimate interests of the party who would otherwise be advantaged by the term'. The Victorian Act likewise has been amended this year to remove any reference to 'good faith'. This follows a 2005 report of the English and Scottish Law Commissions, and also is related to current confusion in Australian (commercial) contract law about the content (and applicability) of a generalised duty of good faith.⁴³⁾ Yet TPA provisions on broader 'unconscionable conduct' still list good faith as a factor (Part IV.A). And its excision from the Bill means that Australia will miss out on an opportunity to learn from how civil law tradition countries in Europe and Japan have developed this principle to balance the various social interests involved when providing the (scarce) resources of the state to enforce contracts, especially now those involving consumers.

However, the Bill did give more bite back to enforcement proceedings. Where a term is declared unfair by a court, or proscribed by the Minister (by Regulation — but none were proposed along with the Bill), the regulator (especially the ACCC) can bring injunction proceedings that also seek further orders against corporations using such terms, in favour of those not party to the original proceedings. These orders can include refunds for them, for example, but not full damages. This is a welcome amendment to the narrow scope of TPA s 87 (limiting orders to parties alone), as interpreted in *Medibank Private v Cassidy*.⁴⁴⁾ But the ACCC had been pushing for this reform for the last seven years, pointing out for example that the securities regulator (ASIC) has long had such broader powers.

So that particular reform of the TPA's enforcement regime confirms my impression about Australia's 'lethargic' attitude to consumer law reform since the 1990s.⁴⁵⁾ So does the fact that the unfair terms rules only come into effect at the federal level from 1 July 2010, and are applied by most states in their own legislation only from 1 January 2011. Part of the backdrop is Australia's complex constitutional system, but this timeframe also reflects a lack of political will – compared for example to Europe nowadays, and arguably also Japan.

To keep up momentum and make sure Australia maintains global standards, it will be important to fund better comparative and empirical research centred around consumer law specialists in Australian universities. To that end, Sydney Law School hosted the 4th

↘ *Consumer Law* (Edward Elgar Publishing, 2010), Chapter 7.

43) Elisabeth Peden, 'When Common Law Trumps Equity: The Rise of Good Faith and Reasonableness and the Demise of Unconscionability' *Sydney Law School Research Paper* No 06/57 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=947361> (accessed 26 July 2010).

44) [2002] FCAFC 290.

45) Luke Nottage, 'Australia's Lethargic Law Reform: How (Not) to Revive Consumer Spending' (25 March 2009) <<http://www.eastasiaforum.org/2009/03/25/australias-lethargic-law-reform-how-not-to-revive-consumer-spending/>> (accessed 26 July 2010).

Consumer Law Roundtable on 4 December 2009.⁴⁶⁾ And in another Treasury consultation recently about consumer policy research and advocacy, Roundtable members have also proposed the establishment of the 'Australian Consumer Research Network' (ACReN), partly inspired by the flexible cross-institutional Australian Network for Japanese Law.⁴⁷⁾

6. Comparing Product Safety Re-Regulation in Australia: The Never-Ending Story

(2 December 2009)

Product Safety is one major theme for the 4th Consumer Law Roundtable, hosted this year at Sydney Law School on 4 December 2009.⁴⁸⁾ Others include unfair contract terms and consumer credit, and this Roundtable had an Asia-Pacific focus. Professor Michelle Tan joined us again from Japan, and keynote speakers were Professor Tsuneo Matsumoto (chair of Japan's new Consumer Commission⁴⁹⁾) and Victoria University of Wellington's Kate Tokeley (considering unfair contract terms from a New Zealand perspective).⁵⁰⁾ A major role of the new Consumer Affairs Agency — supervised by a Commission — is to collect and analyse consumer product-related accident data, which Japanese suppliers need to disclose since amendments in 2006.

Meanwhile, on 16 November 2009 the Australian Treasury initiated yet another public Consultation: 'Regulatory Impact Statement — Australian Consumer Law — Best Practice Proposals and Product Safety Regime'.⁵¹⁾ Before being considered for a Bill, a cost-benefit analysis (RIS) has been required for these proposals, based on consumer law reform recommendations from the Productivity Commission (PC) in 2008 other than those (especially unfair contract terms regulations) which were introduced as a separate Bill in July — without the extra hurdle of such a RIS analysis. Unfortunately, the Treasury did not publicise well this latest Consultation and required Submissions by 30 November.⁵²⁾ They wanted to report to the Ministerial Council of Consumer Affairs (MCCA), also scheduled for 4 December — alongside,

46) Sydney Law School, 'Seminars and Events' <<http://sydney.edu.au/law/caplus/events.shtml>> (accessed 26 July 2010).

47) Australian Government — The Treasury, 'Consumer Voices: Sustaining Advocacy and Research in Australia's New Consumer Policy Framework' <<http://www.treasury.gov.au/contentitem.asp?NavId=014&ContentID=1532>> (accessed 26 July 2010).

48) Sydney Law School, above n 46.

49) Professor Matsumoto's outline may be found at 'New Administrative Framework for Consumer Protection in Japan: Consumer Affairs Agency and Consumer Commission' <<http://blogs.usyd.edu.au/japaneselaw/RoundtableMatsumoto.pdf>> (accessed 26 July 2010).

50) See also Part 4.

51) Australian Government — The Treasury, 'Consultation Regulation Impact Statement — Australian Consumer Law — Best Practice Proposals and Product Safety Regime' <http://blogs.usyd.edu.au/japaneselaw/2009/12/comparing_product_safety_rereg.html> (accessed 26 July 2010).

52) For example, not via their portal at <<http://www.treasury.gov.au/consumerlaw/>> (accessed 5 August 2010).

incidentally, Prime Minister Rudd's major conference on his Asia Pacific Community concept.⁵³⁾

Despite this very tight deadline, I provided the following Submission in response to Part II of the Consultation Paper (pp 82-98), regarding product safety re-regulation. I elaborated mainly on a few key points developed in my Submission to the first consultation on the Australian Consumer Law reform announced in February 2009.⁵⁴⁾ The hope was that Australia would finally join Japan and many other Asia-Pacific countries (China, Canada and the US) in adopting the new global standards for product safety.

PC Report's Recommendation 9.3: reporting requirement for products associated with serious injury

1. The PC's report in 2008 appears to offer an alternative requirement of only requiring reporting if there had been a successful product liability claim or out-of-court settlements. But that aimed to reiterate the PC's recommendations from its report of 2006 specifically on product safety, and the latter report in fact preferred the stronger option of disclosure for any products associated with serious injury. This should be the minimum new standard for the PC's reasons which you summarise at the bottom of page 92 of your Paper.

2. Since 2006 all Australia's major trading partners (including China since 2007) have at least this disclosure requirement, extending to their importers as well as manufacturers. But they go further to require notification of certain risks associated with consumer goods, not just actual injury or death as proposed for Australia. The US has had this requirement from the 70s, with further provisions added in 1990 (situations creating 'an unreasonable risk of serious injury or death'). The revised European Directive of 2001 also requires disclosure of serious risks. Japan's amendments in 2006 require disclosure of risks specified in regulations – currently situations involving (officially notified) fires, even if no injury results. Legislation introduced in Canada recently covers 'an occurrence in Canada or elsewhere that resulted or may reasonably have been expected to result in an individual's death or in serious adverse effects on their health, including a serious injury'. In light of these developments world-wide, MCCA should revisit the PC's recommendation and take it a step forward. Its arguments for a disclosure obligation effectively apply also to the new global standard that extends disclosure to at least some serious risks, not just actual injuries that may have been fortuitously avoided in a

53) See my revised blog 'Asia Pacific Socio-economic Regional Architecture: Beyond FTAs and 'Business As Usual' (1 December 2009) <<http://www.eastasiaforum.org/2009/12/01/asia-pacific-socio-economic-regional-architecture/>> (accessed 26 July 2010).

54) Submissions are available at Australian Government — The Treasury, 'Submissions: An Australian Consumer Law: Fair Markets – Confident Consumers' <<http://www.treasury.gov.au/contentitem.asp?ContentID=1501&NavID=>> (accessed 26 July 2010).

particular case.

3. In assessing costs versus benefits in imposing such disclosure obligations, three major points can be added to your Paper:

a. All these countries have gone through similar assessments (Canada's RIS system is closest to Australia's), and have very similar consumption-based economies (except perhaps for China).

b. Explicitly (as in the Canadian provisions just quoted) or implicitly, importers in those countries have to monitor and disclose problems that arise with the goods they trade in even if those arise abroad. This means that prudent importers from our major trading partners will increasingly impose contractual obligations on their Australian exporters to disclose product-related problems that arise in Australia (and indeed third countries). This will make industry compliance costs for Australian exporters increasingly minimal, especially the more reputable ones dealing with reputable importers abroad. If compliance costs do rise for less reputable exporters, they seem particularly justified because those exporters threaten Australia's reputation by risking injury to consumers abroad, and they may well also sell the same goods to Australian consumers. And an unfair situation is created if instead suppliers to our domestic market are not held to the same safety standards as those who export abroad.

c. Regarding instead the costs to the Australian government (p93 of your Paper), these can be minimised by integrating our new system particularly with the European one. Its RAPEX database of notifications is already already linked with other countries (through MoUs with China, the US, and possibly soon Japan). Maximising those efficiencies is another reason to extend Australia's disclosure requirement to that in the 27 EU member states, namely serious risks as well as actual injuries. Inter-governmental information sharing obligations would also be a straightforward valuable addition to Australia's burgeoning FTAs.⁵⁵⁾

4. Other PC Report Recommendations cover goods-related services and reasonably foreseeable misuse of goods, government recall of 'orphan goods', etc. The EU and most of our other major trading partners already provide for these protections as well.

5. The 'reasonable foreseeable misuse' clarification was agreed in the PC's final report

55) See Luke Nottage, 'Asia-Pacific Regional Architecture and Consumer Product Safety Regulation for a Post-FTA Era' *Sydney Law School Research Paper* No 09/125 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1509810> (accessed 26 July 2010).

in 2006 after extensive consultation and criticism of an alternative formulation in its draft report of 2005. As your Paper reiterates (p 90), this is also consistent with product liability requirements under TPA Part VA, so extra compliance costs for (law-abiding) businesses should be minimal.

6. Similarly, all services should be provided safely under the TPA Part V Div 2 when there is a contractual relationship. This still adopts a negligence test, but there is a growing trend in our Asia-Pacific region to extend strict liability to suppliers of unsafe services anyway. The main advantage of clearly extending product safety obligations to goods-related services, under TPA Part V Div 1A, is to reduce costs and delays for regulators faced with arguments from businesses asserting that the problem is associated only with the service and not the goods.

7. At pp 88 and 91 it is stated that the 'do nothing' alternative would be 'cost neutral for the government'. This neglects the significant costs to the government, but also taxpayers who subsidise litigation services, involved where businesses contest distinctions such as whether the problem arose from the 'service' or 'goods' themselves. The federal Attorney General has strongly criticised today's dispute resolution system and various procedural and institutional reforms have been now been proposed. But prevention is usually better than cure.

8. At pp 81 and 91, there are omissions regarding a benefit involved in the government instead undertaking reform: 'meeting reasonable consumer expectations about the role of the state in product safety'. This benefit is mentioned at p 94 regarding the disclosure requirement, and p 96 regarding recalls of orphan goods.

Fortunately, product safety re-regulation did survive this Consultation and RIS process. Provisions along the lines recommended by the PC were included in the *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*.^{*} Unfortunately, despite my further Submissions and evidence given to the Senate Inquiry, the scope of the extra disclosure obligation imposed on suppliers under that enactment remains more restricted than in the US, the EU, China, Canada (probably) and even Japan. It only applies if there is actual serious injury for example; never if there is a risk – however obvious – but without a serious injury occurring.^{**}

* See <http://www.aph.gov.au/senate/committee/economics_ctte/tpa_consumer_law_10/index.htm> (accessed 11 August 2010).

** See *ibid* and Luke Nottage 'Proposed Australian (and Canadian) Requirements to Disclose Consumer Product Related Accidents: Better Late than Never?' (May 2010) 10/41 *Sydney Law School Research Paper* <<http://ssrn.com/abstract=1600502>> (accessed 11 August 2010, also published in 20 *Australian Product Liability Reporter*).

7. Asia-Pacific Product Safety Regulation and Other Regional Architecture for a Post-FTA Era

(19 November 2009)

Imagine an international regime with these institutional features:

1. Virtually free trade in goods and services, including a ‘mutual recognition’ system whereby compliance with regulatory requirements in one jurisdiction (for example, qualifications to practice law or requirements to offering securities to the public) basically means exemption from compliance with regulations in the other jurisdiction. And for sensitive areas, such as food safety, there is a trans-national regulator.
2. Virtually free movement of capital, underpinned by private sector and governmental initiatives.
3. Permanent residence available to nationals from the other jurisdiction (and strong pressure to maintain flexible rules about multiple nationality).
4. Treaties for regulatory cooperation, simple enforcement of judgments (a court ruling in one jurisdiction is treated virtually identically to a ruling of a local court), and to avoid double taxation (including a system for taxpayer-initiated arbitration among the member states).
5. Government commitment to harmonising business law more widely, for example, now for consumer and competition law.

No, the answer is not the obvious one: I am NOT talking about the European Union (EU). I am referring to the Trans-Tasman framework built up between Australia and New Zealand, particularly over the last decade, sometimes through treaties (binding in international law) but sometimes in softer ways (for example, parallel legislation in each country). And since both countries are actively pursuing bilateral and now some regional Free Trade Agreements (FTAs), especially in the Asia-Pacific region, can’t at least some of these Trans-Tasman initiatives become a template for a broader ‘Asia Pacific Community’?

This question is particularly timely as the new DPJ-led government in Japan, has declared its support not only for the WTO system but also for FTAs (Free Trade Agreements), particularly in the Asian region.⁵⁶⁾ It also advocates improvements in food and consumer product safety measures.⁵⁷⁾ Whether or not Australia is considered part of Asia, either by

56) See Part 1.

57) See Part 4.

Japan or itself, the two countries are continuing bilateral FTA negotiations in the context of growing involvement in regional arrangements in the Asia-Pacific region. Such developments constituted one theme at the New Zealand Centre for International Economic Law conference, ‘Trade Agreements: Where Do We Go From Here?’, over 22-23 October 2009 in Wellington. Below is an edited introduction to my four-part paper, now available in further updated form as a Sydney Law School Research Paper.⁵⁸⁾

More and more countries are entering into bilateral FTAs, including now throughout the Asia-Pacific region. This was not such a problem when the world economy was growing, but it and the multilateral WTO regime are now in crisis. Inefficient ‘trade diversion’ is likely even if bilateral FTA partners begin to connect up under regional FTAs, as under the recent ASEAN-Australian-New Zealand Free Trade Agreement (AANZFTA).⁵⁹⁾ This is because greater liberalisation already achieved between bilateral FTA partners tends to be preserved under such regional agreements. And burgeoning FTAs diminish the incentives for national governments to press for a new multilateral system.⁶⁰⁾

Some therefore call for a ‘crisis Round’ to try to revive the system, but that seems unlikely.⁶¹⁾ Another impediment is that the persuasiveness of conventional economic models, and market forces as the best way to maximise socio-economic growth, are under broader threat in the wake of the Global Financial Crisis (GFC) and now the meltdown in most real economies.⁶²⁾

One way forward is to concede that FTAs, already mostly sub-optimal from a narrow economic perspective, should include elements of ‘fair trade’ — not just ‘free trade’. Indeed, many economists might agree that if politicians, government officials and an increasingly broad array of stakeholders are increasingly investing so much time and resources in negotiating various FTAs anyway, the additional marginal costs involved in agreeing on some further matters may be quite minimal. Those costs are likely to be outweighed by marginal benefits, in the form of reductions in a variety of transaction costs currently incurred in managing risks in cross-border trade and investment.⁶³⁾ Legal practitioners do tend to be more aware of those costs and risks than governments and businesspeople. But anyway they also generally recognise many values other than those reflected in cost-benefit analysis, such as

58) Nottage, above n 55

59) Australian Government — Department of Foreign Affairs and Trade, ‘ASEAN-Australia-New Zealand Free Trade Agreement’ <<http://www.dfat.gov.au/trade/fta/asean/aanzfta/>> (accessed 26 July 2010).

60) Brett Williams, ‘The Korea-Australia FTA: Obstacle or Building Block?’ (14 April 2009) <<http://www.eastasiaforum.org/2009/04/14/the-korea-australia-fta-obstacle-or-building-block/>> (accessed 26 July 2010).

61) Andrew Elek, ‘The Crisis and Reinventing WTO Negotiations’ (15 April 2009) <<http://www.eastasiaforum.org/2009/04/15/the-crisis-and-reinventing-wto-negotiations/>> (accessed 26 July 2010).

62) See Nottage, above n 18. But see now: John Quiggin *Zombie Economics* (Princeton University Press, 2010).

63) The Honourable JJ Spigelman AC, ‘Transaction Costs and International Litigation’, Address to the 16th Inter-Pacific Bar Association Conference, Sydney (2 May 2006) <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman020506> (accessed 26 July 2010).

participation rights or maintaining the coherence and overall integrity of a regulatory system.

In striving to balance free and fair trade nowadays, a rough analogy would be the ways in which the European Union (EU) has evolved so it is no longer just an economic community. Despite — or perhaps because of — the steady expansion of EU membership, it has addressed concerns about democratic legitimacy and accountability, alongside its original core objectives of free movement in people, capital, goods and services. The EU has achieved this over many decades, often by trial-and-error and in a variety of ways, ranging from core or additional treaties, diverse European law harmonisation measures, through to ‘soft law’ initiatives.

This analogy seems particularly timely for the Asia-Pacific region, for three main reasons. First, our region certainly remains diverse in terms of social and legal or political systems, but economic integration has burgeoned since the 1980s and will intensify even further as pan-Asian production networks (strongly connected with Japan⁶⁴) turn away from European and US markets in the wake of the GFC. The ‘diversity gap’ is narrowing significantly as the EU itself expands and becomes more diverse, at least when compared to East Asia, Australia and New Zealand.

Secondly, there remains considerable interest in Australian Prime Minister Kevin Rudd’s for a new ‘Asia Pacific Community’. Proposed last year in rather inchoate form, including whether and how this new concept might include any EU-like institutional features, in December it will be discussed by regional leaders in Sydney and probably then at the APEC meeting in Singapore.⁶⁵ Many remain skeptical.⁶⁶ But Yukio Hatoyama also wrote shortly before Japan’s general election this year about the need now to strengthen institutions in Asia, ranging from financial system infrastructure to human rights institutions.⁶⁷ And his new government now appears to be pressing for some sort of East Asian Community (centred on Japan and China, initially without the US).⁶⁸

Thirdly, throughout the region, considerable distrust has re-emerged about leaving socio-economic ordering to outright market fundamentalism. Although some assert that market forces have long prevailed in Japan, for example, most agree instead that post-War Japanese capitalism has maintained distinctive norms (such as close business-government relations) and institutions (such as ‘main banks’) that help explain why even the far-reaching reforms to corporate governance since the 1990s still only amount to a gradual transformation.⁶⁹

64) See Part 8.

65) Greg Sheridan, ‘Rudd’s New Vision for Asia-Pacific’ <<http://www.theaustralian.com.au/news/opinion/rudds-new-vision-for-asia-pacific/story-e6frg76f-1225772087960>> (accessed 26 July 2010).

66) See eg <http://www.asialink.unimelb.edu.au/__data/assets/pdf_file/0003/23898/Heseltine_essay7.pdf> (accessed 11 August 2010).

67) Joel Ratus, ‘Japan, the DPJ and Regional Financial Arrangements’ (11 August 2009) <<http://www.eastasiaforum.org/2009/08/11/japan-the-djp-and-regional-financial-arrangements/>> (accessed 26 July 2010).

68) Aurelia George Mulgan, ‘Responses to Hatoyama’s Middle-power Diplomacy’ (28 September 2009) <<http://www.eastasiaforum.org/2009/09/28/7199/>> (accessed 26 July 2010).

69) Luke Nottage, Leon Wolff and Kent Anderson, ‘Japan’s Gradual Transformation in Corporate Governance’ *Sydney Law School Research Paper No 08/29* <<http://papers.ssrn.com/sol3/> ↗

Rudd has consistently protested about the excesses of market fundamentalism, although it remains to be seen whether for example how far this will translate into reforms to consumer protection legislation in Australia — likely also to be followed in New Zealand.⁷⁰⁾ Such views underpinned his electoral victory in 2007 (although a wind-back of labour market deregulation was a much higher profile issue), but also Hatoyama's election victory this August. The new Japanese government appears likely to intensify measures to promote consumer rights and product safety, while simultaneously promoting actively both the WTO system and bilateral or regional FTAs.⁷¹⁾

What is likely therefore to emerge — or, at least, what we should now be encouraging — is deeper and broader economic integration in the Asia-Pacific (or at least Australasia) that simultaneously incorporates regulatory safeguards to meet the challenges and expectations of our brave new post-GFC world. These innovations may be built into FTAs or negotiated out alongside them, but it needs to be done in a more concerted and comprehensive manner. Part II of my full paper online therefore explains various options for promoting 'free but fair' movements of capital, people and services. Part III addresses free movement of consumer goods combined with better safety regulation: the WTO backdrop, the European approach, and some Asia-Pacific developments (especially Trans-Tasman). Part IV concludes that such initiatives to marry liberalisation with contemporary public interest concerns are essential to sustainable development in the Asia-Pacific region — and hence, potentially, to reinvigorating the multilateral order.⁷²⁾

B. Legal Professionals and Dispute Resolution

8. Australia and Japan: A New Economic [and Legal!] Partnership in Asia

(12 October 2009)

Emeritus Professor Peter Drysdale recently presented in Sydney a preview of his now-published consultancy report for Austrade, which urges:⁷³⁾

a paradigm shift in thinking about Australia's relationship with the Japanese economy. The Japanese market is no longer confined to Japan itself. It is a huge international market generated by the activities of Japanese business and investors, especially via

↘ [papers.cfm?abstract_id=1121510](#)> (accessed 26 July 2010).

70) See Part 3.

71) See Part 4.

72) For more in response to Euro-skeptics, see also my blog on the East Asia Forum: Nottage, above n 53.

73) Peter Drysdale, 'Time to Re-think the Economic Partnership with Japan in Asia' (12 September 2009) <<http://www.eastasiaforum.org/2009/09/13/time-to-re-think-the-economic-partnership-with-japan-in-asia/>> (accessed 2 August 2010), p 3.

production networks in Asia. It is a market enhanced by the economic cooperation programs of the Japanese government throughout the developing world, particularly in the Asian and Pacific region. And it is a market in which Japanese business now plays an increasingly important role from an Australian base in manufacturing, agriculture and services.

The *Australian Financial Review* also confirms that Japan has led China and other Asian investors into Australia over the previous year.⁷⁴⁾ But many probably remain unaware of these facts highlighted by Drysdale's report:⁷⁵⁾

The stock of Japanese investment in Asia amounted to A\$ 180 billion out of Japan's global investment of A\$ 772 billion at end-2008. The flow of export and import trade which Japanese business generates in Asia each year was US\$ 690 billion in 2008. Procurements through Japanese corporate subsidiaries in Asia amount to A\$ 1.2 trillion annually. In addition, Japan spent A\$ 11 billion (901 billion yen) in Asia on Overseas Development Assistance programs and procurement through economic cooperation programs. Japanese business has now also established a platform for export to the region from Australia, with diversified investments across food, manufacturing as well as resources, that already delivers A\$ 6 billion in Australian sales to Asian markets other than Japan. These are all large new elements in the economic relationship with Japan beyond the A\$ 51 billion export trade and A\$ 20 billion import trade that Australia already does each year with Japan itself.

These pervasive economic ties are underpinned by very wide-ranging and stable relations between Australia and Japan at all sorts of levels: governmental, judicial, educational, working holidays, and so on. As pointed out in another recent report, the GFC has led policy-makers as well as businesspeople to look again more favourably on relationships that combine lower risk with less return, compared to high risk/return ventures.⁷⁶⁾

We can take advantage of these strong and still very profitable Australia-Japan bilateral relationships, as well as the investment and trading links each country (especially Japan) has developed in other parts of Asia particularly since the 1990s, by more actively joining Australian and Japanese partners for ventures throughout Asia. This spreads the risks typically associated with the possibility of higher returns, and also allows each partner to contribute goods or services in which that country has more of a comparative advantage. Thus, for

74) 'What Crisis? Asian Investors Rush to our Shores', 24 September 2009.

75) Ibid, pp 3-4.

76) Manuel Panagiotopoulos and Andrew Cornell, 'Australia and Japan: Beyond the Mainstream' <http://www.ajf.australia.or.jp/docs/20090625_AJF_Manuel_Panagiotopoulos_Business.pdf> (accessed 2 August 2010).

example, Drysdale suggests:⁷⁷⁾

partnership with Australian services firms in finance, legal services and engineering could be mutual productive. ... In FTA talks with Japan the Rudd Government is trying to open the way for professional and financial services firms to set up in Japan, encouraging wider recognition of qualifications and the removal of barriers to obtaining licences in Japan.

As an example of 'legal and consultancy services', Drysdale mentions that several Australian law firms have long experience in the Asian region, and gives the example of Mallesons Japan. But he concludes that 'if we are serious about joining global supply chains and capturing service industry opportunities in Asia then Australian firms need to be there on the ground to capture the business'.

Unfortunately, unlike the major US and European law firms, neither Mallesons Japan nor any other Australian law firm had taken sufficient advantage of the now fully-liberalised and growing market for international legal services in Tokyo (described in a recent lecture by International Bar Association Vice-President and ANJeL Advisor, Mr Akira Kawamura).⁷⁸⁾ A major opportunity opened up especially when full profit-sharing partnerships between Japanese and international lawyers were permitted from 2004, and many young Australian law graduates are now directly joining the Tokyo offices of US or UK law firms rather than going first through their head offices. If Australian law firms could also establish offices in Tokyo, they too would not only access burgeoning markets there, but also be better placed to pursue opportunities in other parts of Asia. For example, they could use their home client base to help link up Australian firms with firms in Japan interested in joint ventures in Asia. And the Tokyo office could liaise, for example, with an office say in Shanghai when its Australian client found itself dealing with a joint venture in China that in fact involves significant Japanese interests.

Educational services is another area where Australia has significant expertise as well as demonstrated export market potential, and this extends to legal education. For example, through the Australian Network for Japanese Law⁷⁹⁾ Sydney Law School partners primarily with Ritsumeikan Law School to offer intensive Kyoto and Tokyo Seminars comparing Japanese law.⁸⁰⁾ These are offered not only to Australian and Japanese students, but also to students travelling from other parts of Asia (especially Hong Kong and Singapore). Through its 400-strong membership, ANJeL coordinates lecturers comprising professors and

77) Ibid, p 25.

78) See Luke Nottage, 'Kawamura Connections: Tokyo Lawyers Go Global, All the Way With the IBA' (23 September 2009) <http://blogs.usyd.edu.au/japaneselaw/2009/09/kawamura_connections_tokyo_law_1.html> (accessed 2 August 2010).

79) See ANJeL, <<http://sydney.edu.au/law/anjel/>> (accessed 11 August 2010).

80) See Kyoto Seminar, <<http://www.kyoto-seminar.jp>> (accessed 11 August 2010).

practitioners from Australia and all around Japan, not limited to those at or already known to Ritsumeikan.

As another recent example, the Centre for Asian and Pacific Law at the University of Sydney (CAPLUS⁸¹) worked with our Research Institute for the Asia Pacific (RIAP⁸²) to bid successfully for a United Nations 'legal technical assistance' project to support a South-East Asian government interested in implementing judicial sector reform. The government was particularly interested in comparing Japan, China, Indonesia (for all three of which CAPLUS has particular expertise), Korea (where CAPLUS has close contacts) and Russia. Again in conjunction with ANJeL, we were able to bring in some Japanese partners to assist with the criminal justice aspects of the report on Japan. Those Japanese partners alone, again, would have been unlikely to have attempted such a project. Combining Australian with Japanese expertise therefore opens up another possibility for exporting legal education services to another part of Asia.

In sum, developments are already occurring in some law-related fields that illustrate Drysdale's thesis very well. But there is certainly scope for doing much more, for example through more direct engagement with the legal services market in Tokyo on the part of Australia's law firms.* The key now is to think regionally (and globally), not just bilaterally.

9. Legal Education and the Profession in Australia, Japan, and Beyond

(7 October 2009)

Following on from my previous report on Mr Akira Kawamura's talk in Sydney about the significant transformations impacting on the legal profession in Japan, East Asia and worldwide, let us briefly consider also some inter-related changes to legal education in our region.⁸³ ANJeL Judges-in-Residence Program Convenor⁸⁴ Stacey Steele was Co-edited, with Kathryn Taylor, 'Legal Education in East Asia: Globalisation, Change and Contexts'⁸⁵ to commemorate the late Professor Mal Smith, who did so much for ANJeL, Australia-Japan relations, and legal education particularly in the Asia-Pacific region. ANJeL Co-director Kent

81) See <<http://www.sydney.edu.au/law/caplus>> (accessed 11 August 2010).

82) The University of Sydney, 'Research Institute for Asia and the Pacific' <<http://www.usyd.edu.au/riap/>> (accessed 2 August 2010).

* An Australian law firm subsequently announced it will venture into the burgeoning legal services market in Tokyo: see "Blake Dawson First to Open Japan Office", Australian Financial Review (Friday 23 October 2009) and <http://www.blakedawson.com/Templates/News/x_news_content_page.aspx?id=56941> (accessed 11 August 2010).

83) Nottage, below n 85.

84) See ANJeL Program Convenors, above n 14.

85) Stacey Steele and Kathryn Taylor (eds), *Legal Education in Asia: Globalization, Change and Contexts* (London, New York, Routledge, 2010). See also <<http://www.routledge.com/books/details/9780415494335/>> (accessed 3 August 2010).

Anderson and Competitions Program Convenor⁸⁶⁾ Trevor Ryan have contributed a very useful chapter on ‘Gatekeepers: A Comparative Critique of Admission to the Legal Profession and Japan’s New Law Schools’, which they and Stacey kindly shared with me in manuscript form.⁸⁷⁾

Hopefully without stealing too much of their thunder, I would like to extend it to locate especially Australian legal education. Below are my opening remarks for a co-authored National Report on Topic I.D ‘The Role of Practice in Legal Education’ for the 18th International Congress of Comparative Law, held four-yearly in different venues — this time from 25 July 2010 in Washington DC.⁸⁸⁾ Through the Sydney Centre for International Law, Professor Cheryl Saunders, Justice James Douglas and I have arranged for many other National Reporters on diverse topics selected for the Congress.⁸⁹⁾ We can also expect there many National Reports from Japan, although none were volunteered for the same Legal Education topic. There remains considerable uncertainty about Japan’s new postgraduate ‘Law School’ programs and their relationship to the National Legal Examination system, as I explained in a paper first presented a conference organised by Stacey in Melbourne where the ‘gatekeeper’ framework was first unveiled.⁹⁰⁾

Overall, but focusing especially on Japan, Kent Anderson and Trevor Ryan show how legal education and entry to the legal profession can usefully be analysed by comparing who acts as ‘gatekeeper’ to the profession. One possible gatekeeper is the legal profession itself. Traditionally, in England, this comprises solicitors and barristers, who administer qualification examinations. This system has also been influential in former British colonies like Australia.⁹¹⁾

However, an alternative gatekeeper is the university system. Countries like Australia (and New Zealand) have moved mainly to this model since around the 1960s, by basically requiring all lawyers to have passed an LLB or similar (undergraduate or initial) law degree. (NSW is unusual in retaining an alternative, perhaps reflecting the strength of the profession vis-à-vis universities in that state. The Legal Profession Admission Board allows students

86) See ANJeL Program Convenors, above n 14.

87) Kent Anderson and Trevor Ryan, ‘Gatekeepers: A Comparative Critique of Admission to the Legal Profession and Japan’s New Law Schools’ in Stacey Steele and Kathryn Taylor (eds), *Legal Education in Asia: Globalization, Change and Contexts* (Routledge, London, 2010), Chapter 3.

88) ‘International Academy of Comparative law’ <<http://www.iuscomparatum.org/>>. For the National Report co-authored with Justice Douglas, greatly assisted by Sydney Law School student Alicia Lyons, see <http://sydney.edu.au/law/scil/documents/2010/wp_no_27_Role_of_Practice_In_Legal_Ed.pdf> (both accessed 3 August 2010).

89) Sydney Law School, ‘Sydney Centre for International Law’ <<http://sydney.edu.au/law/scil/>> (accessed 3 August 2010).

90) Luke Nottage, ‘Build Postgraduate Law Schools in Kyoto, and Will They Come — Sooner and Later?’ (2005) 7(3) *Australian Journal of Asian Law* 241, also available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=986529> (accessed 3 August 2010).

91) Christoph Antons, ‘Legal Education in Australia’ (2001) 22 *Kansai University Review of Law and Politics* 71 [Scanned PDF may be available from Luke Nottage on request].

instead to study for its exams, mostly in evening classes, preparing students for the Diploma in Law — treated as equivalent to an LLB for qualifying as a lawyer in NSW. This program is nominally affiliated with the University of Sydney, but instructors and course content are quite separate from its Law School.⁹²⁾ It is true that throughout Australia there are now short programs for Practical Legal Training (PLT) necessary in addition to an LLB for admission as lawyers, and these administered, for example, in NSW primarily by the ‘College of Law’, but some law schools sometimes administer those too (for example, the University of Technology in Sydney).

Nonetheless, Australia also has affinities with a model centred on a third gatekeeper: the market (for law graduates). The US epitomises this model because basically anyone can pass even the hardest state bar examination – but if only after multiple attempts or with poor results, that person will not be able to compete in the market and get a good job as a lawyer (especially if also a graduate from a less well-regarded law school or with poor university grades). Australia is similar because the proliferation of law schools particularly since the late 1980s allows basically everyone to get some form of LLB, and basically everyone can pass the short PLT programs if they can afford them. But if someone’s university grades are underwhelming, s/he will find it very difficult to actually practice as lawyers.

Australia also shows some influence from a model centred on a fourth gatekeeper: the state. This arises because the government funds universities, especially through limited numbers of Commonwealth Supported Places (CSP) for many students undertaking LLB degrees — whereby students pay lower fees to the law schools, and the government pays them a subsidy per student. Yet, as explained below, Australia has witnessed not only the emergence of a few private law schools since the late 1980s. There is also a growing tendency for public law schools to seek full-fee-paying LLB students (as well as international students, and LLM or other similar postgraduate students, who are always full-fee-paying — note however that an LLM or such qualification does not allow admission to the legal profession). Still, this situation remains very different from (more ‘civil law tradition’) countries like Germany or Japan,⁹³⁾ where the state — with more or less consultation with the legal profession — sets a national legal examination. (Usually the latter also opens up careers in the judiciary or procuracy, not just as lawyers, and often therefore it is accompanied by some post-exam training at state rather than private expense.)

Australia’s legacy of the legal profession itself as a gatekeeper is reflected not only in the NSW LPAB exams alternative to the LLB, but also more generally in the profession’s

92) Compare the websites of the Law Extension Committee and the Sydney Law School, respectively at <<http://www.usyd.edu.au/lec/>> (accessed 3 August 2010) and <<http://www.law.usyd.edu.au/>> (accessed 3 August 2010).

93) Masaki Abe and Luke Nottage, ‘Japanese Law’ in Jan Smit (ed), *Encyclopedia Of Comparative Law* (Edward Elgar, Cheltenham, 2006), updated at <<http://www.asianlii.org/jp/other/JPLRes/2008/1.html>> (accessed 3 August 2010).

broad control over what must be taught in the LLB (the ‘Priestley 11’, named after a committee chaired by a then-Judge). Combined with a (possibly accelerating) shift towards the market as major gatekeeper to the profession, this generates strong pressures to make legal education ‘practice-oriented’ even in universities. However, their law schools are increasingly integrated in wider academic communities, nationally and internationally, and the government also has interests in law students graduating with a broader perspective (as well as incentivising law schools in other ways by offering funding for research, not necessarily linked to teaching). The net effect since the 1970s, at least until recently, has been for law school education to become less practice-oriented and more interdisciplinary and theoretical – although less so, for example, compared to the top US law schools.⁹⁴⁾ Whether this balance is optimal or sustainable is difficult to assess, but was debated in broader comparative and theoretical perspective in Washington DC in July 2010.*

10. Japan’s Legal Profession (and ADR and Legal Education) at a Crossroads

(17 March 2010)

Japanese *bengoshi* lawyers, as the most influential group within the legal profession, stand at a crossroads. Overall, through the overarching Japan Federation of Bar Associations (JFBA), their work and attitudes have become more amenable to collaborating with the judiciary and even public prosecutors in implementing reforms to the litigation system; to increasing the numbers allowed to pass the National Legal Examination as the gateway to careers as a lawyer, judge or prosecutor; and even to allowing Japan’s many ‘quasi-lawyers’ to expand their legal practice, as well as more promotion of privately-supplied ADR services.⁹⁵⁾ Reforms in all these areas were propelled by the Judicial Reform Council’s final recommendations to the Prime Minister in 2001, but they were consistent with the trajectory of *bengoshi* as a whole. However, the controversial election of a new JFBA President may derail all this, with implications also for related initiatives such as Japan’s new postgraduate ‘Law School’ programs inaugurated in 2004.

94) See, for example, Michael Coper, ‘Law Reform and Legal Education: Uniting Separate Worlds’ (2007-8) 39 *University of Toledo Law Review* 233, and Luke Nottage, ‘International Arbitration and Commercial Law Education for an International World’, in M Deguchi and M Storme (eds), *The Reception and Transmission of Civil Procedural Law in the Global Society* (Maklu, Antwerp/Apeldoorn, 2008), also *CDAMS Discussion Paper* No 04/30E; *Sydney Law School Research Paper* No 07/84 at <<http://ssrn.com/abstract=838030>> (accessed 3 August 2010), both containing further references; and Patrick Keyzer (ed) *Community Engagement in Contemporary Legal Education: Pro Bono, Clinical Legal Education and Service-Learning* (Halstead Press, Sydney, 2009).

* For the General Report, drawing also on many other National Reports, see <<https://www.wcl.american.edu/events/2010congress/reports/>> (accessed 11 August 2010), or contact me for details. See also my Review Essay of the rest of the book edited by Steele and Taylor, at <<http://www.ssrn.com/author=488525>>

95) See Part 9.

Until the 1960s, *bengoshi* and the JFBA were primarily concerned at increasing their status vis-à-vis prosecutors and the courts — implying the need to cap numbers passing the National Legal Examination — and serving as a ‘noble opposition’ to government as well as promoting a strict vision of the rule of law. By the 1980s, more confident in their status and financial circumstances, they had mostly shifted towards a more collaborative relationship. This aimed at extending the rule of law even for example through ADR mechanisms, beginning with a 1978 scheme with insurers to resolve traffic accident disputes, followed by the establishment of Bar Association ADR Centres from 1990.

Since the 1990s, prompted by more radical proposals from certain business and government interests for deregulating and expanding the legal profession, some *bengoshi* (for example, in the emergent corporate law firms) began to see themselves as advancing the public good and the rule of law by becoming mainly private suppliers of even more varied legal services.⁹⁶⁾ This vision not only implies a greater willingness to increase *bengoshi* numbers, but also to allow expansion in numbers and roles of (more or less) competing ‘quasi-lawyers’ and even non-legal professionals specialising in ADR. The influence of this view even among *bengoshi* provides one explanation for the many recommendations emerging from the JRC in 2001 and their implementation over 2001-4.*

However, this latest view probably remains a minority one among *bengoshi*. Many *bengoshi* are still (often older) practitioners leading or working in sole or small practices, and even those in Tokyo or Osaka do not derive most of their work from corporate clients — certainly not transactional work, as opposed to litigation. It is quite unsurprising, therefore, that there has been a visible backlash by this more conservative majority in the recent election of the JFBA President, despite not initially having support from any of the largest — and generally more liberal — Bar Associations (three in Tokyo plus Osaka). As reported in the Mainichi Daily News on 11 March 2010:⁹⁷⁾

Lawyer Kenji Utsunomiya, 63, has been elected the next president of the Japan Federation of Bar Associations (JFBA). JFBA presidents had traditionally been elected from candidates backed by the most powerful members in the country’s major bar associations. However, Utsunomiya, who is widely recognised as an expert in multiple debt issues, broke the trend by defeating rival candidate Takeji Yamamoto, 66, who was

96) See R Hamano, ‘The Turn to Law: The Emergence of Corporate Law Firms in Japan’ in William Alford (ed) *Raising the Bar: The Emerging Legal Profession in East Asia* (Cambridge, Mass, Harvard University Press, 2007).

* See the Final Report at <<http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>> and ‘Ensuring that the Results of the Justice System Reform Take Root’ <<http://www.moj.go.jp/ENGLISH/issues/issues01.html>> (both accessed 11 August 2010).

97) ‘Lawyer Beats Powerful Interests, Tradition to Become Bar Association Federation President’ (11 March 2010) <<http://mdn.mainichi.jp/mdnnews/news/20100311p2a00m0na016000c.html>> (accessed 17 March 2010).

backed by the current JFBA leadership.

As the overcrowded legal profession became a major campaign issue, Utsunomiya's proposal to reduce the number of people passing the bar exam to 1,500 a year gained broad support from regional bar associations concerned about over-heated competition and job security at law firms. Meanwhile, Yamamoto, who also proposed a downsizing of the legal community, failed to present a specific target.

To qualify as the winner, a JFBA presidential candidate is required to gain a majority vote in at least a third of all 52 bar associations nationwide. In the first round of voting in February, Yamamoto beat out Utsunomiya by 976 votes. However, as Utsunomiya won a majority in 42 associations, a second poll was called on Wednesday, in which Utsunomiya bested Yamamoto by 9,720 votes to 8,284, winning in 46 associations.

All 28,700 or so lawyers in Japan had voting rights in the presidential election, with a turnout rate of 63.19 percent. Currently, about 60 percent of the nation's lawyers belong to either one of the three major bar associations in Tokyo or the one in Osaka, and the candidates supported by the major parties in these associations had always won the presidential elections. However Yamamoto, who despite gaining the backing of the four associations in the latest campaign, failed to win a majority in Osaka in the second vote.

A native of Ehime Prefecture and a member of the Tokyo Bar Association, Utsunomiya started his career as an attorney in 1971. He is a leading expert in consumer affairs, and serves as an acting general manager for the JFBA task force for multiple debt issues, as well as a director of a support group for victims of crimes committed by Aum Shinrikyo cult members. He will be officially appointed as the new president in April and lead the federation for the next two years.

This latest development will make it difficult to pursue further deregulation of *bengoshi*, and the legal profession more generally ('unification of the profession' or *hoso ichigen* in its broadest sense).⁹⁸⁾ That in turn will have a large impact on reform issues such as the expansion of private ADR, as well as the new Law Schools which are already struggling with a National Legal Examination pass rate of only 30 per cent compared to the 70-80 per cent envisaged by the JRC.⁹⁹⁾

98) See para 7-230 of K Ishida and V Taylor, 'The Legal Profession of Japan' in Luke Nottage (Exec Ed), *CCH Japan Business Law Guide* (Singapore, CCH Asia, 2008).

99) Luke Nottage, 'Interpreting the Results of Japan's first National Legal Examination' (18 October 2006) <http://sydney.edu.au/law/anjel/documents/ResearchPublications/Results_of_Japans_first_National_Legal_Examination.pdf> (accessed 3 August 2010).

11. Will Privately-Supplied ADR Keep Growing in Japan?

(17 March 2010)

The shift since the 1990s in the self-image of many *bengoshi* lawyers outlined above,¹⁰⁰ underpinned also by the slowly changing nature of their work generally as well as the emergence of corporate law firms, helps explain the quite swift enactment of the 2004 *Law to Promote the Use of Out-of-Court Dispute Resolution Procedures*,¹⁰¹ driven also by a Judicial Reform Council (JRC) recommendation in 2001.¹⁰² After a slow start, the Law also seemed to be gaining some traction in promoting privately-supplied ADR services.

However, Court-annexed mediation and recent improvements in the litigation process itself leave a formidable competitor. And the conservative backlash among *bengoshi* in electing their new JFBA President is likely to further dampen the emergence of private ADR services and institutions. Especially now, that only seems probable if and when private suppliers develop niche markets like more facilitative (not evaluative) forms of ADR — a characteristic of ADR in Australia that has impressed ANJeL's Visiting Professor Tatsuya Nakamura — and if litigation costs balloon like they have in countries like Australia.¹⁰³

Out of the reform debates regarding the 2004 Law, the view did emerge that promoting ADR, not just better court procedures, was consistent with the rule of law — the ultimate aim of judicial sector reform. ADR could complement court proceedings if it could help bring disputing parties closer together 'in the shadow of the law' cast by an improved system of courts (and, of course, predictable substantive law). ADR could also advance the vision of the JRC (and the government more generally) of more informed and active citizens, taking greater responsibility for their own actions rather than relying passively on guidance from public authorities.

A second debate that emerged, particularly within the Study Group set up in late 2001 to propose concrete elements of the new legislation to promote ADR, was whether ADR providers should be licenced, certified or completely deregulated.¹⁰⁴

Ultimately, although not mentioned by the JRC recommendations, the Group and the Law provided a MoJ certification scheme. The rationale was that this was needed to promote public trust in ADR, given already the active use of Court-annexed conciliation on the one hand, and on the other the continuing involvement of *yakuza* gangsters and other undesirable providers of dispute resolution 'services' in Japan. This view prevailed over those who argued

100) See Part 10.

101) Law No 151 of 2004. Translation available at 'Japanese Law Translation', above n 33.

102) The Justice System Reform Council, 'Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century' (12 June 2001) <http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html> (accessed 3 August 2010).

103) See his columns in Japanese reproduced at ANJeL, 'ANJeL Research Publications' <http://sydney.edu.au/law/anjel/content/anjel_research_pub.html> (accessed 3 August 2010).

104) For both debates and the following summary of the outcomes, see Aya Yamada, 'ADR in Japan: Does the New Law Liberalize ADR from Historical Shackles or Legalize It?' (2009) 2 *Contemporary Asia Arbitration Journal* 1 at 15-16.

that liberalisation would have been more consistent with the goal of promoting private ADR and the broader deregulatory program of the government. Liberalisation was also seen as too much of a shift from the starting point, which was close to licencing: Art 72 of the *Lawyers Law* (criminally) prohibited legal services provided other than by *bengoshi* except when (i) not offered on a (continuing) business basis, (ii) a legitimate act, or (iii) other legislation provided differently.¹⁰⁵⁾

The Law's certification scheme represented a compromise aimed to placate *bengoshi* by coming within exception (iii), while appealing to those sceptical about too much government control over the ADR services industry. It offers a 'carrot' (to encourage certification by ADR providers) rather than using a 'stick' (forcing providers to get licenced before they provide services). Providers do not need to become certified, although then there is a risk that they may violate the *Lawyers Law* unless they fit within another exception to Art 72. But if they do get certified, they obtain three specific advantages:

- If their procedure ends without the parties settling and one sues within a month, the prescription period is calculated as if the suit had been brought on the date the claim was filed with the certified ADR procedure (Art 25);
- If a suit is pending but parties agree to use the certified procedure or it is already underway, the court may suspend litigation proceedings for up to four months (Art 26; compare court-annexed conciliation, where there is no time limit);
- Parties can elect to use certified ADR instead of the court-annexed system (Art 27) if other legislation requires conciliation before litigation (for example, land or building rent disputes under *Civil Conciliation Law* Art 24-2(1) or divorces under the Domestic Relations Adjudication Law — *kaji shimpan ho*).¹⁰⁶⁾

Certification also provides the more diffuse benefit or marketing point of showing the public that the private institution (or individual) has fulfilled minimum standards detailed in Art 6, and is not disqualified under Art 7 (for example, a *yakuza* member). These standards are mostly procedural (for example, it must clarify a standard process from commencement to termination, including notices and grounds for termination), and mostly consistent with international standards (for example, ISO 10003, but not including a confidentiality requirement).

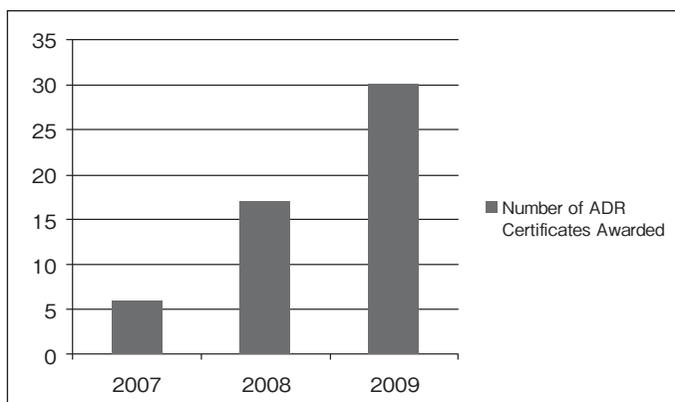
After a slow start (only 5 by November 2007) there has been an almost exponential growth in certified ADR providers (26 by January 2009 and 61 by March 2010).¹⁰⁷⁾ Of the current 61 institutions, 4 are local Bar Associations but 9 are local Judicial Scriveners

105) Law No 87 of 2005.

106) Law No 222 of 1951.

107) See, in Japanese, '*Kaiketsu Sapoto Ichiran* [Resolution Support Synopsis]' <<http://www.moj.go.jp/KANBOU/ADR/jigyousya/ninsyou-index.html>> (accessed 3 August 2010) and my graph below compiled thanks to ANJeL Assistant Glenn Kembrey.

Associations (many *shihoshoshi* being engaged now, for example, in resolving consumer credit disputes) and one is the Tokyo Administrative Scriveners Association.



There is no comprehensive data on whether certification has led directly to much more filings and cases being resolved through these providers of ADR (which the Law defines as processes to encourage settlement, thus excluding arbitration from its scope). Anecdotal evidence suggests that this has not yet occurred, and that public knowledge and trust remains lower than for court- or government-administered ADR. However, businesses do seem to be settling cases more often at an earlier stage through the certified bodies (or even in direct negotiations) because they wish to avoid the more formalised mediation process.¹⁰⁸⁾

A second effect is a growing diversification in ADR providers. Many certified are smaller and/or newer bodies specialising, for example, in labour or social security related disputes. The Japan Industrial Counselors Association also adopts a more facilitative style of mediation, in contrast to Court-annexed (and even Bar Association Centre) evaluative mediation. (Others like the JCAA or the Sports Arbitration Centre have obtained certification with the goal of expanding their services to include mediation.) Other government agencies have become more interested in privately-supplied ADR. For example, METI in 2008 allowed those certified under the MoJ to obtain further METI certification to become involved in mediations under the Law on Special Measures for Industry Revitalisation.

Thirdly, due to the certification standards the providers have started to become more conscious about the need for transparency and structure in designing and implementing their various dispute resolution processes. For example, in the industry-association based PL ADR Centres for consumers' product defect related claims (two of which are now certified), many cases have been resolved without proceeding to a cheap but formal mediation thanks to Centre staff engaged in 'shuttle diplomacy' (often by free-dial phone or by exchange of

¹⁰⁸⁾ See Yamada, above n 104, pp 20-1, also regarding the following three other likely effects of the Law so far.

documentation).¹⁰⁹ However, now they are more conscious of the need to maintain due process standards (including confidentiality, adopted voluntarily by the Centres) even at this stage.

Lastly, networking is emerging among ADR providers. For example, the (certified) Osaka Bar Association tries to work in with other providers, as do now some of the *Hoterasu* offices. Mediators registered under the Civil Conciliation Law are also starting to up-skill through training offered by private certified ADR providers.

These amount to small but very significant changes, underpinned by earlier attempts from *bengoshi* to become more involved in ADR and in turn likely to reinforce their involvement (although not necessarily so much in Bar Association ADR Centres). However, Court-annexed ADR is extremely well-established due to its long history, public trust in the judiciary, and low cost (with registered mediators so far accepting low wages for the honour and opportunity of serving in Civil Conciliation Law proceedings). Another challenge to (even certified) privately-provided ADR services comes from a further round of reforms to the Code of Civil Procedure, in effect from 2004 (and also reflecting some JRC recommendations).¹¹⁰ This opens more avenues to the courts and may also make it easier to settle disputes within the litigation process. For example, these amendments:

- allow parties to seek opinions from expert advisors before formally lodging suit;
- encourage more use of expert witnesses (*kanteinin*) during proceedings; and
- introduce a system of 'expert commissioners' (*semmon i'in*) who can provide explanations in writing or orally before the parties and, with their consent, even attend settlement conferences to facilitate settlement or attend witness examinations to ask questions.

12. Judicial Education and Training in Japan

(1 April 2010)

To qualify as a lawyer (*bengoshi*) with full rights to give legal advice and represent clients — and also to be appointed as a senior court judge or public prosecutor — candidates must pass the National Legal Examination (*shiho shiken*), and then be trained at the Legal Research and Training Institute (LRTI). University legal education still takes place primarily at the undergraduate level. Every year, about 45,000 students graduate with a Bachelor of Laws. However, most of them do not become lawyers, instead finding employment in governmental organs or private corporations, because it has been extremely difficult to pass the National

109) See also my paper with Yoshitaka Wada, 'Japan's New Product Liability ADR Centers: Bureaucratic, Industry, or Consumer Informalism?' (1998) 6 *Journal of Japanese Law* 40, also available at <<http://ssrn.com/abstract=837965>> (accessed 3 August 2010).

110) See Luke Nottage, 'Civil Procedure Reforms in Japan: The Latest Round' (2005) 22 *Ritsumeikan University Law Review* 81, available at <<http://ssrn.com/abstract=837864>> (accessed 3 August 2010).

Legal Examination. In 2004, while more than 40,000 people took the Examination, less than 1,500 examinees passed. The number of successful examinees is intentionally limited. The number was 500 in 1990, then gradually increased to 1,000 in 2000, and to around 1500 in 2004. It was expected to rise to around 3,000 per annum in 2010, as part of a broader program of judicial reforms underway since 2001, but the recent election of a new President for the Japan Federation of Bar Associations now makes this very unlikely.¹¹¹⁾

Another aspect of the agenda advanced by the Judicial Reform Council (JRC) related to the training of prospective legal professionals was the inauguration of 68 new postgraduate 'Law Schools' from April 2004. However, although it is easier for their (carefully selected) students to pass a 'New Legal Examination' (*shin-shiho shiken*), it remains one of the most difficult in Japan — with a pass rate of about 30 per cent. The old *shiho shiken*, which could be attempted without any university degree, has been gradually phased out to allow the new Law Schools to get established, although (as recommended by the JRC in 2001) a small new scheme will be introduced to allow those unable to afford Law School to still qualify to become a *bengoshi*, prosecutor or Judge.

But what happens after this Examination and when one joins the almost 3,000-strong judiciary in Japan? Judicial training is comparatively under-researched.* First, all those who have passed the Examination receive the same further but more practical legal training at the LRTI, administered by the Supreme Court and funded out of the judiciary's budget. The five courses taught in this Division of the LRTI comprise criminal and civil litigation (*keiji* and *minji saiban*, both taught by judges and concentrating on *yoken-jijitsu-ron* or what facts have to be alleged proven to make out claims), prosecutions (*kensatsu*, taught by prosecutors), civil and criminal law practice (*minji* and *keiji bengo*, taught by *bengoshi*). Trainees receive a government stipendium and subsidised accommodation, as well as externships in lawyers and prosecutors offices as well as a court. The rises in numbers of those passing the Examination each year over the last decade have been paralleled by reductions in the period of overall training at the LRTI, from 24 to 12 months.

The style of LRTI instruction is very much based on court-related work, especially litigation techniques and judgment-writing. It retains remnants of the pre-War orientation towards training to become judges (or prosecutors, who were then considered equal or even superior to judges). This is despite the large proportion of judicial work involved in settling cases, rather than rendering formal judgments. It also goes against the reality that around 80 per cent of LRTI graduates proceed into private legal practice, which is steadily involving more transactional legal work. Moreover, from the late 1960s some of the brightest graduates

111) See Part 10.

* For Australia, see James Douglas and Luke Nottage, 'The Role of Practice in Legal Education: National Report for Australia' (2010) 27 *SCIL Working Paper* at <http://sydney.edu.au/law/scil/documents/2010/wp_no_27_Role_of_Practice_In_Legal_Ed.pdf> (accessed 9 August 2010). I also thank Associate Judge Yoshinori Hashiguchi, ANJeL Judge-in-Residence in Sydney over 2009-2010, for some of the data on Japan summarised here; but the views expressed here remain solely my own.

began declining offers to work as judges upon graduation.¹¹²⁾ Recently, Tokyo's now very large law firms have become even more attractive career options.¹¹³⁾

Once graduates have decided on their career path, there is still very little lateral movement. The Courts Law has long provided that *bengoshi* or prosecutors can be appointed as judges, but there has been almost no exchange. One very limited exception has been the re-appointment as judges of prosecutors 'loaned' from the Courts to the Ministry of Justice, usually for 2-3 years.¹¹⁴⁾ Another is the appointment of *bengoshi* as full-time judges, since the Supreme Court changed its policy due to increasing pressure from the JFBA. However, no more than five were appointed this way each year through the 1990s. Somewhat more have been so appointed following the JRC recommendations, but the numbers remain low — ranging between 4-10 yearly over 2003-9.¹¹⁵⁾ A further recent development has been the appointment of *bengoshi* as part-time judicial officers (called *chotei-kan*) empowered to conduct civil or domestic relations conciliation procedures with the same level of competence as a judge. They are appointed from among attorneys who have practical experience of five or more years, and 237 were so appointed over 2004-9.

The few who are appointed to the judiciary from among *bengoshi* will have received some ongoing Continuing Legal Education, administered through Bar Associations, although this too is a recent and quite limited development. Those who pursue a career as a judge upon graduation from the LRTI are dependent on ongoing education administered by the Supreme Court. The Court itself organises various seminars or longer conferences (for example, two *jitsumu kyogikai* in 2009), usually to encourage — but not, at least formally, to force — more unified practices among lower courts dealing with pressing socio-legal issues (for example, traffic accidents from the 1960s). The LRTI also offers a few such conferences (collectively called *sogo bunya kenkyukai*: one of the two in 2009 was for judges seconded as professors to the new Law Schools). The LRTI offers more area-specific Seminars over two to three days (*saiban bunya betsu kenkyukai*: 19 in 2009), with numbers of attendees similarly capped at 20-40 judges each. Usually each lower court or Division within larger ones gets funding to send a judge to attend such events, meaning that judges — especially younger ones — do not get the opportunity to attend them very often.

In addition, through the LRTI the Supreme Court arranges six induction courses (*shokumu donyu kenshu*) especially for newly appointed judges (for example, for one week immediately after graduation from the LRTI and before commencing work in the courts; four days after

112) See Yasuhei Taniguchi, 'Reflections and a Personal Memoir' in Harry Scheiber and Laurent Mayali (eds), *Emerging Concepts of Rights in Japanese Law* (Berkeley, UC Berkeley — Robbins Collection, 2007), p 23.

113) See Curtis Milhaupt and Mark West, *Economic Organizations and Corporate Governance in Japan: The Impact of Formal and Informal Rules* (Oxford University Press, Oxford, 2004).

114) See Nottage, above n 28.

115) See, in Japanese, 'Saibankan ni Narimasen ka? [Would you like to be a judge?]' <http://www.toben.or.jp/news/libra/pdf/2009_11/p02-16.pdf> (accessed 3 August 2010).

three years of judging; three days after 10 years and promotion from Associate to Full Judge; also three days for those few judges appointed from among *bengoshi*). There are also some separate induction courses and ongoing CLE Seminars specifically for Summary Court judges (five in 2009).

All such official judicial training is conducted internally; in general judges cannot get funding to attend conferences or educational events hosted by other organisations such as the JFBA. However, the Supreme Court does arrange for some short-term study tours (*hakengata kenshu*). In 2009 there were two to media organisations (newspaper companies and the national broadcaster NHK — for 16 full judges), three to private companies (Tokyo, Osaka, Nagoya — for 24 full judges), and two to a university or technology institute to get IP-related training (three judges, one for three months rather than two weeks). This program offers one-year secondments by full and especially associate judges to the Bank of Japan (one) and private companies (nine judges), with the Supreme Court covering their salaries and some further expenses.

Lastly, the Court organises a growing number of other long-term secondments. One longstanding example is to the MoJ as *shomu kenji* (10 planned for 2010), where over two to three years the judges obtain new perspectives on legal practice and the workings of government by helping represent it in administrative and civil cases. Others go to the MoJ to assist with other work such as law reform initiatives over two to three years (10 in 2010). Another established practice is secondment directly to the Tokyo District Prosecutors Office for 2 years (a few judges, having at least five years' experience). All these judges resign and get appointed as prosecutors (*kenji*), then get reappointed when rejoining the courts. So do almost all judges who are seconded to other Ministries or government agencies (a few each and also for two years in principle, although some of these also simultaneously have another status (for example, Tribunal Member or *shinpankan* if working in the Japan Fair Trade Commission). This includes the Foreign Ministry and its missions overseas, and usually another judge is seconded to JICA or the MoJ to assist them with legal technical assistance projects abroad. Around 30 associate judges do a year's research based at courts or universities outside Japan (for example, in 2009: 9 out of 29 to Europe, 16 to the US, and two each to Australia and Canada). A few judges are usually seconded also to the House of Representatives' or Cabinet's Legal Affairs Division (*hoseikyoku*) or to the Social Insurance Agency (*shakai yokin hoken kiko*), and one to the Keidanren's 21st Century Policy Institute think-tank.

The gradual diversification of such secondments is also evident in placements now to private law firms (about 10 judges for 2010). They become registered as *bengoshi* for the two years, but also remain Court Officials (*saibansho jimukan*). Associate judges (and prosecutors) have been allowed this possibility since legislation was enacted in 2004 pursuant

to JRC recommendations.¹¹⁶⁾ The aim, especially for these newer programs, is to broaden the judges' horizons at an early career stage, and help them to be more adaptable and interactive — traits increasingly seen as valuable for judges in the post-JRC context of greater popular participation in the judicial system. And lastly, although no data is readily available, hundreds of judges now teach full-time or especially part-time in Japan's new postgraduate Law Schools around the country.

13. Arb-Med and New International Commercial Mediation Rules in Japan

(21 July 2009)

A recent issue of the Japan Commercial Arbitration Association (JCAA) Newsletter is largely devoted to these topics.¹¹⁷⁾ Sydney Law School and ANJeL are privileged to host not only one of Japan's doyens in ICA (and other cross-border dispute resolution, especially WTO procedures), Professor Yasuhei Taniguchi (over July-August 2009).¹¹⁸⁾ We also welcome (over September 2009-March 2010) Kokushikan University Professor Tatsuya Nakamura, a leader of Japan's 'new generation' of arbitration specialists who heads JCAA's Arbitration Department.

They have already got me thinking further about Arb-Med (arbitrators encouraging parties to settle their dispute), in the context also of interesting new JCAA Rules focused more specifically on Mediation.¹¹⁹⁾ Both developments are important for Australia, presently reviewing its legislative and institutional framework for international commercial arbitration (ICA), as well as for many other Asia-Pacific countries intensely interested nowadays in efficient mechanisms to resolve cross-border disputes.¹²⁰⁾

In the Newsletter, Professor Nakamura presents an intriguing preliminary study of Arb-Med, which parties agreed to try in 48 (40 per cent) out of 121 JCAA arbitrations that proceeded over 1999-2008.¹²¹⁾ About half (25 or 52 per cent) of these attempts resulted in a settlement agreement (with 18 then recorded as a 'consent award'), and involved terms proposed by the arbitrator(s) (28 or 58 per cent). In most cases (37 or 77 per cent), the arbitrators attempted settlement after all evidence had been presented, suggesting that they

116) See, in Japanese, <<http://www.kantei.go.jp/jp/singi/hourei/hanjiho.html>> (accessed 1 April 2010).

117) JCAA Newsletter (July 2009) No 22, available at <<http://www.jcaa.or.jp/e/arbitration-e/syuppan-e/newslet/newslist.html>> (accessed 3 August 2010).

118) See ANJeL, 'ANJeL Visiting Academics Scheme' <http://sydney.edu.au/law/anjel/content/anjel_people_vis.html> (accessed 3 August 2010).

119) Luke Nottage, 'Arb-Med in Australia: The Time has Come' (2007) 5 *Australian ADR Reporter (Chartered Institute of Arbitrators — Australian Branch)* 18, also available at <http://sydney.edu.au/law/scigl/2007_docs_pdfs/ArbMed.pdf> (accessed 3 August 2010).

120) Luke Nottage, 'Australia's Less Lethargic Law Reform? International Arbitration in the Asia-Pacific' (19 April 2009) <http://blogs.usyd.edu.au/japaneselaw/2009/04/australias_less_lethargic_law.html> (accessed 3 August 2010).

121) JCAA Newsletter, above n 117, pp 10-12.

adopted an ‘evaluative’ rather than ‘facilitative’ style to mediation. Attempts were particularly common among arbitrators with civil law rather than common law backgrounds, with the former almost being mostly Japanese. Professor Nakamura suggests that the background of the parties themselves did not seem so important, however, because in the 7 out of 48 cases (15 per cent) where at least one party was from a common law background, those parties did not oppose the arbitrators’ attempt to settlement.

I do have some doubts first about that last generalisation, as the parties in those 7 cases may be unrepresentative. Specifically, we should examine the background of the 73 cases where Arb-Med was not even attempted. If there is a considerable number of cases where parties are from a common law background, it could be that arbitrators did not suggest Arb-Med because they felt (rightly or wrongly) that they might be rebuffed. So we could infer that party background can be significant after all.

Secondly, I would be interested to know more about the background of the parties’ legal advisors (especially outside counsel). For example, in the 7 cases where the parties didn’t oppose Arb-Med overtures, did the common law background parties engage civil law (especially Japanese) lawyers? I would expect English lawyers to be the most reticent about Arb-Med. Even more so than American lawyers, who not only have longer familiarity with ADR even in connection with court proceedings (since the 1980s), but also are trained in a less formalist variant of the common law (reflected also in less objection, for example, to the *lex mercatoria*¹²²).

Thirdly, have Arb-Med attempts have been increasing over this ten-year period? Professor Taniguchi, in private conversation, has a sense that instead they may have been decreasing. Indeed, Professor Nakamura himself downplayed the tendency for Arb-Med to occur in JCAA arbitrations when writing in an article published in 2001.¹²³ This was partly in justifiable reaction to some continued critiques about various allegedly distinctive features of JCAA arbitrations (including by one of my former University of Sydney students¹²⁴). Leading Japanese arbitrators like Professor Taniguchi had also publically questioned whether Arb-Med was appropriate for international arbitrations in Japan, at least at this stage of its development, despite renewed advocacy for this hybrid procedure advanced by other leaders such as Professor Toshio Sawada.¹²⁵ But there is growing evidence that costs — even more

122) See Luke Nottage, ‘Practical and Theoretical Implications of the *Lex Mercatoria* for Japan: Central’s Empirical Study on the Use of Transnational Law’ (2000) 4(2) *Vindobona Journal of International Commercial Law and Arbitration* 132, also available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=880388> (accessed 3 August 2010).

123) Tatsuya Nakamura, ‘Continuing Mis-conceptions of International Commercial Arbitration in Japan’ (2001) 18(6) *Journal of International Arbitration* 641.

124) Russell Thirgood, ‘A Critique of Foreign Arbitration in Japan’ (2001) 18(2) *Journal of International Arbitration* 177.

125) See Luke Nottage, ‘Japan’s New Arbitration Law: Domestication Reinforcing Internationalisation?’ (2004) 7 *International Arbitration Law Review* 54, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=838025> (accessed 4 August 2010), with further references.

so than delays, perhaps — are re-emerging as a major problem in ICA world-wide.¹²⁶⁾ And so the winds may be shifting in Japan too — towards more positive assessments and usage of measures like Arb-Med that promise greater efficiencies in cross-border dispute resolution.

Fourthly, however, it would be helpful to know more about a key issue in current debates world-wide about Arb-Med: whether or how the arbitrators might meet separately with each party ('caucusing'). As I have previously mentioned, experts from European civil law jurisdictions (let alone the Anglo-Australian variant of the common law tradition) generally remain skeptical about this, due to concerns about natural justice and (apparent or actual) bias tainting the arbitrators.¹²⁷⁾ By contrast, Professor Nakamura tells me that caucusing is very widely used in JCAA Arb-Med. (Similarly, this tends to occur in civil litigation before Japanese judges — unlike for example German judges, who actively encourage settlement but in open session.)

I don't have so much problem with caucusing when combined with a more facilitative approach to mediation, for example, rephrasing and relaying one party's argument to the other where parties have become too emotional or otherwise incapable of understanding what the other side is saying or proposing. I am also open to caucusing when, for instance, the parties have basically resolved major issues and only want Arb-Med to settle some remaining minor points. But I do have reservations when major issues and amounts are at stake. There can be a temptation for the arbitrator to indicate privately to one party that the other will settle within a particular range (even if the latter hasn't really made that clear), and vice versa, in achieve a settlement. At least, a suspicion that this has occurred can arise, and it cannot easily be tested afterwards because of confidentiality obligations during the Arb-Med process.

For such reasons and others, like CEDR I still prefer 'no caucusing' as the starting principle.¹²⁸⁾ And perhaps, if parties do get invited to caucus, they should be required to get separate professional legal (and practical) advice about such additional risks, as well as its possible benefits. They might then decide, for example, to allow caucusing but only in a more 'facilitative' style by the arbitrators, requiring the latter to try more 'evaluative' Arb-Med (for example, proposing specific settlement terms or ranges) only in open session. Another possibility might be to allow one arbitrator to caucus in a more evaluative style, but retain a panel of three arbitrators to issue an award if settlement did not eventuate.

Interestingly, a commentary in the Newsletter by Mark Goodrich and Christopher Hunt regarding JCAA's 'New International Arbitration Commercial Mediation Rules' quotes

126) Luke Nottage and Richard Garnett, 'The Top Twenty Things to Change in or around Australia's International Arbitration Act' in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, Sydney, 2010), earlier version also available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1378722> (accessed 3 August 2010).

127) See Part 14.

128) CEDR is the Centre for Effective Dispute Resolution. See 'The CEDR Commission on Settlement in International Arbitration' <http://www.cedr.com/about_us/arbitration_commission/index.php> (accessed 3 August 2010).

Professor Nakamura as believing ‘that lawyers be ideal candidates to be evaluative mediators but that more focus should be placed on training facilitative mediators, as the skills required for that approach are more subtle’.¹²⁹⁾ On the other hand, they report that the first mediation under these Rules (in mid-March) involved an evaluative approach, with ‘the two days of the mediation meeting ... filled by oral submissions and questions from the panel of three mediators’.¹³⁰⁾ This suggests that little or no caucusing took place, or at least that it could be a realistic option for parties to cross-border disputes even in ‘pure’ mediation settings.

In other words, these new Mediation Rules could be used either as a more facilitative manner, leaving subsequent arbitrations to allow the possibility of more evaluative Arb-Med (with or even without caucusing). Or instead the new Rules could be used to have an evaluative-style mediation, possibly not even involving caucusing — although Rule 9.5 creates a default rule allowing it (subject to any contrary party agreement, however, as mediation naturally is rooted in consent).

Either way, however, it is important to note that Rule 8 allows a mediator subsequently to sit as an arbitrator simply ‘if the parties so agree’. Goodrich and Hunt argue that this differs from mediation rules for the ICC and SCC (Stockholm Chamber of Commerce), ‘where the starting assumption is that this should not happen’.¹³¹⁾ They also contrast HKIAC Mediation Rule 14, prohibiting the mediator from later becoming the arbitrator even if parties so agree. (Presumably, if parties wish this they should instead commence arbitration, then allow Arb-Med but subject to the provisions of the Hong Kong *Arbitration Ordinance* — although in practice those Arb-Med provisions apparently are hardly ever used.)

I would also add that JCAA Mediation Rule 8 seems to allow even oral agreement. But if Japan’s *Arbitration Act 2003* applies then agreement triggering the subsequent arbitration does have to be in writing (Japan has not adopted the revised UNCITRAL ICA Model Law variant that permits purely oral agreements¹³²⁾) and arbitrator selection is anyway usually done by writing. By contrast, if the arbitration commences first, the Act requires any Arb-Med to be recorded in writing (unless — perhaps even orally! — the parties dispense with that writing requirement).

An even more important feature rightly highlighted by Goodrich and Hunt is JCAA Mediation Rule 11: if parties agree to settle, they can appoint the mediator as arbitrator to issue a consent award. They question whether the 1958 New York Convention regime will enforce ‘the somewhat artificial “award” as in this case’.¹³³⁾ However, they note that SCC Mediation Rule 11 has a similar provision. But I would point out that the latter’s effectiveness has been criticised too.¹³⁴⁾ For this reason too, it may be better to begin with

129) JCAA Newsletter, above n 117, p 10.

130) Ibid, p 7.

131) Ibid, p 8.

132) See ‘UNCITRAL’ <<http://www.uncitral.org>> (accessed 3 August 2010).

133) JCAA Newsletter, above n 117, p 8.

134) Christopher Newmark and Richard Hill, ‘Can A Mediated Settlement Become An Enforceable 

an arbitration, then allow (in writing) Arb-Med under specified conditions (such as ‘no caucusing’). Indeed, parties could require the arbitrator to attempt settlement well before the evidentiary phase. This would also maximise the potential for time and cost savings, a major attraction of the new JCAA Mediation Rules.

That alternative would also avoid a third interesting feature: Rule 7.3 requires the mediator to ‘be independent in principle’ but remain always ‘impartial’ (although Rules 7.4 and 7.7 refer to ‘independence or impartiality’ in connection with the mediator’s disclosure requirements). By contrast, JCAA Arbitration Rule 28.1 demands both independence and impartiality of arbitrators. (Further, Article 5.4 of the 2002 UNCITRAL Model Law on International Commercial Conciliation encourages appointment of mediators who are both independent and impartial.¹³⁵)

A final caveat highlighted by Goodrich and Hunt is that the confidentiality obligation in Mediation Rule 12.3 does not expressly cover all information disclosed in the mediation, and so may not extend to all documents produced during those proceedings.¹³⁶ I would contrast Arbitration Rule 40.2, which refers to all ‘facts’ relating to the arbitration). That formulation could be another reason to chose arbitration but with additional consent to Arb-Med (pursuant to Arbitration Rule 47, and as allowed by Article 38.4 of the Japanese Act).

However, the alternative is to use the new JCAA Mediation Rules, trying to circumvent these issues as much as possible through further party agreement varying relevant rules or clarifying more precisely what is expected (and allowed) regarding the mediator. The Rules will also be useful for other arbitral institutions interested in updating their own rules on international mediation. For example, ACICA has an official ‘panel of mediators’ — albeit currently with only one person listed¹³⁷ — but its mediation rules are still based quite closely on the 1980 UNCITRAL Conciliation Rules. JCAA’s new Rules are also very welcome, especially when considered alongside the innovative study on Arb-Med by Professor Nakamura, for the growing number of other dispute resolution organisations and experts world-wide interested in developing best practice for arbitrators facilitating settlement.

14. International Investment and Commercial Arbitration in Australia and Japan: Shared Challenges, Different Solutions?*

(20 July 2009)

Australia and Japan face a remarkably similar challenge. Few international arbitrations have

↘ Arbitration Award?’ (2000) 16 *Arbitration International* 81.

135) The Model Law is accessible via UNCITRAL, above n 132.

136) JCAA Newsletter, above n 117, p 8.

137) See <http://www.acica.org.au/panel_mediators.html> (accessed 21 July 2009).

* This is an outline of my presentation at the International Investment Treaty Law and Arbitration conference held at Sydney Law School over 19-20 February 2010: see <<http://sydney.edu.au/news/law/457.html?eventcategoryid=37&eventid=430>> (accessed 4 August 2010).

their seat in either country, despite various initiatives undertaken over the last decade or two.¹³⁸⁾ Both Australia and Japan probably need to adapt quite radical measures to overcome remaining barriers to attracting international arbitration activity to their respective shores. This shared problem is serious not just because their arbitrators, lawyers, institutions or local economies miss out on business — after all, at least the arbitrators and lawyers can still earn fees by deploying their skills in arbitrations further abroad. The problem is serious also because low levels of international arbitration activity in both countries limit the potential to develop domestic arbitration, ADR more generally, and indeed effective civil procedure.

Despite the shared challenge, however, quite radical solutions for each country may differ somewhat. Expedited arbitration procedures may be a particular selling point for Australia, but not Japan. Caucusing in Arb-Med may work in Japan, but not Australia. And Japan may have more scope than Australia to develop international arbitration through a ‘whole-of-government’ approach that promotes investment arbitration provisions, for example, even in treaties with other developed countries.

Few international arbitrations in either country persist despite, firstly, striking differences in background ‘general culture’ (predominantly British/Irish in Australia, plus diverse immigrant groups particularly since the 1970s¹³⁹⁾); and, arguably more importantly, in ‘legal culture’ (the strict English variant of the common law in Australia; a considerable Franco-German civil law legacy in Japan). This makes it harder to advance a straightforward ‘culturalist’ (or ‘Asian Values’) explanation for low levels of arbitration activity.¹⁴⁰⁾ That becomes even more questionable in light of empirical evidence that Japanese corporations quite frequently appear before arbitral institutions (and even national courts) outside Japan, and regularly include arbitration clauses in their cross-border contracts.¹⁴¹⁾ More anecdotal evidence suggests the same for Australian corporations. They often use arbitration too, but the seat still tends to be located abroad — albeit perhaps increasingly in other parts of the Asia-Pacific, not just held in the traditional European or US ‘core’ of the arbitration world.

There are also problems with a second explanation sometimes given for low levels of arbitration and litigation activity within Japan, and potentially elsewhere — including therefore Australia. An ‘economic rationalist’ paradigm focuses instead on predictability of substantive law (and, by extension, procedural law). If the outcomes (and processes) are reasonably certain, parties will not persist with the formal proceeding. Instead, they will negotiate out or mediate the dispute, thus jointly saving the costs involved. This theory may help explain why the US, in particular, has quite a lot of domestic arbitration activity

138) Nottage, above n 125.

139) Luke Nottage, ‘Multicultural Japan? Policy, Law and Society’ (26 June 2009) <http://blogs.usyd.edu.au/japaneselaw/2009/06/multicultural_japan_policy_law.html> (accessed 4 August 2010).

140) Abe and Nottage, above n 93.

141) Toshimitsu Kitagawa and Luke Nottage, ‘Globalization of Japanese Corporations and the Development of Corporate Legal Departments: Problems and Prospects’ (2006) *Sydney Law School Research Paper No 06/46* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=837906> (accessed 4 August 2010).

— parties wish to avoid the uncertainties of jury trials and so on even in civil trials. But it doesn't explain why Japan has low levels of domestic arbitration, despite more much more predictable court processes. The theory becomes even more intractable when extended to international arbitrations, in an attempt to explain few cases with their seat in Japan or Australia.

This leaves a third explanation, also derived originally from literature comparing civil litigation rates. 'Institutional barriers' dissuade parties from choosing Japan or Australia as the seat for their arbitrations.¹⁴²⁾ For example, court costs and legal fees in Japan are quite reasonable; unlike judges, arbitrators are not subsidised by the state. Initially it was uncertain whether even 'foreign law solicitors' resident in Japan could represent clients in international arbitrations. There were also concerns about the skills of *bengoshi* lawyers and of Japanese arbitrators in international arbitration. And Japan's arbitration legislation dated back to 1898.

Yet the legislature clarified the foreign lawyers issue in 1996, and in 2003 enacted an Arbitration Act based on the UNCITRAL Model Law (admittedly, in the context of broader reforms that simultaneously made civil litigation more attractive as well).¹⁴³⁾ Australia resolved both issues in 1989, although its *International Arbitration Act* was reviewed from late 2008 and court decisions have been less pro-arbitration than those of Japanese courts (especially when enforcing foreign arbitral awards).¹⁴⁴⁾ Both Australia and now Japan also have an emerging 'new generation' of arbitration law experts — lawyers, arbitrators and professors.

Do these recent parallels therefore suggest that international arbitrations will increase significantly in both countries? This paper suggests that this is unlikely, unless some fairly radical measures are taken. One reason is that a major barrier remains fairly insurmountable: geography. Why come all the way down to Australia or across to Japan, especially given their limited caseloads so far? Especially now that more convenient venues like Hong Kong and Singapore have attracted much larger caseloads and experience since the 1990s, also boasting quite similar attractions (Model Law based legislation, experts, independent and professional courts supportive of arbitration). All the more so, now that countries like Korea are also devoting significant resources in an attempt to share in some of their success.

A second reason is that the governments in neither Japan nor Australia appear prepared to devote so much time or resources to compete for business in the Asia-Pacific. If they were, we would have expected a much earlier and ambitious set of reforms to international (and domestic) arbitration in Australia. We would also have expected a more flexible approach to have emerged regarding investment treaty arbitration, which has significant synergies with commercial arbitration despite the greater public interests involved.¹⁴⁵⁾ At

142) See generally Abe and Nottage, above n 93.

143) Nottage, above n 125.

144) Nottage and Garnett, above n 126.

145) Luke Nottage and Kate Miles, '“Back to the Future” for Investor-State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests' (2009) 26(1) *Journal of International Arbitration* 25, updated in Luke Nottage and Richard Garnett (eds) *International Arbitration in Australia* (Federation ↗

present, in negotiating BITs and FTAs, it seems that Australia maintains a simplistic position: ‘no investment arbitration provisions with developed countries’.

Japan adopts a more nuanced position in this last respect (for example, including such provisions in its FTA with Switzerland recently), although perhaps because it is often a net capital exporter even vis-à-vis other developed countries. Promoting investment treaty arbitration provisions and reforms may therefore be one way that Japan can develop a somewhat higher profile in international arbitration more generally.¹⁴⁶⁾

But another and more direct way is to take develop a feature of JCAA (and presumably TOMAC) arbitration: a tradition of arbitrators encouraging settlement during the proceedings, especially — according to a recent study by ANJeL Research Visitor Professor Tatsuya Nakamura — if they come from a civil law or Japanese background.¹⁴⁷⁾ However, it seems that almost all such attempts include ‘caucusing’ (arbitrators meeting separately with parties). This is unusual even for civil law arbitrators, at least from the Germanic tradition, and is not recommended in recent international initiatives from the likes of CEDR.¹⁴⁸⁾ So Japan can either revise its practice, or try to turn this ‘caucusing’ feature into a distinctive marketing advantage. The CI Arb in Australia is currently developing Arb-Med rules that do allow for caucusing, but ACICA’s Rules Subcommittee prefers the CEDR approach. Even the latter version of ‘Arb-Med’ will represent quite a radical measure to try to increase Australia’s attractiveness vis-à-vis countries like Singapore and Hong Kong (which do not actively engage in Arb-Med, in fact, despite provisions in their Acts).

A final and quite radical way forward for Australia is to promote Expedited Arbitration. By insisting that an oral hearing is used only exceptionally (Rule 13.2¹⁴⁹⁾), and even then potentially using internet-based videoconferencing, it can overcome the tyranny of distance. By keeping costs down more generally, Australia can distinguish itself from other venues around the Asia-Pacific. On the other hand, Japan may have a comparative advantage in regular proceedings, especially larger-scale and more complex arbitrations. After all, to venture a cross-cultural over-generalisation: the Japanese pride themselves on being meticulous, whereas the Australian ethos is to get the job done quickly — even if this means cutting some corners or not getting it quite right.

↘ Press, Sydney, 2010), Chapter 10.

146) Luke Nottage and Romesh Weeramantry, ‘Investment Arbitration for Japan and Asia: Five Perspectives on Law and Practice’ (March 2009) *Sydney Centre Working Paper* No 21 <http://sydney.edu.au/law/scil/documents/2009/SCILWP21_NottageWeeramantry.pdf> (accessed 4 August 2010).

147) See JCAA Newsletter, above n 117.

148) See CEDR, above n 128.

149) Accessible via ACICA’s website at <<http://www.acica.org.au/>> (accessed 4 August 2010).

15. International Commercial Arbitration Reform in Australia, Japan and Beyond

(12 July 2010)

Australia's long-awaited *International Arbitration Amendment Act 2010* (Cth) received Royal Assent on 6 July, after the Senate agreed on 17 June to the Bill introduced to the House of Representatives on 25 November 2009 as revised by the federal Government itself on 17 March 2010.¹⁵⁰ The *International Arbitration Act 1974*, as thereby amended ('amended IAA'), is set in broader context by the first book devoted to this important field of dispute resolution ('DR') law and practice.¹⁵¹

This eleven-chapter work adds a Preface from NSW Chief Justice Spigelman, a powerful proponent of arbitration and broader access to justice as well as judicial exchange with Japan.¹⁵² It is partly dedicated to Professor Yasuhei Taniguchi, one of my inspiring former teachers at Kyoto University in the early 1990s and a Distinguished Visitor to Sydney Law School over July-August 2009.¹⁵³ He is also renowned as a practitioner of international commercial arbitration (ICA), having served for example as arbitrator in an ICC arbitration in Melbourne, as well as a former Judge on the WTO Appellate Body.

The amended IAA brings new promise for ICA in Australia, and may offer lessons for countries like Japan. But Australia can also learn from Japan, especially the thorough way in which it goes about legislative reform.

Australia's IAA was first amended in 1989 by adopting the 1985 UNCITRAL Model Law on ICA (ML), which also forms the core of Japan's *Arbitration Act* of 2003.¹⁵⁴ This ML regime was important in diminishing scope for court intervention in arbitration once agreed by the parties, thus promising greater potential for them to tailor the arbitral process to their particular DR needs. Australia's amended IAA of 2010 goes a step further by largely adopting the 2006 revisions to the Model Law agreed by this United Nations Commission, which includes Australia and Japan as permanent members. These revisions further expand party autonomy, but Japan has yet to follow Australia — and earlier already Florida and

150) See Richard Garnett and Luke Nottage, "The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?" (2011) 7 (1) *Asian International Arbitration Journal* forthcoming.

151) Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, Sydney, 2010). See publication details at <<http://www.federationpress.com.au/bookstore/book.asp?isbn=9781862878051>> and the draft Prelims downloadable at <http://blogs.usyd.edu.au/japaneselaw/prelims_WS14clean.pdf> (both accessed 4 August 2010). The *International Arbitration Act* is available online at Comlaw <<http://www.comlaw.gov.au>> (accessed 4 August 2010).

152) The Honourable JJ Spigelman AC, 'Judicial Exchange between Australia and Japan (28 February 2006)' <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman280206> (accessed 4 August 2010).

153) See Luke Nottage, 'Taniguchi Talk: Does the WTO Really Settle International Trade Disputes?' (1 August 2009) <http://blogs.usyd.edu.au/japaneselaw/2009/08/taniguchi_talk.html> (accessed 4 August 2010).

154) *Arbitration Law* (No 138 of 2003), English translation available at <<http://www.jcaa.or.jp/e/arbitration/civil.html>> (accessed 4 August 2010).

Ireland (with enactments in 2010), Hong Kong (with a Bill proposed in 2009), Mauritius, Peru, Rwanda and Slovenia (enactments in 2008), as well as New Zealand (2007).

The amended IAA, even more so than the 1989 amendments and Japan's 2003 legislation, also adds many extra useful features to the ML core provisions. For example, it sets out detailed provisions on arbitration confidentiality and privacy (ss 23C – 23G), which apply if parties expressly 'opt in' to them. These draw on the New Zealand legislation, although that applies instead on an 'opt out' basis (that is, unless parties agree otherwise). Japan's Act, like the ML, contain no provisions — and therefore guidance for parties, legal advisors and courts — regarding this topic, although confidentiality appears to be particularly valued in the Asian region by arbitration users and practitioners.¹⁵⁵⁾

The amended IAA also now forms the core of Australia's regime for domestic commercial arbitration disputes. In June, based on prior agreement among the states and territories to follow its lead, NSW enacted the *Commercial Arbitration Act 2010* (CAA), modelled also on ML provisions. The new uniform CAAs include extra provisions not found in the more directly ML-inspired IAA, such as review of awards for certain serious substantive errors of law by the arbitrators, which derive from older English legislation and are considered a more appropriate starting point for domestic rather than international DR. However, the CAA still allows parties to opt in to the IAA regime, and thus avoid this extra possibility of supervision by local courts, if that suits their needs for greater finality and speed. (Japan's 2003 Act also basically has the same regime for international and domestic arbitrations, but, for example, excludes labour arbitrations and allows consumers to terminate an arbitration agreement.)

Lastly, the amended IAA offers a platform for a real 'cultural reform' in Australia, as the federal Attorney-General urged at a conference on 4 December 2009:¹⁵⁶⁾

If Australia is to ever emerge as an arbitration centre we need our arbitrators to provide a service that is not available in those seats — something that is more than 'litigation-lite'. We need to invent a form of arbitration that is tailored to the needs of the parties — to the needs of business. A form of arbitration that is prepared to do away with unnecessary formalities and get on with identifying and solving the problem that exists between the parties. A form of arbitration that delivers swift and cost-competitive outcomes. A form of arbitration that is innovative and creative and allows the undoubted talents that exist in the arbitration community to flourish. We need to be able to put

155) Shahla F Ali, 'Approaching the Global Arbitration Table: Comparing the Advantages of Arbitration as Seen by Practitioners in East Asia and the West' (2009) 28(4) *Review of Litigation* 791 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542609> (accessed 4 August 2010).

156) Robert McClelland, 'International Commercial Arbitration in Australia: More Effective and Certain' (4 December 2009) <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_FourthQuarter_4December2009-InternationalCommercialArbitrationinAustraliaMoreEffectiveandCertain> (accessed 4 August 2010).

ourselves forward as the place you come to when you want your problem fixed, and fixed fast and fairly.

However, the amended IAA may not be enough for this or to lead to a significant increase in ICA cases based in Australia, as opposed to the traditional ‘core’ venues (Paris, Geneva, New York and London) and now well-established Asian venues (Beijing, Hong Kong and Singapore).¹⁵⁷⁾ In this sense of persistently low caseloads despite legislative activity and the ongoing growth in ICA filings world-wide, albeit arguably for partly different reasons, Australia and Japan share a common experience.¹⁵⁸⁾ This may not be much of an upswing despite financial commitments in May 2010 by the NSW and federal governments, along with Australian arbitral institutions, to establish the dedicated new ‘Australian International Disputes Centre’ in Sydney.¹⁵⁹⁾

This more pessimistic prognosis arises first because party autonomy is not consistently promoted in the amended IAA. For example, no ‘opt out’ is permitted. Not just into the CAA regime, which Courts in Queensland had allowed too readily. No opt out is permitted now into a foreign arbitral law, to govern their dispute, even though this would not usually be advisable anyway. New Zealand, and other countries inspired by its original Arbitration Act and earlier Law Commission report (such as Singapore and Malaysia), allows such opt-outs. Influential commentators in Japan, including Professor Taniguchi, argue that the 2003 Act’s silence on this issue allows scope for parties to exercise their free choice. Indeed, he suggests that opting out of the Act into a regime that allows review for serious error of substantive law, at least for domestic disputes, might even promote arbitration in Japan.

More importantly, it is unclear which provisions in Australia’s amended IAA are mandatory, that is, incapable of any derogation by the parties. This extends even to ‘opt in’ provisions such as those now related to confidentiality. Arguably there are some provisions (for example, the scope of persons who can be bound by confidentiality obligations) which can be varied by party agreement. But there may well be others that instead are mandatory, such as the statutory ‘public interest’ exemptions.

Also debatable is the Government’s assertion, in its Supplementary Explanatory Memorandum for its March 2010 amendments to the original Bill, that various optional provisions were changed (especially from ‘opt in’ to ‘opt out’) in order to align the amended IAA more closely with legislation in the UK, Singapore and Hong Kong.¹⁶⁰⁾ For example, both confidentiality and consolidation of related disputes are instead ‘opt-out’ provisions in the English *Arbitration Act 1996*. And indeed failure to assist the arbitrators in specified ways

157) Comparative data available at <http://blogs.usyd.edu.au/japaneselaw/Ch01_Introduction_Appendix.pdf> (accessed 4 August 2010), Luke Nottage and Richard Garnett © 2010.

158) See Part 14.

159) See website of the Australian International Disputes Centre, at <<http://www.disputescentre.com.au>> (accessed 4 December 2010).

160) The original Bill is available via <<http://parlinfo.aph.gov.au>> (accessed 4 August 2010).

is a mandatory provision in that Act, not ‘opt-out’ as under s 23A of the amended IIA.

The Australian Government also did not adopt several recommendations made in a public Submission by myself and Professor Garnett to the IAA Review initiated in November 2008. The following were some of our ‘Top 20’ recommendations, developed into an article in the Asian International Arbitration Journal (and now Chapter 8 of our new book), which promised even greater potential for more cost- and time-efficient arbitral procedures for Australia:¹⁶¹⁾

- There is no additional clarification about what matters are ‘arbitrable’ for the purposes of enforcing agreements or awards, or running arbitrations with the seat in Australia, as opposed to being contrary to other mandatory laws such as trade practices legislation;
- The writing requirements for valid arbitration agreements have been liberalised, but not completely (even for arbitrations where the seat is in Australia);
- There is no clarification allowing Australian courts to enforce awards that have been annulled in foreign seats;
- There is no provision for arbitrators to issue (even non-binding) ex parte ‘preliminary orders’ in support of interim measure of protection, as in almost all other countries that have adopted the 2006 revisions to the ML, and seemingly it is impossible for parties to agree otherwise on this point;
- There is no reference to international ‘soft law’ instruments such as the Rules on the Taking of Evidence in ICA agreed in 1999 (and amended in 2010) by the International Bar Association (IBA) or the ILA’s 2002 Recommendations regarding ‘public policy’ as one of the limited grounds for refusing enforcement of a foreign award;
- There are no provisions on Arb-Med (arbitrators actively encouraging settlement).¹⁶²⁾

These deficiencies in substantive outcomes are also related, in my view, to a rather inadequate consultation process. In particular, the Government should have referred its Bill to a specialist parliamentary committee for a proper round of public inquiry, as, for example, in its recent amendment to trade practices and consumer law.¹⁶³⁾ Japan now has an admirably transparent process of *shingikai* law reform deliberation, partly thanks to the internet, and the strong influence still of academic experts helps produce impressive outcomes.

Despite these problems in process and outcome, the amended IAA may still result in some significant ‘cultural reform’ for Australia. One overlooked factor is to take full advantage of the expertise of professors expert in arbitration law (and, preferably, other related fields such as private international law, contract and commercial law). It is worth

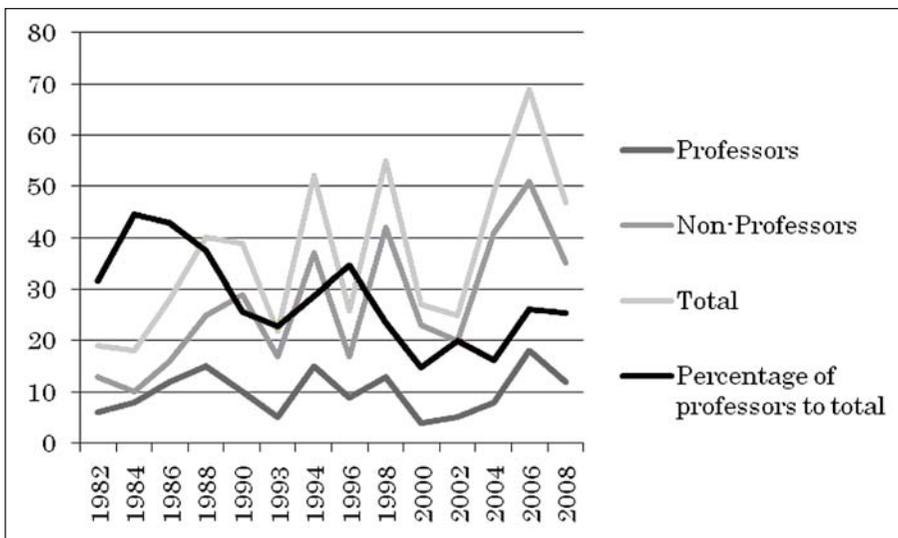
161) See Nottage and Garnett, above n 151.

162) On Arb-Med, see Part 13 above.

163) Luke Nottage, ‘Senate Inquiry into Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010’ (23 April 2010) <<http://acren.wordpress.com/2010/04/23/senate-inquiry-into-trade-practices-amendment-australian-consumer-law-bill-no-2-2010/>> (accessed 4 August 2010).

remembering that ICA grew almost out of nothing in the 1950s and 1960s thanks especially to an older generation of academics, such as Professor Taniguchi. Some of the leading arbitrators in Europe and North American are still professors, and the professoriate is also very prominent in the still relatively new burgeoning field of investor-state arbitrations (usually now pursuant to investment treaties or FTAs).¹⁶⁴⁾ Full-time professors can bring not only a comprehensive understanding of the field(s) of law, but also a willingness to resolve disputes quickly and therefore cost-effectively so they can return to their ‘day jobs’, which are still not dominated by the ‘billable hours’ mentality increasingly prevalent in legal practice.¹⁶⁵⁾

In this respect more generally, it is somewhat disturbing to find over the last two decades that there is declining proportion of professors invited to present at the major biannual Congresses for ICA run by a leading association, the International Council for Commercial Arbitration:¹⁶⁶⁾



Hopefully, in Australia especially, both arbitral institutions and policy makers will draw on and support a new and diverse generation of arbitration specialists in order to achieve real ‘cultural reform’ for ICA.

164) See Nottage and Miles, above n 145.

165) See The Honourable Wayne Martin, ‘Billable hours — past their use-by date?’ (17 May 2010) <<http://www.lawsocietywa.asn.au/AnnouncementRetrieve.aspx?ID=32465>> (accessed 4 August 2010).

166) For information on conferences and congresses, see ICCA’s website, at <<http://www.arbitration-icca.org/conferences-and-congresses.html>> (accessed 4 August 2010). Source data can be found at <<http://blogs.usyd.edu.au/japaneselaw/SpeakersICCAconfs.pdf>> (accessed 4 August 2010).

