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FACULTY OF LAW, UNIVERSITY OF SYDNEY



**Law, Public Policy and Economics
in Japan and Australia:
Reviewing Bilateral Relations and
Commercial Regulation in 2009**

Associate Professor Luke Nottage

*Associate, Sydney Centre for International Law
Faculty of Law, The University of Sydney*



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Luke NOTTAGE[#]

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Abstract: This paper is an edited and updated selection of my postings to the now widely-read 'East Asia Forum' blog (<http://www.eastasiaforum.org>, indicated with an asterisk in the Table of Contents below), and my own partly overlapping 'Japanese Law and the Asia-Pacific' blog subsequently initiated through the University of Sydney (<http://blogs.usyd.edu.au/japaneselaw/>). The paper is based mainly on developments from the end of 2008 through to mid-2009. Many topics are important not only within Australia and Japan, but also potentially for bilateral relations (for example, as novel dimensions to the FTA or 'Economic Partnership Agreement' already under negotiation between these two countries). Several topics (for example, the state of economics as a discipline after the GFC, neo-communitarian perspectives on comparative law and society, the legacy of the post-War Occupation of Japan) also address more broadly how we should (re)conceptualise law, economics and public policy particularly in the Asia-Pacific context.

As in my survey of developments over 2008 (<http://ssrn.com/abstract=1295064>),* readers can read through these topics sequentially, as I tried to link them to previous postings and therefore create a 'chain novel' narrative effect. But readers may prefer to jump around the topics in their own order of interest, especially as some postings were uploaded initially in response to particular developments (such as announcements for major consumer law and then arbitration law reforms in Australia).

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[#] Associate Professor and founding Co-Director, Australian Network for Japanese Law (<<http://www.law.usyd.edu.au/anjel>>), Sydney Law School. Thanks, but no responsibility for any views or errors remaining here, are due to Shiro Armstrong and Peter Drysdale (editors of the East Asia Forum blog), Ichiro Araki, Harald Baum, Stephen Green, Makoto Ibusuki, Noburo Kashiwagi, David Kelly, Wan Sang Lung and Michelle Tan.

* Luke Nottage, 'Economics, Politics, Public Policy and Law in Japan, Australasia and the Pacific: Corporate Governance, Financial Crisis, and Consumer Product Safety in 2008' (2009) 26 *Ritsumeikan Law Review* 49, also at <<http://ssrn.com/abstract=1295064>> (accessed 4 August 2009). Citations and cross-references originally in the blog postings are indicated in this present paper by numbered footnotes, sometimes adding some updated references or information. Wholly new material is indicated by asterisked footnotes (like this one).

8. Responsible consumer lending rules for Australia too: Submission on the National Consumer Credit Protection Bill (11 May 2009)
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Keywords: Japanese law, Australian law, Asian law, bilateral relations, public policy and law reform, tourism, whaling, international trade law (WTO and FTA), arbitration, consumer law and financial markets regulation, social policy (labour law, multiculturalism), laws of nationality and names, legal profession, methodological frameworks (economics, neo-communitarianism, Foucault)

1. More Visitors to Japan – Is it Me, or Kyoto?

(23 November 2008)

I have lived in Kyoto for five years over the last two decades, on or off, and otherwise visited Japan's delightful former capital once or twice each year. But this is the first time that I have been struck by how many visitors from abroad there seem to be here these days. And not just at the main tourist spots, or when the autumn colours are at their most resplendent.

Some preliminary statistical analysis suggests that I am not victim to the 'availability' bias, for once, but also that the rise in foreign visitors may not be limited to Kyoto. And the sudden appreciation of the yen, combined with the GFC, already appears to impacting on inbound tourism.

In experiments that have belatedly attracted the interest of policy-makers, social psychologists asked questions like: 'which is more likely, (a) natural disasters causing fatalities, or (b) earthquakes causing fatalities?'. Many answered (b), even though logically

(a) is correct because it encompasses (b) as well other natural disasters (like floods) that can cause further fatalities. Social psychologists call this the ‘representativeness heuristic’ (or what Dan Gardner calls ‘the Rule of Typical Things’): we make judgments based on simple notions of what we believe to be ‘typical’. It is one of many heuristics or biases, often overlapping, which we frequently use as shortcuts in decision-making. The representativeness heuristic, for example, can overlap with the ‘availability heuristic’ (‘the Example Rule’).^{*} More concrete events or bits of information (earthquakes, rather than natural disasters generally) tend to stick in our minds. So could such heuristics be affecting me, leading to an over-emphasis on sightings of Chinese tour groups and diverse Western tourists encountered in Kyoto recently?

Probably not. Kyoto City Hall kindly provided some data. On the one hand, there were some increases in foreign students in Kyoto particularly between 2000 (2900 students) and 2003 (4314); but there were similar increases nation-wide (53,640 students in 2000, 98,135 in 2003), and numbers have leveled off subsequently. (Most of the 4513 students in Kyoto in 2008 are recorded as from China, then Korea, but some of those or their parents may have been born in Japan.)

On the other hand, tourists from abroad who overnighted in Kyoto increased 15.5% in 2007, a new record of 926,000 for the fourth year running (but out of almost 50 million tourists, who collectively spent over A\$10 billion!) City Hall attributes this to setting up information centres in Taiwan and the US, with earlier publicity drives also aimed at Australia, Korea and China. Kyoto City also highlights efforts to link into the government’s ‘Visit Japan Campaign’, coordinating for example with Hokkaido to attract visitors (skiers!) from Australia. There is also now a Kyoto Winter Special and an official Kyoto Travel Guide website.¹ (The Australian Network for Japanese Law [ANJeL] also plays a small but innovative role by bringing together law students from Australia and the Asia-Pacific, with students mainly from Ritsumeikan Law School, for the Kyoto and Tokyo Seminars in Japanese Law every February.²)

But these rises should be kept in the context of nation-wide increases in foreign visitor numbers over recent years. According to the Japan National Tourist Organization, there were 4.3 million arrivals over January-June 2008, including 3.1 million tourists (a 13.7% increase); 5.9 million over 2007 (18.3% growth); and 4.9 million over 2006.³ So the

^{*} Dan Gardner, *Risk: The Science and Politics of Fear* (Scribe, Carlton North, 2008) pp. 47-67.

¹ Respectively, <<http://www.kyotowinterspecial.com>> and <<http://www.kyoto.travel>> (accessed 18 July 2009).

² See ‘Australian Network of Japanese Law Homepage’ <<http://www.law.usyd.edu.au/anjel>> and ‘Kyoto Seminar’ <<http://www.kyoto-seminar.jp>> (accessed 18 July 2009) for more information.

³ Japan National Tourist Organization, ‘Tourism Statistics’, <<http://www.jnto.go.jp/eng/ttp/sta/index.html>> (accessed 18 July 2009).

country seems to have been doing well despite the thoughtless public comments of Transport Minister Nariaki Nakayama, forced to resign a few months ago.⁴ Even if Taro Aso delivers his own further gaffe about foreigners or international relations, as was his wont before becoming Prime Minister, tourists will probably still wish to visit Japan. Yet economic realities are likely to remain important, and tourist arrivals dropped in August and especially September. That surely reflects the sudden (and quite bizarre) rapid appreciation of the yen, along with the Global Financial Crisis (GFC) undermining consumer confidence world-wide.⁵

Anyway, it seems that it wasn't just me, but perhaps it wasn't just Kyoto.

2. Traffic rules and alcohol regulation in Japan*

(29 November 2008)

If you are one of those many more short-term visitors to Japan nowadays, and even if you are an old hand, watch out for signs setting out various rules that may be unexpected or new. Like these two signs:



The bigger one to the bottom left is one of many signs we see increasingly around Japan in English (and sometimes now Chinese or Korean). The text is small but reads (in my

⁴ Luke Nottage, 'Political dynasties in Japan, the US, Australia ... but not New Zealand?' (25 October 2008), <<http://eastasiaforum.org/2008/10/25/political-dynasties-in-japan-the-us-australia-but-not-nz>> (accessed 18 July 2009).

⁵ See further Parts 6 and 8. Almost a year later, in August 2009, the yen had dropped back considerably at least against the Australian dollar.

* This and the next Part 3 of this paper draw on a class on 'Alcohol and the Law' for the Kyoto Seminar intensive course in Japanese Law in February 2009: see generally <<http://www.kyoto-seminar.jp>>.

translation): ‘In the Beautification Enforcement Areas you will be fined up to 30,000 yen for littering regardless of your nationality or status’. The kind of prohibition and penalty you might expect in Singapore. Not in Japan, where local communities have long taken pride in being tidy – although that has not excluded individuals or dodgy firms from dumping their rubbish in distant communities! But what is meant by the round blue sign up on the right?

It shows an adult walking with a small child, as well as a bicycle. Not so obvious, although more self-explanatory than the picture on the bigger sign. The text in Japanese under this blue sign – not yet in English! – indicates that riding a bicycle is permissible on that footpath. Most countries I know prohibit this, at least for adults, because poorer sight lines from the footpath make it more likely that bicyclists will have accidents. Alice Gordenker suggests that Japan does have more fatalities per capita than major European countries or the US, but points out that:

Until about 1970, when these signs first started appearing, it wasn’t permitted to ride on sidewalks at all. But the rapid increase in the number of automobiles during the first postwar decades forced bicyclists up onto the sidewalks for sheer safety. Traffic was chaotic, and there were few of the safeguards we take for granted today, like guardrails and pedestrian lights.

Writing for *The Japan Times* on 23 January 2007, she also reports that the Japanese police still seemed to favour bicyclists keeping off the roads, which explains why officers haven’t been concerned about them riding on footpaths even without those blue signs allowing for it.⁶ That has also been my experience. It also helps explain why some taxi drivers in Kyoto in the early 1990s shouted at me to get off the road I was riding on – even though this is always allowed, in addition to sometimes being permitted to ride on the footpath. Lax police enforcement may also have been related to the blue signs being quite widely spaced, and the footpaths not being as obviously for cyclists as some of them are now (with separate lanes, still usually not respected especially by pedestrians!).

Indeed, following amendments to the Road Traffic Law (No. 105 of 1960) in effect from June 2008, bicycling on footpaths has been allowed in two more situations:⁷ where road or traffic conditions make it unavoidable, or for children up to 13 or those over 70. But these seem more sensible and comparable to rules abroad. And other amendments are aimed at making bicyclists ride more safely anyway, whether on footpaths or on the

⁶ Alice Gordenker, ‘Cycling on sidewalks’ (23 January 2007) *The Japan Times Online*, <<http://search.japantimes.co.jp/cgi-bin/ek20070123wh.html>> (accessed 18 July 2009).

⁷ See ‘TsukuBlog’, <<http://blog.alientimes.org/category/transportation/bicycles>> (accessed 18 July 2009).

road.⁸ Parents now have to tell children under 13 to wear bicycle helmets. But this is a ‘best efforts’ duty (*doryoku gimu*), so the Law provides no sanctions; and bicyclists 13 or over still don’t need to wear helmets in Japan. Volunteer ‘Regional Traffic Safety Activities Promotion Members’ can now also ‘promote good manners for bicycle riding’. These are the first significant reforms aimed at cyclists since the 1970s, reflecting burgeoning accidents involving bicycles.⁹

Against this backdrop, various existing rules also may be enforced more strictly. For example, to avoid a fine up to 50,000 yen, cyclists must display lights at night. Cyclists often ignored this rule, partly because the front light was typically powered by a pedal-driven dynamo. Now, more and more people use battery-operated lights (like the one in the photo below). Easier on the pedaling, worse for the environment, but safer than no lights.

Riding double can be fined up to 20,000 yen, except if a child up to aged 6 and in a proper seat. This exception never extended to a parent carrying two children on the bicycle. But recently the police caved in to public pressure and will allow that as a further exception if parents’ bicycles meet new safety standards.¹⁰ The new regulation came into effect on 1 July 2009, but the new models are quite costly. Apparently this has led the police to encourage local governments to offer subsidies or rentals, and will only issue warnings for non-compliance until usage and public awareness become more widespread.* Behind this lies not only the GFC and Japan’s recession, presumably, but also a very important general election announced for 30 August 2009.

Following the 2008 amendments, using a mobile phone or holding an umbrella on a bicycle may also be more likely subjected to a fine. But violations involving mobile phones are still apparent. And shops in Kyoto still sell handlebar accessories that will hold an umbrella up for you. This is partly due to the Kyoto Prefecture Road Traffic Safety Regulations (*keisaku*, under the Law), which allows cyclists anyway to ride with umbrellas if the road there is on is not ‘frequently’ used. This makes it difficult to enforce criminal law provisions on abetting (*hojo-zai*) vis-à-vis suppliers of such products. (Likewise, the police have had difficulty taking on suppliers of covers for car number plates, since there is a – small! – chance that they will be used for legal purposes, like protecting the plates from the

⁸ Japan International Training Cooperation Organization, ‘The Rules concerning Riding Bicycles on Public Roads have been Revised’, <http://www.jitco.or.jp/download/data/leaflet_English.pdf> (accessed 20 July 2009).

⁹ Nagoya International Center, ‘A Crash Course Guide to Bicycle Safety’, <<http://www.nic-nagoya.or.jp/en/canyouhelpme/rules%20for%20cyclists.htm>> (accessed 20 July 2009).

¹⁰ ‘Moms win: Ban on using two-tot bikes to be lifted’, (25 July 2008) *The Japan Times Online*, <<http://search.japantimes.co.jp/cgi-bin/nn20080725a3.html>> (accessed 20 July 2009).

* ‘Moms balk at high cost of new safety-approved bikes’, (9 July 2009), *The Japan Times Online*, <<http://search.japantimes.co.jp/mail/nn20090709f1.html>>.

elements rather than hiding identity from the police.) Nonetheless, now that riding with an umbrella is more widely perceived as a safety issue, supply of such products nowadays may at least to raise the spectre of contractual liability or manufacturers' product liability.

Drink driving is most likely to attract enforcement action, rather than just a caution. Not many visitors to Japan will be aware that the Road Traffic Law sets a very low tolerance level. Some say it is zero tolerance, which is not quite true. One threshold (for the crime of *shukiobi-unten* under the Law) is by blood-alcohol rate, which was lowered in 2002 to 0.15 from 0.25 (2.5 grams of alcohol per litre). Yet this does mean that one drink will put most people over the limit, which is stricter than Australia and much stricter than New Zealand or the UK.¹¹ Anyway, a second crime is *sakeyoi-unten*, which involves a more discretionary test: a risk that the person cannot drive properly due to the influence of alcohol.

Even fewer visitors will realise that this second crime also extends to bicycles. This is because they are defined as 'light vehicles' (*keisharyo*) in Article 2(11) of the Road Traffic Law, in turn encompassed within 'vehicles (*sharyo*)' – along with automobiles – under Article 2(8). Bicycles are expressly excluded from the usual penalty provisions regarding the first crime (Article 117-4(3)), but if you have been drinking the police may try to get you under *sakeyoi-unten*. You may only get a caution, unless you injure someone in a bad accident while significantly under the influence of alcohol. But the fear is enough nowadays to dissuade not only government officials, but also for example a professor I know working in a private university, to not drink at all if later riding a bicycle.

So visitors should be aware that the police are now more concerned about safe riding on bicycles, after years of flouting the rules and lax enforcement (confirmed by a survey back in 2006¹²). A stricter attitude may be linked to the growing proportion of elderly Japanese wandering the streets (rather than the small children depicted in the blue sign above, which dates back to the post-War baby boom era). Reflecting broader public opinion, the police are even more concerned about drink driving. Back in the 1990s, police only cracked down periodically and predictably. But some nasty accidents attracted intense media attention, especially when a local government official drunkenly rear-ended a SUV, killing three children in Fukuoka in August 2006.¹³

The Road Traffic Law was amended in 2007 to impose stricter penalties on (a)

¹¹ 'Worldwide BAC Limits', <http://www.drinkdriving.org/worldwide_drink_driving_limits.php> (accessed 20 July 2009).

¹² Ken Y-N, 'Vast Majority of Japanese riders are scofflaws' (21 October 2006), <<http://whatjapanthinks.com/2006/10/21/vast-majority-of-japanese-riders-are-scofflaws>> (accessed 20 July 2009).

¹³ 'Halting Drunk Drivers', (23 January 2007) *The Japan Times Online*, <<http://search.japantimes.co.jp/cgi-bin/ed20070123a1.html>> (accessed 20 July 2009).

drunk drivers, but also on those who abet them by providing (b) a vehicle or (c) alcohol despite the risk that they will drive (prohibited since 2002, but with a lesser penalty). One of the most controversial amendments introduced a new category, penalising (d) passengers who ask someone to drive them knowing that person will commit *shukiobi-* or *sakeyoi-unten*. So far, however, the penalties for such passengers are lower:

Infringement Category /	(a) = [now] (b)	(c)	(d) liability of passengers
1. <i>sakeyoi-unten</i>	Up to 5 years' [previously 3 years'] imprisonment or a 1m yen [0.5m] fine	Up to 3 years' imprisonment or a 0.5 million yen fine	Up to 2 years' imprisonment or a 0.3 million yen fine
2. <i>shukiobi-unten</i>	Up to 3 [1] years' imprisonment or a 0.5 [0.3] million yen fine	Up to 2 years' imprisonment or a 0.3 million yen fine	

It may be hard for police and prosecutors to prove cases in category (d). But in April, for example, proceedings were initiated in Sendai¹⁴ after a recommendation by the Prosecutorial Review Board. And the arrest of a small restaurant owner in Saitama, falling within category (b), sparked renewed debate¹⁵ about such expanded scope for criminal liability.

Additionally in 2007, the Criminal Code added Article 211(2) on 'negligent automotive homicide and injury' (*gyomujo kashitsu chishi-zai*, more specific than Article 208-2).¹⁶ This provision also covers two-wheeled motor vehicles and 'light vehicles'. For now, however, such cases will not be subject to the lay assessor or 'quasi-jury' system for serious criminal matters that Japan is reintroducing from May next year. The Saiban-in Law applies to cases of 'intentionally causing death', under Article 2(2), so it only extends for example to *kiken unten chishi zai* (Criminal Code Article 208-2). One expectation for the lay assessor system is that randomly selected lay people and judges will hold more accused to be not guilty. But there are also some concerns that verdicts will be come even tougher for cases that happen to attract widespread public opprobrium by the time they get to trial.

¹⁴ <<http://sankei.jp.msn.com/affairs/disaster/080424/dst0804242124008-n1.htm>> (accessed 20 November 2008).

¹⁵ <<http://archive.japantoday.com/jp/news/429520/all>> (accessed 20 November 2008).

¹⁶ Shin Matsuzawa, '2007 Amendment to the Traffic-Related Criminal Law and the Role of Punishment' (7 May 2008), <http://www.waseda.jp/hiken/en/jalaw_inf/topics/003matsuzawa.html> (accessed 20 July 2009).

Overall, it remains to be seen whether some clampdown on bicyclists and this latest round of bigger clampdowns on drunk drivers will have any lasting long-term effect. Socio-legal studies examining the impact of stricter drink driving laws in other jurisdictions have often suggested otherwise. In Japan in 2005, there were approximately 140,000 drink-driving arrests, a 60 percent decrease from 1999. But this number indicated that drink-driving was still an everyday fact of life, despite a similar high-profile accident that resulted in 2002 amendments to the Road Traffic Law.¹⁷ Police officers may also still be driven more by a requirement or expectation to meet infringement ‘quotas’, rather than a thoroughgoing commitment to applying the rules uniformly in order to maximize safety on the roads and footpaths. Similar concerns have been raised, for example, in parts of Australia.

Meanwhile, if you want to enjoy a taste of Japanese beer, *sake* or *shochu*, either walk or consider using a scooter, which doesn’t seem to fit within the definition of a light vehicle! So far, I’ve only noticed foldaway bikes in Japan, which seem to have become increasingly popular (at least in Kyoto) since authorities have clamped down (somewhat) on parking near railway stations. But that’s another story.

3. Deregulation Japan-style: on the (local) grog

(15 January 2009)

Japan appeared to have recovered from its own financial crisis a decade ago, albeit at the cost of much accumulated government debt. The country was then hit by the collapse of its export markets and the rapid rise of the yen, following the imminent global recession. Professor Iwao Nakatani, former Chairman of Sony, has urged a radical shift in economic policy in Japan and elsewhere from policy ‘based on neo-conservative economics and the philosophy of small government to one based on Keynesianism and welfare state ideology’.¹⁸

Some may be sceptical as to whether Japan ever really embraced the former philosophy, and its ascendancy was certainly never as pronounced as in the US, the UK or then Australia. But deregulation of alcohol distribution is one of Japan’s many transformations over the last decade. It is also the flipside of ever-stricter rules on drink driving,¹⁹ although these rules also reflect a broader trend towards criminalisation of

¹⁷ Philip Brator, ‘Struggling to put the Brakes on the Culture of Drunk Driving’ (17 September 2006) *The Japan Times Online*, <<http://search.japantimes.co.jp/cgi-bin/fd20060917pb.html>> (accessed 20 July 2009).

¹⁸ Iwao Nakatani, ‘Japan: change in paradigm to rescue the ailing economy’ (26 December 2008), <<http://www.eastasiaforum.org/2008/12/26/japan-change-in-paradigm-to-rescue-the-ailing-economy>> (accessed 20 July 2009).

¹⁹ See ‘Traffic Rules and Alcohol Regulation in Japan’, Part 2 above.

socio-economic deviance, evident in product safety or consumer credit re-regulation.²⁰

On the other hand, deregulation is most notable in terms of where you can buy alcohol: vending machines and those ubiquitous convenience stores.²¹ It is less obvious in what you pay, especially for certain beer substitutes, which reflect differential tax rates. In fact, these tax rates may well violate WTO law. Yet there is probably not enough financial reward for potential beer exporters to Japan to encourage their home governments to sue Japan. So an implication for FTA negotiators, even those from Australia, may be to seek some offset advantage in their overall bilateral deal with Japan, which would further undermine the entire multilateral WTO framework.

Rising numbers of visitors to Japan and other commentators have remarked on the proliferation of automatic vending machines, including those selling alcohol.²² Careful observers may have noticed an ID card ‘reader’ supplied with many machines since 2001. Designed mainly to check the age given on drivers’ licences, the readers were partly a response to stricter punishments introduced for liquor store owners selling alcohol to minors. They were also intended to claw back market share for ‘mom and pop’ stores. Such stores’ share had dropped from 76 per cent in 1983 to 27 per cent by 2000.²³ The big winners of increasing licensing liberalisation had been larger discount outlets and especially convenience stores, particularly after rule changes in 1993, 1998 and 2003.²⁴

By 2009, at least in Kyoto, many remaining stores seemed to have rendered the readers inoperable. One store owner just told me that they led to too large a drop in sales! The local police don’t seem too concerned, now that alcohol is available in so many convenience stores 24/7, although things are reportedly different in parts of Osaka where teenage drinking remains a social problem. This seems a victory for the proponents of deregulation, despite opposition from many LDP parliamentarians and their small business constituents, although some health and consumer interest advocates are concerned as well. But this industry turns out to be more complicated.

Of Japan’s large alcohol market, *sake* (rice wine), *shochu* (distilled spirits), and

²⁰ Luke Nottage, ‘Dodgy Foods and Chinese Dumplings in Japan’ (11 July 2008), <<http://www.eastasiaforum.org/2008/07/11/dodgy-foods-and-chinese-dumplings-in-japan>> (accessed 20 July 2009); Luke Nottage, ‘Consumer Over-indebtedness in Japan, Australia and the US’ (8 July 2008), <<http://www.eastasiaforum.org/2008/07/08/consumer-over-indebtedness-in-japan-australia-and-the-us>> (accessed 20 July 2009).

²¹ Shiro Armstrong, ‘More Dentists than Convenience Stores in Japan’ (2 July 2008), <<http://www.eastasiaforum.org/2008/07/02/more-dentists-than-convenience-stores-in-japan/>> (accessed 20 July 2009).

²² See ‘More Visitors to Japan – Is it Me, or Kyoto?’, above Part 1.

²³ Taiga Uranaka ‘ID System keeps Alcohol Vending Machines Handy’, (10 April 2001) *The Japan Times Online*, <<http://search.japantimes.co.jp/print/nn20010410b4.html>> (accessed 20 July 2009).

²⁴ ‘Boozing Japan – government to deregulate licensing. (The Pulse).’ (2003), <[http://www.thefreelibrary.com/Boozing+Japan+-+government+to+deregulate+licensing.+\(The+Pulse\)-a0104732975](http://www.thefreelibrary.com/Boozing+Japan+-+government+to+deregulate+licensing.+(The+Pulse)-a0104732975)> (accessed 20 July 2009).

dai-san biiru ('third-category' beer) each make up about 10 per cent, followed by around 20 per cent for *happoshu* and 40 per cent for (real) beer.²⁵ The latter must have a malt content of at least 67 per cent, but is the most heavily taxed.

In 1994, Suntory began marketing beer-like *happoshu* with malt content of 65 per cent, while Sapporo developed *happoshu* containing less than 25 per cent malt. Each attracted lower tax rates, and hence could be sold much more cheaply than real beer.²⁶ From 1996, however, the government responded by hiking the tax rates for both types of *happoshu*. In 2003, it also raised tax on *happoshu* with 25-50 per cent malt content. However, its tax and that of *happoshu* with less than 25 per cent malt remained less than that on high-malt *happoshu* or real beer. In 2004, Sapporo and Suntory responded with a zero-malt *dai-san biiru*, which incurred an even lower tax, and hence retail price, than any *happoshu*.²⁷

In 2002, the then Director of Research at RIETI (a METI offshoot), argued that Japan's existing tax differentials between *happoshu* and real beer amounted to tax discrimination between 'like products', contrary to WTO rules:²⁸

Article III:2 of the General Agreement on Tariffs and Trade says: 'The products of the territory of any Member imported into the territory of any other Member shall not be subject, directly or indirectly, to internal taxes or any other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.' There is no question that beer and *happoshu* are like products. To the extent that imported beer is subject to tax in excess of those applied to domestically produced *happoshu*, it is inconsistent with the WTO rules. ...

The tax authorities are right in their move to equalize the level of taxation between beer and *happoshu*. The major breweries opposed to this are wrong. Their argument that *happoshu* is a totally new product might have been more persuasive if there had been a net increase in the combined market of beer and *happoshu*, but in reality, *happoshu* merely substituted some of the beer market. Beer and *happoshu* should be taxed equally. Of course, the tax authorities could

²⁵ William Campbell, 'What the Japanese are drinking', (13 April 2007) *The Japan Times Online*, <<http://search.japantimes.co.jp/cgi-bin/fg20070413wc.html>> (accessed 20 July 2009).

²⁶ '*Happoshu no Zeikin ga Oyoboshita Eikyō*', <http://www.happoshu.com/tax/k2_3.html> (accessed 20 July 2009).

²⁷ Taiga Uranaka, 'Unavoidable as death, beer taxes', (2 September 2004) *The Japan Times Online*, <<http://search.japantimes.co.jp/cgi-bin/nb20040902a1.html>> (accessed 20 July 2009).

²⁸ Ichiro Araki, 'Bad tax, bad beer' (25 October 2002) RIETI, <<http://www.rieti.go.jp/en/miyakodayori/052.html>> (accessed 20 July 2009).

decide to lower the tax rate on beer to the level equal to happoshu, but such a decision is extremely unlikely in view of the current budget crisis.

Happoshu tax rates were indeed raised from 2003, but some significant differentials remain (underlined in the Table below):

Malt content	Before 1996	Since 1996 {2003-}[2006-²⁹]
Beer: 67% or more	220,000	222,000 [220,000]
<i>Happoshu</i> : 50-67%	152,700	222,000 [220,000]
<i>Happoshu</i> : 25-50%	152,700	152,700 { <u>178,125</u> }
<i>Happoshu</i> : 0-25%	83,300	105,000 { <u>134,250</u> }

Other commentary and cases in the WTO (against Korean *soju*, 1997-9;³⁰ and Chilean *pisco*, 1998-2000³¹) suggest that key tests for discrimination among ‘like products’ include their physical characteristics, common end-uses, tariff classifications, and ‘the marketplace’ - possibly including evidence from changes in other countries. So Professor Ichiro Araki’s argument in 2002 still seems valid for at least some types of (mid-range) *happoshu* – and possibly even now *dai-san biiru*. And that would suggest some persistent limits to liberalising parts of the alcohol industry in Japan, especially when foreign imports, actual or potential, are involved.

Yet which country and their exporters are really likely to sue Japan? Possibly, low-cost producers of reasonable beer from nearby countries, such as China (Tsingtao Beer), Thailand (Singha), Singapore (Tiger) – and perhaps even Mexico (Corona) or Australia. But China didn’t accede to the WTO until 2001, and Japanese consumers have periodically gone off Chinese food imports, especially in recent years.³² And Singapore, then Thailand and Mexico, now Australia, wouldn’t want to jeopardise FTAs with Japan by launching a WTO complaint over an issue like this.³³ The situation is further complicated

²⁹ Updated by Luke Nottage from ‘*Happoshu no Zozei ga Oyoboshita Eikyō*’ <http://www.happoshu.com/tax/k2_3.html> (in Japanese; accessed 5 August 2009).

³⁰ ‘Korea – Alcohol Beverages’ <http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds75sum_e.pdf> (accessed 20 July 2009).

³¹ ‘Chile – Alcoholic Beverages’ <http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds87sum_e.pdf> (accessed 20 July 2009).

³² Luke Nottage, ‘Consequences of melamine-laced milk for China, NZ, Japan and beyond’ (14 October 2008), <<http://www.eastasiaforum.org/2008/10/14/melamine-laced-milk-in-china-nz-japan-and-beyond>> (accessed 20 July 2009).

³³ In his Comment on my blog, Professor Araki also suggests that exporters and their home countries might also be dissuaded from formal complaints due to the possibility of local manufacturers adjusting adroitly to

by Japanese brewers investing overseas, especially Kirin, in brewer Lion Nathan, and more recently Asahi, in Cadbury Schweppes in Australia.³⁴

So perhaps all that might be achieved in dealing with these problems in Japan, especially by countries (like Australia) still negotiating an FTA, is through raising the issue to achieve some sort of extra advantage in the overall bilateral deal. Any advantage could be small, given the practicalities of suing (or not). Some questions also remain about applying the substantive legal test in the context of a product like beer rather than spirits. And such bilateral negotiations in any case undermine a transparent multilateral system of international trade law.*

4. Whalergate, or a way forward?

(31 January 2009)

In 2009 Australia Day (26 January) fell on Chinese Lunar New Year, so there were a few more events celebrating Chinese traditions as well as the ever more frequent display of Australian flags around Sydney.³⁵ But the day after, the Sydney Morning Herald ran a

any new regime, as with *shochu* manufacturers following the whisky dispute: see Luke Nottage, 'Deregulation Japan-style: on the (local) grog (15 January 2009)' <<http://www.eastasiaforum.org/2009/01/15/deregulation-japan-style-on-the-local-grog/>> (accessed 27 July 2009).

³⁴ Daniel Palmer, 'Asahi acquires Cadbury's Schweppes, Coca-Cola still eligible to make counter offer' (25 December 2008) <<http://www.ausfoodnews.com.au/2008/12/25/asahi-set-to-acquire-cadburys-schweppes-coca-cola-still-eligible-to-make-counter-offer.html>> (accessed November 2008). For more recent developments in investments by Japanese firms in the food and beverages industry, and more generally in Australia, see JETRO, 'Japanese Firms Brewing Opportunities in Australia' (7 January 2009), <<http://www.jetro.go.jp/australia/topics/20090107716-topics>> (accessed 2 August 2009) and Manuel Panagiotopoulos and Andrew Cornell, 'Australia and Japan Beyond the Mainstream' (June 2009), <http://www.ajf.australia.or.jp/docs/20090625_AJF_Manuel_Panagiotopoulos_Business.pdf> (accessed 2 August 2009).

* 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/>>. Another problem is highlighted by this 'beer' tax scenario. The lack of incentives to bring formal WTO (let alone FTA) proceedings diminishes the chances of clarifying the precise contours of the 'national treatment' obligation. This in turn may further complicate the (already controversial) transposition of understandings about that obligation in the burgeoning field of investor-state arbitration: see generally Jurgen Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents', *European Journal of International Law*, forthcoming (2009). On investment arbitration see Luke Nottage, 'Investor-state arbitration for Indonesia, Australia and Japan' (24 July 2008), <<http://www.eastasiaforum.org/2008/07/24/investor-state-arbitration-for-indonesia-australia-and-japan/>> (accessed 2 August 2009); Luke Nottage, 'China, national security, and investment treaties' (24 July 2009), <http://blogs.usyd.edu.au/japaneselaw/2009/07/china_national_security_and_in.html> (accessed 2 August 2009); and the Sydney Law School conference on 19-20 February 2010, at <<http://www.usyd.edu.au/news/law/457.html?eventcategoryid=37&eventid=4307>>.

³⁵ 'When patriotism becomes provocation', (31 January 2009) *Sydney Morning Herald*, <<http://www.smh.com.au/news/national/when-patriotism-becomes-provocation/2009/01/30/1232818725619.html?page=fullpage#contentSwap2>> (accessed 20 July 2009).

front-page story entitled 'Revealed: secret whale deal'.³⁶ It highlighted the Federal Government's involvement in generating a proposal whereby:

- Japanese whalers could hunt a regulated number of minke whales in its coastal waters, and take many more whales in the North Pacific, under the plan.
- Japan would agree to one of two offers in exchange: either to phase out scientific whaling in the Antarctic entirely, or to impose an annual Southern Ocean limit.
- The proposal was hammered out in secret by an International Whaling Commission drafting group of six nations, which includes Australia and Japan, at a meeting in Britain last month.

With the whaling season already underway, however, Australia's Environment Minister insists that this is still under negotiation and that the Government remains opposed to any commercial whaling. But one NGO – the International Fund for Animal Welfare – calls this 'Whalergate', criticising the opaque nature of the IWC.

The article didn't mention that the IFAW had recently released a report commissioned from the Canberra Panel of Independent Legal and Policy Experts, which questioned the legality of Japan's Antarctic whaling program from the perspective of the Antarctic Treaty System.³⁷ Dr Tim Stephens, a Sydney University international law expert, was on that Panel and provides a summary on his own blog.³⁸ The Report endorses some arguments for Australia to challenge the legitimacy of Japan's whaling program before the International Court of Justice or the International Tribunal for the Law of the Sea.

A rather different view comes, perhaps unsurprisingly, from a different discipline. Dr Charlotte Epstein, an international relations specialist at the University of Sydney, shows in her new book how views and behaviour about whaling are caught up in broader and evolving discourses, interacting with – but not reducible to – the material interests of states, organisations and individuals.³⁹ I reviewed *The Power of Words in International Relations: Birth of an Anti-Whaling Discourse* on my own blog focused on Japanese law in context,

³⁶ Andrew Darby, 'Revealed: Secret Whale Deal' (27 January 2009) *Sydney Morning Herald*, <<http://www.smh.com.au/news/environment/whale-watch/revealed-secret-whale-deal/2009/01/26/1232818339535.html>> (accessed 20 July 2009).

³⁷ International Fund for Animal Welfare – Canberra Panel, 'Japan's 'Scientific' Whaling Program and the Antarctic Treaty System Independent Panel of Legal and Policy Experts' (12 January 2009) <http://www.ifaw.org/assets/Media_Center/Press_Releases/asset_upload_file187_51771.pdf> (accessed 20 July 2009).

³⁸ Tim Stephens, 'Musings on Environmental Law and Policy in Australia and Beyond' <<http://blogs.usyd.edu.au/timstephens>> (accessed 20 July 2009).

³⁹ 'Dr Charlotte Epstein', *The University of Sydney*, <http://www.arts.usyd.edu.au/departs/government/staff/charlotte_epstein.htm> (accessed 20 July 2009).

which partially overlaps with my postings to East Asia Forum, and the review is reproduced in this paper's Appendix.⁴⁰

Her perspective also helps to explain what I have already identified as internally inconsistent positions maintained by both Australian and Japanese governments, which material interests help to explain – but not completely.⁴¹ To move forward on a complex issue like whaling, I still think we need to nurture forums and processes allowing law, science, economics, politics and broader societal discourse to interact more productively.* Revitalising the IWC or activating international tribunals may help, but so may some new type of regional arrangement.

Meanwhile, relations between Australia and Japan are bound to heat up again every time the whaling season gets underway.

5. Japanese Law in English through the Internet: Take Two⁴²

(20 March 2009)

When Harald Baum and I translated and expanded the original Bibliography chapter in the first edition of this book, and published it as *Japanese Business Law in Western Languages: An Annotated Selective Bibliography*,⁴³ we added a new section introducing the online resources that were already increasingly available for free over the Internet. We also created a webpage - Japanese Law Links, now archived at Sydney Law School - that updated and expanded our introductions to resources made public by various types of organisations.⁴⁴

After another decade, following further exponential growth in the Internet as well as steady increases in interest and writing about Japanese law world-wide, it is now both easier and harder to offer a guide to such online resources. It is harder to be as comprehensive in reviewing them, because of their sheer volume, and there is the added

⁴⁰ Luke Nottage, 'Japanese Law in Asia-Pacific Socio-Economic Context', <<http://blogs.usyd.edu.au/japaneselaw>> (accessed 20 July 2009).

⁴¹ Luke Nottage, 'Whaling: What can law add to science, economics, ethics and politics?' (4 July 2008) <<http://www.eastasiaforum.org/2008/07/04/whaling-what-can-law-add-to-science-economics-ethics-and-politics/>> (accessed 20 July 2009).

* For this reason, I doubt whether a forthcoming (indirect and solely) legal proscription will truly resolve this issue. Cf 'New rules for safe shipping may save whales' (18 July 2009), *Sydney Morning Herald*, <<http://www.smh.com.au/environment/whale-watch/new-rules-for-safe-shipping-may-save-whales-20090717-do9b.html>> (accessed 8 August 2009).

⁴² English version for: Baum, Nottage et al's Bibliography chapter in Harald Baum et al (eds) *Handbuch des japanischen Handels- und Wirtschaftsrechts [Handbook of Japanese Commercial and Economic Law]* (Carl Heymann, Cologne, forthcoming 2009).

⁴³ *Japanese Business Law in Western Languages: An Annotated Selective Bibliography* (Fred B Rothman, Littleton, 1998).

⁴⁴ 'Japanese Law Links', <<http://www.law.usyd.edu.au/~luken/japaneselawlinks.html>> (accessed 2 August 2009).

difficulty of selecting the more authoritative and useful resources. However, our task is also easier in that there are now several well-established and reputable websites. They often contain (sometimes annotated) links to other resources, and often original material, in Western languages – especially in English, which is therefore our main focus in this chapter. It is also easier because of higher-quality Internet search engines, such as Google, although no search engine can ever be perfect – as we show next.

For example, a sample search under ‘Japanese Law’ through Google⁴⁵ on 18 March 2009 produced the Wikipedia’s ‘Law of Japan’ as the highest-ranking entry.⁴⁶ An advantage of this webpage is that it introduces (with hyperlinks) some basic institutions and areas of Japanese law, although these are currently quite brief. The major disadvantage, as many readers may know, is that Wikipedia is like ‘open-source’ software: anyone can register to write or to over-write what others have contributed, on an anonymous basis. Unlike software, however, which will just not work properly for anyone if it turns out to be faulty, it is difficult to know if the current contributions to Wikipedia are wrong or misleading. In fact, Wikipedia had flagged several sections (on Japanese ‘criminal law’ and ‘torts’) as having been nominated for checks about the ‘neutrality’ of the original writer’s descriptions.

Thus, it may be safer to begin online research through similar introductions to the Japanese legal system authored by identifiable and established experts. For example, another highly-ranked entry via the Google search was Professor Makoto Ibusuki’s ‘Japanese Law via the Internet’, on ‘Globalex’ at New York University Law School.⁴⁷ However, it introduces Japanese law and research tools for finding materials in Japanese as well as in English, and was last updated in September 2005.

An alternative, also hyperlinked to the English webpages of various legal institutions described, is the 2008 entry on ‘Japanese Law’ by Professors Masaki Abe and Luke Nottage, contained within the ‘Japan’ part of the ‘AsianLII’ online database.⁴⁸ This is a new part of that database (also accessible via the related WorldLII database⁴⁹), which was therefore not (yet) quite so highly ranked in a Google search. However, incorporating on the Japanese Law Online database built up by ANJeL (the Australian Network for Japanese Law⁵⁰), the Japan part now contains a wealth of annotated links to other resources, by area

⁴⁵ ‘Google’, <<http://www.google.com>> (accessed 2 August 2009).

⁴⁶ ‘Law of Japan’, Wikipedia, <http://en.wikipedia.org/wiki/Law_of_Japan> (accessed 2 August 2009).

⁴⁷ Makoto Ibusuki, ‘Japanese Law via the Internet’ (September 2009) <<http://www.nyulawglobal.org/Globalex/Japan.htm>> (accessed 2 August 2009).

⁴⁸ Masaki Abe and Luke Nottage, ‘Japanese Law: An Overview’ [2008] JPLRes 1 (27 March 2008), <<http://www.asianlii.org/jp/other/JPLRes/2008/1.html>> (accessed 2 August 2009).

⁴⁹ ‘Worldlii’, <<http://www.worldlii.org/catalog/232.html>> (accessed 2 August 2009).

⁵⁰ ANJeL, ‘Researching Japanese Law’ <http://www.law.usyd.edu.au/anjel/content/anjel_research_guide.html> (accessed 2 August 2009).

of law as well as types, such as other 'Introductions to Japanese Law'. The main links are to the 'Governmental Framework' webpage of the Prime Minister of Japan and his Cabinet, including an outline of the basic structure of government and a useful 'organization chart' with hyperlinks to the English websites of the Ministries, the two Houses of Parliament, and the Supreme Court.⁵¹

Another very valuable set of annotated links, often to English- as well as Japanese-language resources and including many web-based resources, is Rob Britt's 'Japanese Legal Research at the University of Washington'.⁵² Although regularly updated, it does not show up so prominently in a Google search under 'Japanese Law'; but other websites do often link to it.⁵³

More experienced researchers, already familiar with the broad contours of the Japanese legal system and other major websites, may wish to go straight to the main websites for primary legal resources. In recent years the Cabinet Office⁵⁴ has embarked on a major project to produce translations of major legislation using a standard bilingual glossary.⁵⁵ On 1 April 2009, the Ministry of Justice incorporated this into a new website of current and anticipated translations, initially with 'translations of 164 laws and 1653 law titles'.⁵⁶ Such resources have increasingly displaced 'Mika's page', hitherto popular from Google searches, which hyperlinked direct 'English Translations of Japanese Law' but has not been updated since January 2007.⁵⁷ The translations by the Cabinet Office, along with other full translations from various public and private sources, are conveniently available via the longstanding and very popular resource provided by Mizuho Securities, 'Japanese Law (Japanese Legislation in English)'.⁵⁸ This website lists them as 'finance-related' or

⁵¹ Prime Minister of Japan and His Cabinet, 'Governmental Framework', <http://www.kantei.go.jp/foreign/government_e.html> (accessed 2 August 2009).

⁵² Rob Britt, 'Japanese Legal Research at the University of Washington', <<http://lib.law.washington.edu/eald/jlr/jres.html>> (accessed 2 August 2009).

⁵³ See, eg, Temple University Japan, <<http://www.tuj.ac.jp/newsite/main/law/lawresources/index.html?sec=sc>> (accessed 2 August 2009).

⁵⁴ Noboru Kashiwagi, 'Translation of Japanese Statutes into English' (2007) 23 *Journal of Japanese Law* 221, also via <http://www.law.usyd.edu.au/anjel/documents/ZJapanR/ZJapanR23/ZJapanR23_19_Kashiwagi.pdf> (accessed 2 August 2009).

⁵⁵ Cabinet Secretariat, 'Translations of Japanese Laws and Regulations', <<http://www.cas.go.jp/jp/seisaku/hourei/data1.html>> (accessed 2 August 2009).

⁵⁶ 'Japanese Law Translation' <<http://www.japaneselawtranslation.go.jp>> (accessed 2 August 2009). Professor Noburo Kashiwagi, a leader in the Cabinet Office project, has subsequently commented that: 'Members of the old committee under the Cabinet Secretariat will continue to serve as members of the new committee under MoJ. Software was developed by the University of Nagoya team led by Professor Koji Matsuura. There [was] a symposium on the law translation [project organised] by Nagoya University in Tokyo on May 29'.

⁵⁷ 'English Translations of Japanese Laws' <<http://homepage2.nifty.com/paper/lawcollection.htm>> (accessed 2 August 2009).

⁵⁸ Mizuho Securities, 'Japanese Law (Japanese Legislation in English)' <<http://www.mizuho-sc.com/english/ebond/law.html>> (accessed 2 August 2009).

‘other’ legislation, and makes the same distinction between summary ‘reports and outlines’ of legislation. Many of those legislative outlines come from the (erstwhile) Office of the Trade and Investment Ombudsman.⁵⁹ Another very helpful set of summaries comes from the Japan External Trade Organisation’s guide to ‘How to Set Up Business in Japan – Laws & Regulations on Setting up Business in Japan’.⁶⁰

Mizuho Securities’ website also links to ‘Courts and Government Entities’ (including further links to selected entities other than Ministries, such as the Financial Services Agency and Fair Trade Commission);⁶¹ and to ‘Courts and Procedures’ (with another link to the Supreme Court of Japan – but without highlighting that this publishes translations of its major judgments).⁶² It also links to ‘Other Useful Law Related Websites’, notably the ‘Transparency of Japanese Law Project’.⁶³ The main focus of this large research project, generously funded via Kyushu University by Japan’s Education Ministry, has been to translate into English selected court judgments in various fields relevant to cross-border transactions.⁶⁴ In response to public feedback, each area also includes some ‘Overview’ material, and links to ‘Legislation/Regulations’ and other resources, although sometimes the overlap with the translated court cases is not complete.

Now that very large law firms have emerged in Tokyo, both as home-grown firms as well as fully-fledged offices of international law firms, most now provide newsletters or other digital material on various areas of law or specific new developments. Various Japanese associations for legal professionals also have some material in English related to Japanese law. For even more contextual material, delving further into how the ‘law in books’ may in fact translates into the ‘law in action’ in Japan, it remains more difficult to find authoritative and up-to-date online material. Within Japan, some major university law faculties publish English-language law journals; but sometimes only once or twice a year, and not necessarily focused on Japanese law per se.⁶⁵

Outside Japan, sample articles in English from the *Journal of Japanese Law* have

⁵⁹ <<http://www5.cao.go.jp/otodb/english/houseido/hou/houseido.html>> (accessed November 2008).

⁶⁰ JETRO, ‘Investing in Japan’, <http://www.jetro.go.jp/en/invest/setting_up/laws/> (accessed 2 August 2009).

⁶¹ Mizuho Securities, ‘Government Ministries & Agencies’, <<http://www.mizuho-sc.com/english/ebond/government.html>> (accessed 2 August 2009).

⁶² Supreme Court of Japan, <<http://www.courts.go.jp/english/judgments/index.html>> (accessed 2 August 2009).

⁶³ Kyushu University, ‘Transparency of Japanese Law’, <<http://www.tomeika.jur.kyushu-u.ac.jp/>> (accessed 2 August 2009).

⁶⁴ Carol Lawson, ‘Found in Translation: The ‘Transparency of Japanese Law Project’ in Context’ (2007) 12(24) *Journal of Japanese Law* 187, also via <http://www.law.usyd.edu.au/anjel/documents/ZJapanR/ZJapanR24/ZJapanR24_16_Lawson.pdf> (accessed 2 August 2009).

⁶⁵ ‘Worldlii—Japan Law Journals’, <<http://www.worldlii.org/catalog/55939.html>> (accessed 2 August 2009).

been made available since 2004.⁶⁶ Quantitatively, however, the largest free resource comprises working papers and accepted articles uploaded on the easily-searchable Legal Scholarship Network – usually in full text, at least displaying abstracts, and usually contained with the Asian Law Abstract series.⁶⁷ For separate papers and books, a newer research tool is Googlebooks, containing sometimes quite lengthy extracts – but subject to the limits imposed by copyright law.⁶⁸

Lastly, the internet continues to develop new forms of communication. One newer legal research tool comprises Japanese Law ‘blogs’ (sometimes know as ‘blawgs’).⁶⁹ As of March 2009, some major ones in English were operated by Luke Nottage (overlapping with the East Asia Forum blog⁷⁰), and Marcelo de Alcantara (mostly reproducing interesting news articles or others’ blog postings).⁷¹ These provide shorter analyses of more contemporary issues, but often link in to broader developments or longer research papers.⁷² Another development, focused less on legal information but more on broader networking among researchers, is the recent growth in networking sites. Readers may now be aware of Facebook⁷³ (mostly for social networking) and LinkedIn⁷⁴ (more for professionals); but for researchers of (Japanese) law the most relevant site may now be Academia.edu.⁷⁵

6. Australia’s lethargic law reform: how (not) to revive consumer spending

(25 March 2009)

In March 2009 the former Chair of the Australia Competition and Consumer Commission, Professor Allan Fels, co-authored a column for the *Sydney Morning Herald* entitled ‘Rudd’s

⁶⁶ ANJeL, ‘Zeitschrift fuer Japanisches Recht/Journal of Japanese Law’, <http://www.law.usyd.edu.au/anjel/content/anjel_research_pap.html> (accessed 2 August 2009).

⁶⁷ SSRN, ‘Asian Law’, <<http://www.ssrn.com/link/asian-law.html>> (accessed 2 August 2009).

⁶⁸ ‘Google Books’, <<http://books.google.com/>> (accessed 2 August 2009). However, note that a class action filed in New York led to a proposed settlement that may impact significantly on this online resource: see <<http://www.googlebooksettlement.com/>> (accessed 2 August 2009).

⁶⁹ Tim Stephens, ‘Blawgs Unite—Staff Seminar 5 March’ (5 March 2009) <http://blogs.usyd.edu.au/timstephens/2009/03/blawgs_unite_staff_seminar_5.html> (accessed 2 August 2009).

⁷⁰ ‘East Asia Forum: Economics, Politics and Public Policy in East Asia and the Pacific’, <<http://www.eastasiaforum.org/author/lukenottage/>> (accessed 2 August 2009).

⁷¹ Marcelo de Alcantara (ed), ‘Japanese Law Blog: Current News and Information about Japanese Law’, <<http://japaneselaw.blogspot.com/>> (accessed 2 August 2009).

⁷² Luke Nottage, ‘Economics, Politics, Public Policy and Law in Japan, Australasia and the Pacific: Corporate Governance, Financial Crisis, and Consumer Product Safety in 2008’ (2009) 26 *Ritsumeikan Law Review* 49, also at <<http://ssrn.com/abstract=1295064>> (accessed 2 August 2009).

⁷³ ‘Facebook’, <<http://www.facebook.com>> (accessed 2 August 2009).

⁷⁴ ‘LinkedIn’, <<http://www.linkedin.com>> (accessed 2 August 2009).

⁷⁵ ‘Academia.edu: Who’s researching what?’, <<http://www.academia.edu>> (accessed 2 August 2009).

Consumer Activism Over the Top'.⁷⁶ Their title is misleading, although they raise some good points in response to Treasury officials' Consultation Paper, 'An Australian Consumer Law: Fair Markets, Confident Consumers'.⁷⁷ On its own terms – let alone compared to developments over recent years in the EU, Japan, and soon Canada – the Paper and the Australian Governments' current proposals remain a disappointment for Australian consumers.

Yet now should be a perfect opportunity, however belatedly, to implement a better consumer regulatory framework and thereby revive consumer trust. After all, partly through cash handouts to consumers, Australia is trying to spend its way out of a huge recession, itself caused (or at least exacerbated) by regulatory failures and increasingly blind faith in improperly regulated markets.

Fels does remark: 'Consumer activism by politicians is no bad thing. Consumer policy was understated in the Howard era'. And he should know, since he ran the ACCC from 1993 until 2005. But former PM Howard's Treasurer did eventually kick off the reform debate by getting the Productivity Commission (PC) to investigate improvements in Australia's consumer product safety regulation (2005 – February 2006),⁷⁸ and then consumer law and policy more broadly (2007 – March 2008).⁷⁹ A year after the latter, the Rudd Government was still at the stage of a 'Consultation Paper' – proposing a more harmonized regime nation-wide to come into effect only from 2011! Australia's Constitution means that responsibility for consumer law is shared between federal and state governments, but this timeframe doesn't seem very 'activist'.

Further, the Consultation Paper's focus is very much on one aspect of the PC's recommendations: reducing transaction costs through harmonization. This was a major component of the PC's estimate that reforming consumer law could generate net economic benefits of A\$1.5-4.5 billion. I can certainly see major benefits from simplification. Accumulated legislation and case law creates a legal morass – as Jocelyn Kellam and I found when analyzing Australia's product liability law and practice in 2007, and when

⁷⁶ Allan Fels & Fred Brenchley, 'Rudd's consumer activism over the top' (21-2 March 2009, Weekend Business section p. 5) *Sydney Morning Herald*, also at <<http://business.smh.com.au/business/rudds-consumer-activism-over-the-top-20090320-94e0.html>> (accessed 2 August 2009).

⁷⁷ 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 2 August 2009).

⁷⁸ Australian Government—Productivity Commission, 'Review of the Australian Consumer Product Safety System: Research Report' (7 February 2006), <<http://www.pc.gov.au/projects/study/productsafety/docs/finalreport>> (accessed 2 August 2009).

⁷⁹ Australian Government—Productivity Commission, 'Review of Australia's Consumer Product Framework: Inquiry Report' (8 May 2008), <<http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport>> (accessed 2 August 2009).

updating in 2008 the more wide-ranging CCH *Australian Sales and Fair Trading Reporter* looseleaf/online service.⁸⁰ In addition, the Consultation Paper does propose ‘trading up’: using the federal Trade Practices Act 1974 (TPA, possibly renamed the Competition and Consumer Law) as the core, but updated for ‘best practice’ developments enacted in state Fair Trading Acts since the late 1980s. So, for example, the Paper proposes a nation-wide version of Victoria’s regime to control proliferating unfair contract terms, in force since 2002 but based on an EU Directive dating back to 1993.

Yet the Consultation Paper seems to be re-opening a debate about the contours of such controls that should have been settled by the PC’s Inquiry. The EU model is working well, so is the Victorian variant, and Japan’s Consumer Contracts Act 2000 is also making a significant difference. Why does Australia feel the need continually to reinvent the wheel?⁸¹ There is a real risk that the wheel we end up with won’t be ‘fit for purpose’, as the Consumer Law Roundtable in effect pointed out in our Submission⁸² regarding the Paper.*

An even bigger problem lies in the Consultation Paper’s focus on harmonizing nationally, rather than internationally. For example, it omits any reference to Recommendations by the PC (in 2006, and again in 2008) to require suppliers to notify regulators about serious product related accidents. Yet another EU Directive enacted this duty in 2001, Japan added a variant in 2006, and another is currently before the Canadian Parliament. The US has also had stricter rules since 1990, even though the uniquely high levels of product liability claims quickly inform the public of potential safety risks anyway. So here is a global standard, which Australia should be catching up to, as I urge in my Submission on the Paper.⁸³ If this doesn’t happen in the present round of reforms, it probably won’t happen for another decade.

Anyway, Australian exporters to the EU, Japan, Canada or the EU are increasingly

⁸⁰ Jocelyn Kellam & Luke Nottage, ‘Happy 15th Birthday, Part VA TPA! Australia’s Product Liability Morass’ (2007) 15 *Competition and Consumer Law Journal* 26, also via <<http://ssrn.com/abstract=988595>> (accessed 2 August 2009).

⁸¹ Luke Nottage, ‘A New Consumer Agency for Japan? Consumer Redress, Contracts and Product Safety’ (30 October 2008), <<http://www.eastasiaforum.org/2008/10/30/a-new-consumer-agency-for-japan-consumer-redress-contracts-and-product-safety/>> (accessed 2 August 2009).

⁸² Accessible via ‘Submissions: An Australian Consumer Law: Fair Markets—Confident Consumers’ (13 March 2009), <<http://www.treasury.gov.au/contentitem.asp?ContentID=1501&NavID=>>> (accessed 2 August 2009).

* Nonetheless, after considerable controversy (especially about whether the unfair terms controls should extend also to ‘small business’ transactions), the first Trade Practices Act Amendment Bill was tabled in June 2009. See, with further references, my ‘Pain on the Road to Recovery’ – So What, for Consumer (Credit) Law Reform for Australia (and Beyond)?’ (28 July 2009), <<http://www.eastasiaforum.org/2009/07/28/pain-on-the-road-to-recovery-so-what-for-consumer-credit-law-reform-for-australia-and-beyond/>>; and ‘Consumer Contract Law Reform in Australia, Japan and Europe’ (9 August 2009), at <<http://blogs.usyd.edu.au/japaneselaw/unfairterms>>.

⁸³ Above n82, subsequently published as Luke Nottage, ‘Product Safety Regulation in the New Australian Consumer Law: Proper Disclosure Please’ 19(10) *Australian Product Liability Reporter*, 146-9 (2009).

likely to be required to monitor and report safety risks, under contracts with importers in those countries who themselves have reporting requirements to their own regulators. Why shouldn't Australian exporters also disclose such information to Australian regulators? If the latter collaborate, informally or preferably formally, with regulators abroad, this could even directly assist exporters who take product safety risks seriously. Even Fonterra's voluntary disclosure to the New Zealand government in 2008 belatedly helped to address the Sanlu milk products disaster in China.⁸⁴

So Australia should at least 'trade up' in its consumer law to meet current global standards, not just local ones. But the nation should also push the envelope and help create some new global standards – as it helped do with its TPA, back in the 1970s. Fels highlights the Consultation Paper's proposal to concentrate power over consumer credit regulation in Canberra, suggesting that the ACCC should be the regulator rather than the Australian Securities and Investment Commission (ASIC, 'with its noted lack of consumer zeal to date'). But I am more interested in some new *substantive* rules. For example, why not a nation-wide 'suitability rule' for at least some types of consumer credit – unsecured or secured – requiring lenders to assess borrowers' ability to repay? Japan enacted such rules in 2006, and similar protections are increasingly available for investors in other financial products world-wide. And why not try a 'world-first' – requiring suppliers of unsecured credit to inform regulators when their products are linked to abnormally high levels of financial distress (insolvencies, even suicides)?⁸⁵ After all, an explosion of unsecured consumer lending was linked in the US and elsewhere to booms (and now busts) in home mortgage lending, property prices, securitisation and other markets.⁸⁶

Instead, the Australian government seems to be losing sight of the bigger picture. At long last some debate is now emerging, for example, about the grant of at least A\$14,000 being handed out to first home buyers. In January 2009, such grants accounted for 26.5 per cent of the A\$8 billion in new home lending. In the same section of the *Sydney Morning Herald* ('Pros and cons of granting a fiscal favour', p. 6), the CEO of Australia's Commonwealth Bank recently drew a parallel with the US subprime housing loans debacle that triggered the current global crisis, pointing out that: 'All of us have to make sure we're lending responsibly to first-home buyers'.⁸⁷ This echoes something I've been thinking and

⁸⁴ Luke Nottage, 'Consequences of Melamine-Laced Milk for China, NZ, Japan and Beyond' (14 October 2008) <<http://www.eastasiaforum.org/2008/10/14/melamine-laced-milk-in-china-nz-japan-and-beyond/>> (accessed 2 August 2009).

⁸⁵ See further Part 8 below.

⁸⁶ Luke Nottage, 'Consumer Over-Indebtedness in Japan, Australia and the US' (8 July 2008), <<http://www.eastasiaforum.org/2008/07/08/consumer-over-indebtedness-in-japan-australia-and-the-us/>> (accessed 2 August 2009).

⁸⁷ Danny John, 'Pros and cons of granting a fiscal favour' (21 March 2009) *Sydney Morning Herald*, <<http://business.smh.com.au/business/pros-and-cons-of-granting-a-fiscal-favour-20090320-94eg.html>>

saying privately for months regarding this grant. It is tempting for governments to try anything in the short term to revive spending, including such measures to make credit *more* readily available. But a key lesson from the present mess is worth remembering. Market participants often suffer from ‘over-optimism bias’ and other irrational impulses, as well as raw greed, which can lead to enormous and widespread adverse consequences over the long term.

Lastly, if the Rudd government really wants to be ‘activist’, it should also consider – as Fels points out – ‘creating a separate consumer agency’. Once again, Australia doesn’t need to reinvent the wheel; a similar debate has recently taken place in Japan, for example.⁸⁸ A separate agency might help generate more comprehensive, careful and expeditious ongoing reforms to Australia’s consumer law – now in mid-life crisis. Policy-makers must respond to the current economic meltdown with more innovative and energetic proposals that promise long-term socio-economic benefits, not just short-term ones.

7. Australia’s less lethargic law reform? International arbitration in the Asia-Pacific

(21 April 2009)

On 21 November 2008, the Attorney-General’s Department (AGD) announced a Review of Australia’s International Arbitration Act 1974 (IAA).⁸⁹ The aim was to consider whether the Act should be amended to:

- ensure it provides a comprehensive and clear framework governing international arbitration in Australia;
- improve the effectiveness and efficiency of the arbitral process while respecting the fundamental consensual basis of arbitration, and;
- consider whether to adopt ‘best-practice’ developments in national arbitral law from overseas.

The AGD’s Discussion Paper (DP) expressed the hope that a revised IAA would make Australia a more attractive venue for conducting international commercial arbitration (ICA), especially within the Asia-Pacific region. Unfortunately, Australia has missed that boat, with

(accessed 2 August 2009).

⁸⁸ Luke Nottage, ‘A New Consumer Agency for Japan? Consumer Redress, Contracts and Product Safety (30 October 2008), <<http://www.eastasiaforum.org/2008/10/30/a-new-consumer-agency-for-japan-consumer-redress-contracts-and-product-safety/>> (accessed 2 August 2009).

⁸⁹ Australian Government—Attorney-General’s Department, ‘Review of International Arbitration Act 1974’ (13 November 2008), <<http://www.ag.gov.au/internationalarbitration>> (accessed 2 August 2009).

China, Hong Kong and Singapore the clear leaders now in this part of the world. For Australia to have any chance at all, it needs a much more ambitious reform than envisaged in the AGD's DP. Anyway, Australia needs to appreciate the more diffuse and long-term benefits of this type of reform.

The Table below, adapted from an empirical study published in 2008 by the University of London and PricewaterhouseCoopers,⁹⁰ confirms that the Australian Centre for International Commercial Arbitration (ACICA) has almost completely missed out on attracted ICA work, compared to its counterparts in China (CIETAC), Hong Kong (HKIAC) and Singapore (SIAC).

Institution	2003	2004	2005	2006	2007	TOTAL
ICC#	580	561	521	593	599	2854
AAA/ICDR	646	614	580	586	621	3047
LCIA	99	83	110	130	127	549
SCC#	169	123	100	141	170	703
Swiss Chambers	0	52	54	50	58	214
HKIAC	287	280	281	394	448	1690
SIAC	35	48	45	65	70	263
CIETAC	422	462	427	442	429	2182
DIS#	81	87	72	75	100	415
ICSID	30	27	26	24	35	142*
ICAC (Ukraine)#	389	262	366	323	319	1659
CICA	70	77	72	62	54	335
KCAB	38	46	53	47	59	243
VIAC	45	50	54	36	40	225
SAKIG	46	55	48	40	32	221
NAI	32	33	32	29	28	154
WIPO Arbitration and Mediation Centre	8	9	22	23	32	94
Chamber of National and International Arbitration Milan	15	11	18	20	23	87

⁹⁰ PriceWaterhouseCoopers, 'International Arbitration: Corporate Attitudes and Practices 2008' (June 2008), <http://www.pwc.co.uk/eng/publications/international_arbitration_2008.html> (accessed 2 August 2009).

Mongolian National Arbitration Court	11	13	11	22	12	69
JCAA	14	17	10	11	14	66
PCA	5	5	6	5	9	30
ACICA	1	1	2	2	1	7
	3023	2916	2910	3120	3280	15249

Notes: * including cases submitted under ICSID Additional Facility Rules

including domestic (not just international) arbitrations

Other arbitration centres in Asia are also building up caseloads (for example, KCAB in Korea), and the American Arbitration Association (AAA) conducts arbitrations in places like California as well as the East Coast. The International Chamber of Commerce is setting up branches in Singapore and Hong Kong, following steady increases in ICC cases involving Asian parties, who also seem keener now to press for the seat to be in Asia (including, albeit occasionally, Australia or Japan) rather than Paris, Geneva or London.

China, Hong Kong and (to a lesser extent) Singapore have benefited from the boom in business with China over the last decade. HKIAC has taken away cases from CIETAC since the UK renounced sovereignty over Hong Kong in 1997, and foreign parties have become more aware that the Chinese government in fact does not require Chinese parties to agree only to CIETAC arbitration. SIAC has also benefited from the emergence of India.

Further, all these institutions have received strong government backing, financial and otherwise, compared say to ACICA. This extends to regular reforms to arbitration legislation, where the Australian government has been most remiss. Although it amended the IAA in 1989 to adopt the 1985 UNCITRAL Model Law on ICA, unlike HK (which also adopted it in 1989) and Singapore (1995) Australia has not amended it for almost two decades now, despite some very peculiar decisions of Australian courts and some clear errors in drafting the legislation. Even New Zealand, which adopted the Model Law in 1996, enacted amendments to its Arbitration Act in 2007 following some major revisions to the Model Law agreed by the UN in 2006.

For Australia to regain any lost ground, it must be bold in adopting new or emerging global standards as reflected in the revised Model Law. This extends to seriously considering the option of completely abolishing writing requirements for a valid arbitration agreement, and especially the revised Model Law's compromise solution of allowing ex parte preliminary orders in support of interim measures issued by arbitrators.

These solutions, already found for example in New Zealand, also help to restore greater informality and therefore cost-effectiveness in ICA proceedings. That is especially important now that studies (like a 2006 one by the University of London/PWC) confirm a re-emergence of a persistent trend for ICA to become more and more like regular court litigation, despite concerted efforts in the late 1990s to address a similar trend.⁹¹

However, this bolder approach is only evident in a few Submissions available via the AGD website,⁹² notably in a Final Submission (and now an article manuscript⁹³) by myself and Professor Richard Garnett. We also urge the AGD to address at least twenty major issues in this Review, not just the (mostly straightforward) eight issues raised in its DP. Australia should re-emphasise informality and a related respect for arbitral autonomy, following the global trend even though the English law tradition has involved greater supervision of arbitration by the courts. Perhaps the Review so far represents another example of Australia's conservatism in law reform, apparent also in the reluctance to follow emerging trends in consumer product safety re-regulation and control over unfair contract terms.⁹⁴

Even if we can achieve a more comprehensive and bolder reform of the IAA, Australia needs to be realistic. Its 'tyranny of distance' and the 'early-mover advantage' achieved by Hong Kong and then Singapore mean that Australia will probably never achieve a dramatic increase in ICA caseloads. One quantitative analysis found quite little economic impact in various countries from adopting even the original Model Law.⁹⁵ However, such analysis deals in aggregates so Hong Kong and Singapore are probably important exceptions, at least nowadays. More importantly, the study did not (and probably cannot easily) deal with more diffuse benefits that can follow from comprehensive arbitration law reform.

For example, it helps Australian lawyers and their clients by re-educating them about existing and emergent global best practices, so they can do more and better when negotiating arbitration clauses and resolving disputes in arbitrations (and sometimes then courts) outside Australia. Comprehensive reform of ICA legislation also assists in

⁹¹ PriceWaterhouseCoopers, 'International Arbitration: Corporate Attitudes and Practices 2006', <<http://www.voldgiftsinstituttet.dk/dk/Materiale/Files/International+arbitration:+corporate+attitudes+and+practices+2006>> (accessed 2 August 2009).

⁹² Above n89.

⁹³ Luke Nottage and Richard Garnett, 'The Top Twenty Things to Change in or around Australia's International Arbitration Act' (2009) Sydney Law School Research Paper No. 09/19; U of Melbourne Legal Studies Research Paper No. 405 <<http://ssrn.com/abstract=1378722>> (accessed 2 August 2009).

⁹⁴ Luke Nottage, 'Investor-state Arbitration for Indonesia, Australia and Japan' (24 July 2008) <<http://www.eastasiaforum.org/2008/07/24/investor-state-arbitration-for-indonesia-australia-and-japan/>> (accessed 2 August 2009).

⁹⁵ Christopher Drahozal, 'Regulatory Competition and the Location of International Arbitration Proceedings' (2004) 24 *International Review of Law & Economics* 371.

understanding and reassessing the distinct but overlapping and growing field of investor-state arbitrations.⁹⁶

Longer term, as in countries like Japan that also recently revised arbitration legislation, comprehensive reform aimed at cross-border arbitration should also help to reinvigorate arbitration of purely domestic disputes.⁹⁷ In Australia, this field is also largely stagnant. Commercial Arbitration Acts still hold sway, dating back to the mid-1980s and involving even greater court supervision of arbitral proceedings. Some of us have been pushing for reform for years. Maybe this will get some traction now that the Chief Justice of New South Wales has highlighted the problem, and the best solution, in a speech in Sydney on 2 February 2009:⁹⁸

The focus on commercial arbitration as a form of commercial dispute resolution has always offered, but rarely delivered, a more cost effective mode of resolution of disputes. Our uniform legislative scheme for domestic arbitration is now hopelessly out of date and requires a complete rewrite. The national scheme implemented in 1984 has not been adjusted in accordance with changes in international best practice. Of course, in our federation, agreement on technical matters such as this in multiple jurisdictions is always subject to delay. The delay with respect to the reform of the Commercial Arbitration Acts is now embarrassing. This is not an area in which harmonisation based on the lowest common denominator principle is appropriate.

In my opinion, the way out of the impasse is to adopt the UNCITRAL Model Law as the domestic Australian arbitration law. It is a workable regime, itself now subject to review at the Commonwealth level. Its adoption as the domestic Australian arbitration law would send a clear signal to the international commercial arbitration community that Australia is serious about a role as a centre for international arbitration. Our competitors in this regard, such as Hong Kong or Singapore, do not create a rigid barrier between their domestic and international arbitration systems. Nor should we.

⁹⁶ Above Part 7.

⁹⁷ See also Luke Nottage, 'International Investment and Commercial Arbitration in Australia and Japan: Shared Challenges, Different Solutions?' (20 July 2009), <http://blogs.usyd.edu.au/japaneselaw/2009/07/international_investment_and_c.html> (accessed 2 August 2009).

⁹⁸ The Honourable JJ Spigelman AC, 'Address—Opening of Law Term Dinner, 2009' (2 February 2009), <[http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/Spigelman020209.pdf/\\$file/Spigelman020209.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/Spigelman020209.pdf/$file/Spigelman020209.pdf)> (accessed 2 August 2009).

I would add that aligning the CAA regime more closely with the revised IAA has the further advantage of reviving domestic arbitration anyway.* Also, the IAA regime should be updated comprehensively, even if in extending it then to domestic arbitrations we then pare back some of the new provisions (or even some of the original ones) to acknowledge some somewhat different public interest elements (for example, in B2C transactions) and perhaps different underlying empirical realities (for example, more use of non-lawyer arbitrators). Ambitious reform of the IAA is particularly important, given the delays and complications alluded to by the Chief Justice that are inherent to Australia's constitutional system. Similar reasons underlie my call for a more comprehensive new 'Australian Consumer Law'.⁹⁹

In both fields of law reform, if we don't get it right now, it will be at least another decade before Australia gets another chance. And we can be sure that other Asia-Pacific countries are probably already engaged in or will soon embark on their own further reforms to laws on ICA. They too will want to further bolster this preferred mechanism for resolving cross-border commercial disputes, to keep attracting more ICA cases (and associated service industries) to their own shores, and to encourage more use of arbitration domestically.

8. Responsible Consumer Lending Rules for Australia Too: Submission on the National Consumer Credit Protection Bill

(11 May 2009)

* Australia's Standing Committee of Attorney Generals (SCAG) met 16-17 April and included this welcome initiative in its Summary of Decisions (available via <http://www.scag.org.au/lawlink/SCAG/ll_scag.nsf/pages/scag_meetingoutcomes>):

Ministers agreed to the drafting of new uniform commercial arbitration legislation based on the UNCITRAL Model Law on International Commercial Arbitration, supplemented by any additional provisions as are necessary or appropriate for the domestic scheme. The aim of the draft model Bill is to give effect to the overriding purpose of commercial arbitration, which is to provide a method of finally resolving disputes that is quicker, cheaper and less formal than litigation. Adoption of the draft model Bill by jurisdictions will be subject to consultation with stakeholders.

And in May the NSW Attorney General released a 'Blueprint for Alternative Dispute Resolution in NSW Discussion Paper' (at <[http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/ADR_Blueprint.doc/\\$file/ADR_Blueprint.doc](http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/ADR_Blueprint.doc/$file/ADR_Blueprint.doc)>) which includes:

Proposal 10: Progress amendments to uniform commercial arbitration legislation, based on the UNCITRAL Model Law on International Commercial Arbitration, supplemented by any additional provisions as are necessary or appropriate for the domestic scheme.

Proposal 11: Establish a single Sydney International Arbitration Centre that has the physical space, organisational facilities, secretarial, computer and research support in the one location, to position Sydney better as a centre for international commercial arbitration.

To my knowledge, however, as of August 2009 nothing has come of this at the State level. Nor indeed had there been any further public communication from the AGD regarding the IAA review.

⁹⁹ Above Part 7.

I wrote to Australia's Treasurer recently agreeing we need re-regulation of Australia's consumer credit markets, along the lines proposed in 'The National Consumer Credit Reform Package'.¹⁰⁰ I considered some improvements that could be made regarding an External Dispute Resolution scheme. But I begin by supporting a key improvement proposed in the National Consumer Credit Protection Bill: imposing responsible lending rules (focused on 'suitability' and repayment capacity), drawing partly on my studies of Japanese law.

Such rules have parallels with more longstanding fair trading legislation requirements on suppliers to provide goods that are both 'fit for purpose' and of general 'merchantable quality' (for example, not unsafe). In today's increasingly service-based economy, the law should promote economic as well as physical security.¹⁰¹ Restoring consumer confidence is particularly important during this recession in Australia and the world's major economies, and underpins a parallel comprehensive revamp underway for other consumer law nation-wide.¹⁰²

Imposing such 'know-your-customer' rules in consumer credit will bring Australia in line with other areas of law too, and with several other jurisdictions. They have long been found in legislation protecting those investing in securities. The rationale given is often the complexity of such products. Yet loan transactions are also complex for most individual consumers. So countries like Japan have now enacted such rules to restore confidence in both unsecured lending and sales credit markets.¹⁰³ More generally, suitability rules are now widely found in OECD member countries, through administrative/criminal law and/or private law.¹⁰⁴

Such developments recognise pervasive and persistent market failures, especially information asymmetries and behavioural biases (such 'over-optimism' bias) favouring suppliers.¹⁰⁵ Problems are exacerbated in Australia after the GFC.¹⁰⁶ Competition has

¹⁰⁰ Australian Government—The Treasury, 'Consumer Credit: Legislation', <<http://www.treasury.gov.au/consumercredit/content/legislation.asp>> (accessed 2 August 2009).

¹⁰¹ Oren Bar-Gill & Elizabeth Warren, 'Making Credit Safer' (2008) 157 *University of Pennsylvania Law Review* 1, also via <<http://ssrn.com/abstract=1137981>> (accessed 3 August 2009).

¹⁰² Above Part 7.

¹⁰³ Souichirou Kozuka and Luke Nottage, 'Re-Regulating Unsecured Consumer Credit in Japan: Over-Indebted Borrowers, the Supreme Court, and New Legislation' (2007) *Yearbook of Consumer Law; Sydney Law School Research Paper No. 07/62*, <<http://ssrn.com/abstract=1019392>> (accessed 3 August 2009).

¹⁰⁴ Directorate for Science, Technology And Industry Committee on Consumer Policy, 'The Report on OECD Member Countries' Approaches to Consumer Contracts' (7 July 2007), <<http://www.oecd.org/dataoecd/11/28/38991787.pdf>> (accessed 3 August 2009).

¹⁰⁵ Elaborated further in: Souichirou Kozuka and Luke Nottage 'The Myth of the Careful Consumer: Law, Culture, Economics and Politics in the Rise and Fall of Unsecured Lending in Japan' (with Souichirou Kozuka) in Johanna Niemi-Kiesilainen, Iain Ramsay & William Whitford (eds) *Consumer Credit, Debt and*

been drastically reduced in favour of its four big banks, which (ironically) have enjoyed large profits.

There is also more awareness world-wide about the strong interrelationships among different financial markets nowadays, and between them and the real economy:

- In the US, burgeoning unsecured consumer debt (particularly through credit cards) was a major factor behind the growth in subprime mortgages, marketed as a means of lower-cost refinancing. This fueled the boom in securitisation and other financial markets, followed by the inevitable bust.
- Australia was lucky – rather than deliberate – to have missed out on much growth in securitisation, although several non-bank institutions (now mostly bankrupt or bought out) did take advantage of the then booming markets in the US to secure low-cost funds for on-lending here. Relatedly, Australia also had less (clearly) sub-prime mortgage lending. But mortgage loans did balloon anyway, and (ironically¹⁰⁷) they are still being encouraged through ongoing ‘first home owner’ grants and other measures from both federal and state governments.¹⁰⁸ And behind this lies similar long-term growth in credit card debt, and increasing evidence of sharp practices in unsecured consumer credit markets more generally (as in debt collection¹⁰⁹ - see also some markets in New Zealand¹¹⁰).

The proposed Bill’s requirements for responsible lending are therefore well overdue. If they had been implemented earlier, as many have called for over the years, we might have averted such a serious financial crisis.

Comparing more closely Japan’s legislation enacted already in 2006, however, the following might be considered for our Bill:¹¹¹

- A rule (or at least a presumption) that the consumer has ‘incapacity to repay’ when the proposed loan payments would exceed more than one-third (or

Bankruptcy: National and International Dimensions (Hart, Oxford, forthcoming 2009); longer version as Sydney Law School Research Paper No. 09/50, at <<http://ssrn.com/abstract=1413464>>.

¹⁰⁶ Allan Fels and Fred Brenchley, ‘Smash and grab days may be over for the big banks’ (16 May 2009) *Sydney Morning Herald*, <<http://business.smh.com.au/business/smash-and-grab-days-may-be-over-for-the-big-banks-20090515-b61n.html>> (accessed 3 August 2009).

¹⁰⁷ Above Part 7.

¹⁰⁸ Jonathan Dart, ‘Rudd advisers criticise home buyers grant’ (16 May 2009) *Sydney Morning Herald*, <<http://www.smh.com.au/national/rudd-advisers-criticise-home-buyers-grant-20090515-b62w.html>> (accessed 3 August 2009).

¹⁰⁹ Australian Competition and Consumer Commission, ‘Debt Collection’ <<http://www.accc.gov.au/content/index.phtml/itemId/622458>> (accessed 3 August 2009).

¹¹⁰ Luke Nottage, ‘The financial crisis – and loansharks in Japan and NZ’ (9 October 2008), <<http://www.eastasiaforum.org/2008/10/09/financial-crisis-and-loansharks-in-japan-and-nz/>> (accessed 3 August 2009).

¹¹¹ Kozuka and Nottage, above n103.

some other clear percentage) of his or her net income;

- An interest rate cap (even if set at a high level), applied consistently across Australia (in contrast to the variable rates nowadays).

We might also go a step further and require Australian credit suppliers to notify ASIC – as well as borrowers themselves – if they have actual or constructive knowledge that their products are associated with abnormally high levels of borrower stress (such as suicides or declared insolvency rates, compared to industry averages).¹¹² The analogy here with similar duties on suppliers of consumer goods to notify regulators of serious product-related accidents. That duty is imposed now in the US, the EU, Japan (since 2006), China (since 2007) and probably soon Canada (currently before Parliament). A variant was also recommended by our Productivity Commission in 2008. Our Consumer Law Roundtable¹¹³ and Choice (Australia’s peak NGO for consumers)¹¹⁴ are pressing for its inclusion in the proposed new nation-wide Consumer Law. I propose here to extend a similar notion, for similar policy reasons, to the National Consumer Credit Protection Bill.

Lastly, I welcome the proposed Bill’s requirement (also long called-for) that mortgage brokers be properly regulated and that all Australian Credit Licences be required to be members of an External Dispute Resolution scheme (in the shadow of standards set by ASIC). Consumer ADR has been overlooked in Treasury officials’ parallel proposals to harmonise and improve other consumer law in Australia.

However, experience from other industry ‘ombudsman’ schemes ([eg for example, telecommunications](#)) shows that to reduce disputing and poor customer relations, it is not enough for such schemes to be provided for ‘free’ to consumers. For the schemes to work, even though they do not (yet) involve court-like processes, it is often necessary for consumers to seek legal or professional help. But the schemes typically do not allow a wronged consumer to claim any expenses for such necessary assistance, in contrast to most courts. Suppliers know this, so they have incentives to not settle claims quickly or for amounts not reflective of the actual costs involved for consumers. A solution, which should be added to the Bill, is a requirement for the proposed scheme for Credit Licences to include a ‘consumer advocate’ service available to deserving consumer complainants, whose costs (borne otherwise by the scheme) could be claimed back from the service provider who is found to be at fault (either through a settlement reached, or a subsequent binding determination).

A second improvement for our legislation would be to clarify whether the scheme is based on administrative law, arbitration law, or contract law. The question has already led

¹¹² Above Part 7.

¹¹³ Above n82.

¹¹⁴ ‘Choice’, <<http://www.choice.com.au>> (accessed 3 August 2009).

to litigation for other schemes. The answer has not yet emerged, but it has various implications ([eg for example](#), the standards of ‘natural justice’ expected, whether consumers or just industry members can complain about those, and whether there can be appeals to the courts for substantive errors of law).

More sophisticated rules for such an Ombudsman scheme would be useful also for countries like Japan. One was proposed by Professor Tsuneo Matsumoto for Japanese banks over a decade ago, but was met by deathly silence. After all the other changes to Japan’s consumer law and policy framework, including now the establishment of a new independent Consumer Affairs Agency, the time may now have come.¹¹⁵

9. Australia and Japan as America’s deputies – in multilateralism?

(12 May 2009)

Dr Malcolm Cook and Mr Andrew Shearer at the Lowy Institute in Sydney published last month a short analysis entitled *Going Global: A New Australia-Japan Agenda for Multilateral Cooperation*.¹¹⁶

To help both governments navigate [a] more complicated and uncertain international environment, the paper offers a agenda for enhanced Australia-Japan multilateral cooperation organised around:

- support for American global leadership, and
- reforming post-war multilateralism.

Three areas of international policy are particularly well suited to closer Australia-Japan cooperation in pursuit of these goals: climate change and energy security; nuclear non-proliferation; and official development assistance.

I have doubts about these two foundational principles, especially over the mid- to long-term, given America’s own longstanding ambivalence about multilateralism, and its relative decline particularly since the GFC. In the short term, however, it seems worthwhile

¹¹⁵ See Comments at 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#comments>; then Kazuaki Nagata, ‘New agency to change policy, culture of consumer affairs’ (16 June 2009) *The Japan Times Online* <<http://search.japantimes.co.jp/cgi-bin/nn20090616a7.html>> (accessed 3 August 2009) and ‘Ex-Cabinet Office vice minister Uchida to head consumer affairs agency’ (2 July 2009) *Japan Today*, <<http://www.japantoday.com/category/politics/view/ex-cabinet-office-vice-minister-uchida-to-head-consumer-affairs-agency>> (accessed 3 August 2009).

¹¹⁶ Malcolm Cook & Andrew Shearer, ‘Australia and Japan: Going global’ <<http://www.lowyinstitute.org/Publication.asp?pid=1022%20>> (accessed 3 August 2009).

to think more deeply and creatively about three of their seven specific recommendations:¹¹⁷

- Leverage APEC and the East Asia Summit more to act as caucuses in multilateral bodies like the WTO ...
- Better coordinate Australian and Japanese aid policies and programs ...
- More ambitiously, develop and pursue an Australia-Japan agenda for reform of the multilateral system.

Mostly implicit in the analysis is the rise of China, although that the paper does mention that specifically – along with the rise of India – as ‘changing power balances in the region’.¹¹⁸ Ian Castles has disagreed recently with the foreign editor of *The Australian* on ‘Measuring China’s Size and Power’, even in economic terms.¹¹⁹ How quickly China grows relative to the US will partly define the ‘short term’ for both Australia and Japan. Already, Tobias Harris reports that PM Aso alluded recently in Beijing to the possibility of a Japan-China FTA.¹²⁰ If this eventuates before any Japan-US FTA, what does this bode for the ‘support for American global leadership’ advocated by Cook and Shearer?

Nor should we forget India, as Bill Emmott argued in *Rivals* in 2008.¹²¹ Even in the short term, Raghendra Jha remains ‘guardedly optimistic’ about its growth prospects – and everything, especially nowadays, is relative.¹²² Already, Japan has commenced bilateral FTA negotiations with India.

The point is that the world is becoming increasingly multi-polar, especially as the GFC and recession hit the US particularly hard. Hitching our wagon to America may well leave us behind. It might be better for Japan and especially Australia to support other economic powerhouses in leadership bids, on a more ad hoc basis. Similarly, regarding at least some security matters (like invasions of Iraq), but I leave that to the experts.

Another point is that America itself has hardly been exemplary in promoting

¹¹⁷ p. 2.

¹¹⁸ p. 5.

¹¹⁹ Ian Castles, ‘Measuring China’s size and power’ (10 May 2009), <<http://www.eastasiaforum.org/2009/05/10/measuring-chinas-size-and-power-correctly/>> (accessed 3 August 2009).

¹²⁰ Tobias Harris, ‘The emergence of Middle Power Asia’ (7 May 2009), <<http://www.eastasiaforum.org/2009/05/07/the-emergence-of-middle-power-asia/>> (accessed 3 August 2009).

¹²¹ *Rivals* (Harcourt, New York, 2008). See Luke Nottage, ‘Rivals: China, India and Japan—Economic, not Olympic?’ (22 August 2008), <<http://www.eastasiaforum.org/2008/08/22/rivals-china-india-and-japan-%e2%80%93-economic-not-olympic/>> (accessed 3 August 2009).

¹²² Raghendra Jha, ‘The global financial crisis and short-run prospects for India’ (8 May 2009), <<http://www.eastasiaforum.org/2009/05/08/the-global-financial-crisis-and-short-run-prospects-for-india/#more-4066>> (accessed 3 August 2009).

‘post-war multilateralism’, whether in security or economic affairs. (Think of its pre-WTO approach to market access in Japan and elsewhere, its slow implementation of adverse WTO rulings, and America’s active involvement in bilateral and regional FTAs – beginning with NAFTA.) That’s understandable for a great power, and the US may be – or turn out to be – better than others like the EU or large countries in Asia. But we don’t yet know for sure, and meanwhile it leaves a tension between the two guiding principles proposed by Cook and Shearer.

In the (truly) short term, however, this approach could be useful in some fields. For example, Australia and Japan could include balanced investor-state arbitration provisions in the FTA they are currently negotiating.¹²³ These could serve as a template for those in the Trans-Tasman Partnership Agreement, which both Australia and the US wish to join. A permanent Appellate Body and improvements in state-to-state dispute settlement could be added to such Agreements, which in turn might promote useful reforms to the WTO’s Dispute Settlement Understanding at the multilateral level.* But even in this process, note that the US could not call all the shots, even with the support of Australia and Japan. Other countries are already involved, and pragmatic accommodations reached. All the more so, if trying to include further APEC or East Asian Summit members.

A second area where the latter two countries could collaborate is ‘legal technical assistance’, within their ODA programs. For example, AusAID programs increasingly emphasise long-term sustainability, as with Sydney Law School’s program to promote human rights awareness among police and prosecutors in Nepal.¹²⁴ As well as ‘training the trainers’, as in that program, it would be useful to be able to commit to follow-ups with other grants through agencies like JICA in Japan. More simply, the two ODA agencies could cooperate in a one longer-term project. This, in turn, might be better coordinated with regional or multilateral initiatives.

However, note again that the vision of the perfect ‘rule of law’ in the US is not necessarily identical to that which has evolved over the centuries in Australia, from the original English variant of the common law tradition. Let alone the vision found in the countries like Japan, with a legal system that has borrowed heavily from continental European law traditions. So, once again, bilateral cooperation may come up against a

¹²³ Luke Nottage, ‘Investor-state Arbitration for Indonesia, Australia and Japan’ (24 July 2008), <<http://www.eastasiaforum.org/2008/07/24/investor-state-arbitration-for-indonesia-australia-and-japan/>> (accessed 3 August 2009).

* See generally ‘Taniguchi Talk – Does the WTO Really Settle International Trade Disputes?’, (1 August 2009) <http://blogs.usyd.edu.au/japaneselaw/2009/08/taniguchi_talk.html>.

¹²⁴ ‘Safeguarding Human Rights in the Criminal Justice System in Nepal’, Sydney Centre for International Law, <<http://www.law.usyd.edu.au/scil/nepal.html>> (accessed 3 August 2009). See also the conference on ‘Human Rights in Asia: Towards Institution Building’ co-hosted by ANJeL at Sydney Law School on 27-8 November 2009, <<http://www.usyd.edu.au/news/law/457.html?eventcategoryid=39&eventid=4142>>.

trade-off between American leadership and a new multilateralism.

10. Neoclassical and Chicago School Economics Keeps Coming to Japan(ese Law)

(6 June 2009)

A lively and long-overdue debate has emerged recently on the now widely-read East Asia Forum blog. Leading in to their forthcoming 6th edition textbook, economists McTaggart, Findlay and Parkin defended ‘The state of economics’ against charges it failed to anticipate and address well the GFC.¹²⁵ Another Australian economist, Steve Keen from UWS,¹²⁶ responded with: ‘Why neoclassical economics is dead’.¹²⁷ So Richard Pomfret from Adelaide objects that it is: ‘Too soon for obituaries: economics is alive and (reasonably) well’.¹²⁸

I can’t resist adding my two yen’s worth. Contrary to Pomfret, unfortunately ‘neoclassical economics’ is not a ‘straw man’ set up by Keen. Nor has it ‘moved on’ - enough, especially these days. To give only one example relevant to Australasia: J Mark Ramseyer’s simplistic application of Chicago School methodology to the economic analysis of virtually all aspects of Japanese law and the economy.

Craig Freedman and I debunked such Chicago Fundamentalism, methodologically and empirically, back in 2006.¹²⁹ But Ramseyer at Harvard keeps churning out more research ‘proving’ that Japan is readily explicable by the most basic and ‘universal’ determinants. Allegedly:

- everyone else in wrong about eg the existence of ‘main banks’ or corporate ‘keiretsu’ groups (that is, we don’t need to worry about distinctive parameters or exogenous variables, which might lead to complex inquiries into how and why those come into existence); and
- most fundamentally, basic Chicago School theory assumes that people are driven by narrow self-interested behaviour (no matter what they say or seem to

¹²⁵ Doug McTaggart, Christopher Findlay & Michael Parkin, ‘The state of economics’ (21 May 2009) <<http://www.eastasiaforum.org/2009/05/21/the-state-of-economics/>> (accessed 3 August 2009).

¹²⁶ ‘Associate Professor Steve Keen’, University of Western Sydney Expert Directory, <http://pubapps.uws.edu.au/expert/expert_details.php?eid=3> (accessed 3 August 2009).

¹²⁷ Steve Keen, ‘Why neoclassical economics is dead’ (30 May 2009), <<http://www.eastasiaforum.org/2009/05/30/why-neoclassical-economics-is-dead/>> (accessed 3 August 2009).

¹²⁸ Richard Promfret, ‘Too soon for obituaries: economics is alive and (reasonably) well’ (4 June 2009), <<http://www.eastasiaforum.org/2009/06/04/too-soon-for-obituaries-economics-is-alive-and-reasonably-wel1/>> (accessed 3 August 2009).

¹²⁹ Craig Freedman & Luke Nottage, ‘You Say Tomato, I Say Tomahto, Le’ts Call the Whole Thing Off: The Chicago School of Law and Economics Comes to Japan’ (2006), <http://www.econ.mq.edu.au/Econ_docs/cjes/research_papers/2006-4_Freedman_Nottage.pdf> (accessed 3 August 2009).

do) and the Japanese must be no different.

Further, just like Milton Friedman and colleagues, this professes to be purely descriptive but the vision is also normative.¹³⁰

So in a February 2009 paper, Ramseyer et al find that listed companies in Japan don't pay their execs too much when compared to smaller closely-held companies.¹³¹ I think we are supposed to draw the implications that (a) this holds elsewhere (like the US and Australia), and (b) we shouldn't attempt to regulate any aspects of exec pay (unlike the debates now in both countries) because everyone is making informed choices.

Not too different from his 2006 study of Japanese *bengoshi* lawyer incomes.¹³² That found (a) a bifurcated Bar (like in Heinz et al found decades ago in Chicago): 'smarter' and therefore 'appropriately' richer corporate lawyers in Tokyo, vs other lawyers in smaller provincial law firms. Except that here we are told (b) the latter cohort earn 'monopoly rents' - so the normative implication we presumably are to draw is: 'just liberalise all entry into the legal profession'.

So, how will die-hard (and real-life) Chicago School analysts like Ramseyer look at consumer credit markets in Japan or elsewhere, for example, even post-GFC? Souichirou Kozuka and I imagine their all-too-predictable view in a paper (just uploaded on SSRN.com), although the editors of the book it appears in (rightly) found it so unbelievable they had us cut out most of this Ramseyerian thought experiment!¹³³ Our paper shows instead that those markets are instead better explained by information economics (Stiglitz) and especially behavioural economics, and our current writing considers more wide-ranging normative implications.

Yet it remains so hard to achieve prompt and meaningful reforms both in consumer credit reform, especially in Australia (see my Submission above¹³⁴), and in consumer law reform more generally (as I pointed out above, originally on the East Asia

¹³⁰ See also now: Craig Freedman, *Chicago Fundamentalism: Ideology and Methodology in Economics* (2008), also via <http://books.google.com.au/books?id=NsRs4nzp0_gC&dq=craig+freedman+chicago+fundamentalism&printsec=frontcover&source=bl&ots=dCJ4gll1SX&sig=g8DPUeosk47tuayKhFXttlrvjrs&hl=en&ei=l_YpSoicBcKSkAX9hMz-Cg&sa=X&oi=book_result&ct=result&resnum=1> (accessed 3 August 2009).

¹³¹ J Mark Ramseyer, Minoru Nakazato & Eric Bennett Rasmusen, 'Public and Private Firm Compensation Compared: Evidence from Japanese Tax Returns' (2009) <<http://ssrn.com/abstract=1358572>> (accessed 3 August 2009).

¹³² Minoru Nakazato, J Mark Ramseyer & Eric Bennett Rasmusen, 'The Industrial Organization of the Japanese Bar: Levels and Determinants of Attorney Incomes' (2006) <<http://ssrn.com/abstract=951622>> (accessed 3 August 2009).

¹³³ Souichirou Kozuka & Luke Nottage, 'The Myth of the Cautious Consumer: Law, Culture, Economics and Politics in the Rise and Partial Fall of Unsecured Lending in Japan' (2009) <<http://ssrn.com/abstract=1413464>> (accessed 3 August 2009).

¹³⁴ Above Part 8, originally at <http://blogs.usyd.edu.au/japaneselaw/2009/05/responsible_consumer_lending_r.html>.

Forum¹³⁵). And I am bemused at Prime Minister Rudd's reshuffling of his front bench in June 2009.¹³⁶ Craig Emerson, the Minister for Small Business, is now responsible also for Consumer Affairs - replacing Chris Bowen, who has moved onto better things as a full Cabinet Minister charged with 'Financial Services, Superannuation and Corporate Law', and 'Human Services' (whatever that means).*

So I'm afraid the shadow of Chicago School (and neoclassical) economics still casts a long shadow in some Asia-Pacific settings. And Steve Keen's broader point remains. Will economists and their policy audiences take this latest financial catastrophe as an opportunity to venture outside their comfort zone and risk sincerely reconsidering engrained ways of looking at and engaging with the world? Or will they tend again to batten down the hatches and hope for 'business as usual'?

11. Possibilities and Pitfalls in Laws Affecting Children of Australian and Japanese Parents

(12 June 2009)

Responding partly to the May judgment of the German Constitutional Court upholding a ban on hyphenated triple-barrelled surnames, Lisa Pryor suggests we adopt 'the Spanish solution'.¹³⁷ That is, children get two surnames, one from each parent. She also suggests we ditch middle names. But middle names already can be used to good effect to address her concerns, especially in the Australia-Japan context. On the other hand, there remains a problem with Japan's Nationality Law, despite its recent amendments, that might catch out children of Australian and Japanese parents.

First, the good news - how middle names can be used to good effect. For example, my eldest daughter (Moana) takes my wife's surname (Kobayashi) as her middle name when we live in an English-speaking country like Australia (becoming: Moana Kobayashi

¹³⁵ Above Part 6, originally at <http://www.eastasiaforum.org/2009/03/25/australias-lethargic-law-reform-how-not-to-revive-consumer-spending/>.

¹³⁶ Josh Gordon, 'Rudd shuffles his frontbench deck' (7 June 2009) <<http://www.smh.com.au/national/rudd-shuffles-his-frontbench-deck-20090606-bz2z.html>> (accessed 3 August 2009).

* Despite - or indeed partly because of - what Rudd wrote and left out in his lengthy manifesto published subsequently in the *Sydney Morning Herald* (25-6 July 2009), I remain concerned that his renewed critique of market fundamentalism will not necessarily translate into optimal consumer law reform. See 'Pain on the Road to Recovery' - So What, for Consumer (Credit) Law Reform for Australia (and Beyond)? (28 July 2009), <<http://www.eastasiaforum.org/2009/07/28/pain-on-the-road-to-recovery-so-what-for-consumer-credit-law-reform-for-australia-and-beyond/>>.

¹³⁷ 'Repetitive name injury', *Sydney Morning Herald*, 6-7 June, News Review p. 7; <<http://www.smh.com.au/opinion/repetitive-name-injury-parents-drop-that-doublebarrelled-title-for-your-kids-sake-20090605-bydx.html>> (accessed 3 August 2009).

Nottage, usually then abbreviated to Moana Nottage). In Japan(ese), she takes Kobayashi as surname, and Nottage as part of her personal name (becoming, as the surname is said first: Kobayashi NottageMoana). That gets abbreviated to Kobayashi Moana in schools there, which sounds like any other Japanese name. But ‘Nottage’ is formally included in her passport or Family Register. That has practical advantages: for example, if Moana and I ever travel across borders without my wife (Australia has acceded to the Hague Convention on Child Abduction, unlike Japan).¹³⁸ And it allows our children to use fairly equally both surnames, retained by their parents.

Perhaps this solution can work for other international marriages and partnerships too. However, it does depend on the flexibility of family and passport-issuing laws, especially overseas. Fortunately, at least the common law tradition tends to take a quite liberal approach to using and changing names.¹³⁹

While on the topic of international marriages with a Japanese and their children, however, let me highlight a second problem relating instead to citizenship. Moana and her younger sister Erica were born in Japan, taking Japanese nationality through their Japanese mother and New Zealand nationality through me. Their younger sister Miah and brother Liam were born in Sydney after we immigrated here in 2001, also gaining Australian nationality because this country maintains an old common law tradition of *ius solis* (allowing nationality also based on place of birth). So when I decided to apply myself for Australian citizenship based on several years as a permanent resident here, to be able for example to vote in federal elections, I included Moana and Erica in my application. (The fee was considerable, but adding children costed no more.)

However, then I happened to read an article by Chuo Law School’s Professor Yasuhiro Okuda in the *Journal of Japanese Law* (Issue 18, 2005), which I help edit in collaboration with the Australian Network for Japanese Law (ANJeL).¹⁴⁰ A problem remains in this situation under Japan’s Nationality Law, despite earlier amendment to allow children of international marriages to have dual citizenship at birth through their parents until reaching the age of majority (currently 20, although that too is now being reconsidered in Japan).¹⁴¹ The Law still provides that anyone is deemed to have renounced

¹³⁸ ‘Authorities—Convention of 25 October 1980 on the Civil Aspects of International Child Abduction’, HCCH, <http://hcch.e-vision.nl/index_en.php?act=conventions.authorities&cid=24> (accessed 3 August 2009).

¹³⁹ See, eg, Roderick Munday, ‘The French Law of Surnames: A Study in Rights of Property, Personality and Privacy’ 6 *Legal Studies* 79 (1986).

¹⁴⁰ ‘Prof Yasuhiro Okuda’, Law School, Chuo University, <<http://c-faculty.chuo-u.ac.jp/~okuda/>> (accessed 3 August 2009); ‘Zeitschrift fuer Japanisches Recht/Journal of Japanese Law’, ANJeL, <http://www.law.usyd.edu.au/anjel/content/anjel_research_pap.html> (accessed 3 August 2009).

¹⁴¹ Jun Hongo, ‘Are young people ready, willing to be adults at 18?’ (16 July 2008) *The Japan Times Online*, <<http://search.japantimes.co.jp/cgi-bin/nn20080716f1.html>> (accessed 3 August 2009).

their Japanese citizenship if they apply for foreign citizenship (including therefore children like Moana and Erica, applying through me as their father). So when I pointed this out to my wife, she insisted that I immediately ring up Australian immigration authorities to withdraw Moana and Erica from my application!

I did so, of course, ‘for the sake of family harmony’ (*katei heiwa no tame ni*)! Although I know that while having the law on the books is one thing, its enforcement can be very different. And would the Japanese Ministry of Justice ever know that Moana and Erica, through me, had taken on Australian nationality? Anyway, there should be some scope to reapply for Japanese nationality if lost due a parent’s inadvertence.

By withdrawing the application for Moana and Erica, however, the end result for our family is that they can’t have Australian as well as Japanese nationality (as do their two siblings born here) until eg they reach 20, decide to chose New Zealand over Japanese nationality anyway, and then apply for Australian nationality. That shouldn’t be a problem if they still reside with us in Australia and Australian law doesn’t change, so that their permanent residency period here allows them to apply forthwith for Australian nationality. But what if we move overseas again? Then they may need to come back to Australia as New Zealand citizens, and reside here for the minimum period before being able to apply. And what if New Zealand citizens no longer get preferential treatment as permanent residents? Or what say Moana and Erica want to come back to Australia before they reach 20, for example, to start university? Having New Zealand and Japanese but not Australian nationality may be disadvantageous in various ways.

Unfortunately, I don’t think these problems sufficiently affect the ‘rights of the child’ and other rights guaranteed by Japan, under international and constitutional law, to have the relevant provisions of the Nationality Law impugned as unconstitutional. The situation facing the Supreme Court was much worse for the children and families, when it disallowed other provisions, as explained by Professor Okuda and Dr Hiroshi Nasu in the Journal’s Issue 26 (2008).¹⁴² In its judgment of 4 June 2008, the Court held that it was contrary to rights to equality that a child born out of wedlock between a Japanese father and a foreign mother can get Japanese nationality only if the father admits paternity during the mother’s pregnancy (or if the couple get married before the child turns 20), but not after birth.¹⁴³ So many families in Japan had ended up with some children having Japanese nationality but not others, even though the Japanese father admitted paternity for all of

¹⁴² ANJeL, above n140.

¹⁴³ (2008) 62(6) Minshu; ‘Case Number 2006 (Gyo-Tsu) No. 135’, translated at <<http://www.courts.go.jp/english/judgments/text/2008.06.04-2006.-Gyo-Tsu-.No..135-111255.html>> (accessed 3 August 2009).

them. The revised Nationality Law now gets rid of this particular problem.¹⁴⁴

But why not change that Law even further, to get rid of issues facing families like mine? The legislation and policy-makers still seem to be stuck in a time-warp, envisaging Japanese and non-Japanese people moving between only two countries. Yet nowadays there is much more to globalisation than that: people often spend considerable periods living and working in many other countries. And even powerful interests within the conservative ruling Coalition had been pushing in 2008 to increase immigration dramatically into Japan, although the GFC has taken some of the wind out of that sail.¹⁴⁵

The solution is simple. Just amend the Nationality Law so that minors from international marriages and partnerships (already entitled to multiple nationality at birth) are not deemed to have renounced Japanese nationality by obtaining a further nationality after birth. And if that seems too much to stomach, why not limit it to parents from countries with which Japan has an FTA or 'Economic Partnership Agreement', as in that already with the Philippines or that presently under negotiation with Australia?

Policy makers might see this as an ambitious proposal. But not compared to a simpler alternative: just allow multiple nationalities, for adults as well as children! That is increasingly common world-wide, even in countries that have inherited the continental European legal tradition. Allowing multiple nationalities in Japanese law would take away much of the rationale for having the current expansive provisions on renunciation of Japanese nationality. The Nationality Law would still need to provide the possibility for renunciation, for those who didn't want to perform the duties associated with Japanese nationality, but simply applying for another nationality would no longer need to be deemed to be renunciation. And a further compromise solution might be, again, to allow multiple nationalities for citizens of countries with which Japan has an FTA or EPA.

12. Multicultural Japan? Policy, Law and Society

(26 June 2009)

A recent lecture in Sydney by Meiji University Professor Keizo Yamawaki reminded me that every country has its myths or somewhat warped perspectives concerning its own national identity.¹⁴⁶

¹⁴⁴ Setsuko Kamiya and Minoru Matsutani, 'Citizenship for kids still tall order' (5 November 2008) *The Japan Times Online*, <<http://search.japantimes.co.jp/cgi-bin/nn20081105f2.html>> (accessed 3 August 2009).

¹⁴⁵ Sayuri Daimon, 'Opening the door to foreigners' (30 April 2009) *The Japan Times Online*, <<http://search.japantimes.co.jp/cgi-bin/nn20090430f1.html>> (accessed 3 August 2009).

¹⁴⁶ Japan Foundation, 'Japan and Migration in the age of globalisation: Ready to become a country of immigration?—Lecture by Professor Keizo Yamawaki, Melbourne and Sydney' <<http://mailmagazine.jpj-sydney.org/issue15/>> (accessed 3 August 2009).

Australia's include the idea that it was traditionally English at its core, even though many of its organising principles – egalitarianism, respect for the state, yet a certain larrikanism – were arguably Irish.¹⁴⁷ Another was that Australia centres on rural communities and 'the bush', even in the case of its greatest sporting hero.¹⁴⁸ A related but debatable motif is that Australia can and should enlighten the world - be 'better than the British'. Such thinking underpinned the Chifley government's push to entrench human rights in Europe and the fledgling United Nations, and to promote a politically radical labour movement in Occupation Japan. Yet the latter policy also involved deeply pragmatic assumptions.¹⁴⁹ And the former push has failed to result, even now, in an enforceable Bill of Rights throughout Australia itself.¹⁵⁰

In Japan, one of the most persistent myths or over-exaggerations has been that of national homogeneity.* Yet this is being increasingly undermined by new initiatives to bolster long-term immigration into Japan, building off a significant rise in foreign residents since the 1990s.

Still, as pointed out in March 2007 by a Japan-based lecturer in Japanese and Australian studies, Chris Burgess:¹⁵¹

In February, education minister Bunmei Ibuki called Japan 'an extremely homogenous country'. Eighteen months earlier, [then] Foreign Minister Taro Aso [and current Prime Minister] described Japan as having 'one nation, one civilization, one language, one culture, and one race'.

Such pronouncements fly in the face of intra-regional differences in Japan, longstanding and intensifying socio-economic disparities, and even significant ethnic and racial diversity – including the Diet's own declaration (on 6 June 2008) that the Ainu were an indigenous people of Japan. Politicians continue to voice them, despite the evidence mustered by social scientists.¹⁵²

Yet new approaches are also emerging in Japan, including within other parts of the government. Despite or perhaps because of the 'lost decade' of the 1990s, numbers of

¹⁴⁷ Patrick O'Farrell, *The Irish in Australia*, (UNSW Press, Sydney, 3rd ed 2000), p. 21.

¹⁴⁸ Brett Hutchins, *Don Bradman: Challenging the Myth*, (Cambridge UP, 2001).

¹⁴⁹ Christine de Matos, *Imposing Peace and Prosperity*, (Australian Scholarly Publishing, North Melbourne, 2008).

¹⁵⁰ Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights*, (Vintage, North Sydney, 2009). But see the diverse views even among some Sydney Law School commentators: <<http://www.usyd.edu.au/news/law/436.html?newsstoryid=3606>>.

* See also Michael Weiner (ed) *Japan's Minorities: The Illusion of Homogeneity* (Routledge, 2nd ed 2008).

¹⁵¹ Chris Burgess, "Multicultural Japan' remains a pipe dream' (27 March 2007) *The Japan Times Online*, <<http://search.japantimes.co.jp/cgi-bin/fl20070327zg.html>> (accessed 3 August 2009).

¹⁵² Yoshio Sugimoto, *An Introduction to Japanese Society* (Cambridge University Press, 2nd ed 2003).

registered foreign residents in Japan have grown to over two million. They are approaching two percent of the overall population, rapidly aging and already in decline since 2004. Further, according to Professor Yamawaki's paper for the 12th International Metropolis Conference hosted by Monash University in 2008, of these residents the proportion of de facto immigrants – permanent residents (over 800,000), their spouses or children, or other long-term residents – has grown to around two-thirds.¹⁵³ Foreign residents are especially concentrated in Tokyo (more than 3 percent of its population) but also other cities in Kanto, as well as the Tokai (especially Brazilians) and Kansai regions (especially Koreans). Figures over the last decade show a decline in Korean residents and dramatic increases in Chinese residents, but also rises in Brazilians and the 'other' category (including Australians!).

This provides a backdrop not only to developments in constitutional case law mentioned in my previous blog posting, but also government legislation and policy initiatives over the last few years in Japan.¹⁵⁴ Traditionally, Yamawaki argues, the law has focused on rules governing the admission of foreigners into Japan. (These remain important, as shown by evolving developments regarding refugees, outlined for example by Osamu Arakaki.¹⁵⁵ Another example is controversial legislation this June abolishing the Alien Registration Law to concentrate information on foreign residents completely in the Ministry of Justice, rather than being shared with local authorities.¹⁵⁶)

However, attention is also now turning to 'integration' policy, arguably with more parallels to the approach in the European Union than that in Australia or Canada. Some local governments (for example, in Kansai) had developed policy and ordinances mainly out of a concern for human rights, but from the 1990s (for example, in Tokai) these had often been promoted under the catch-cry of internationalisation (*kokusaiika*). Those in the latter tradition established networks such as the Council of Municipalities with Large Foreign Resident Populations (2001) and the Council for the Promotion of Multicultural Community Building (2004), with Miyage Prefecture being the first to enact an ordinance promoting multiculturalism (2007).

Rather like the development of Freedom of Information ordinances or consumer law, this bottom-up approach has led to some central government initiatives. Over 2005-6

¹⁵³ Monash University, 'The Challenges for Japanese Immigrant Integration Policy', 4(2) *Around the Globe* 42 (Summer 2008), available via <<http://www.kisc.meiji.ac.jp/~yamawaki/etc/08monash.pdf>> (accessed 3 August 2009).

¹⁵⁴ Above Part 11, originally at <http://blogs.usyd.edu.au/japaneselaw/2009/06/possibilities_and_pitfalls_in.html>.

¹⁵⁵ *Refugee Law and Practice in Japan* (Ashgate, Aldershot, 2008).

¹⁵⁶ Minoru Matsutani, 'Immigration Revision set to be passed' (19 June 2009) *The Japan Times Online*, <<http://search.japantimes.co.jp/print/nn20090619a1.html>> (accessed 3 August 2009).

the Ministry of Internal Affairs and Communications developed a Plan for the Promotion of Multicultural Community Building, requesting all major cities and prefectures to develop plans or guidelines. Then Prime Minister Koizumi's Council on Economic and Fiscal Policy led to an inter-ministry study, resulting in 'Comprehensive Measures for Foreign Residents' released in December 2006. These addressed education for foreign children (many, especially Brazilians, missed schooling or went to non-accredited schools lacking public funding), social insurance, and revisions of the registration system.

On 30 January 2009, in the wake of the GFC, the Cabinet Office outlined Immediate (Short-term) Support Measures for Foreign Residents - again covering education and better information, but especially employment and training measures, housing support, and 'support for return home'.¹⁵⁷ Various measures have since been added, including repatriation grants from the Ministry of Health Labour and Welfare for 'displaced people of Japanese descent if they wish to return to their home countries'. This has been picked up by commentators world-wide, as it sounds rather like what some perceived as behind the original Gastarbeiter regime in Germany: foreigners should come to do the unpleasant jobs that locals are no longer interested in, until those are all that's left during an economic downturn, and then they and their families should just go 'home'. But the exodus from Japan has been limited compared to that from Dubai, for example, after the GFC. And while this highlights that severe economic downturns can impact negatively on immigration in the short run, longer-term economic problems (like those that have dogged Japan since the 1990s) can provide an impetus to attempt more far-reaching policy change.

Indeed, in June 2008 a group of 80 parliamentarians from the Liberal Democratic Party (LDP, the main conservative coalition partner), led by former Secretary-General Hidenao Nakagawa, proposed increasing foreign residents to 10 million within 50 years.¹⁵⁸ Further, they focused on ways to encourage them to stay for the long-term, through greater opportunities for training and their families. The plan also proposed increasing refugees to 1000 per annum, and to raise foreign students from around 130,000 now to one million by 2025. The current Chief Cabinet Secretary, Takeo Kawamura, also established a group to advance a bill to support schools for foreign residents. Meanwhile, in early 2008 both the Secretary-General of the Komeito (LDP's longstanding coalition party) and Ichiro Ozawa (recently retired as leader of the Minshuto, the main opposition party) were keen to

¹⁵⁷ Council for the Promotion of Measures for Foreign Residents, 'Promotion of Support Measures for Foreign Residents in Japan (Provisional Translation)' (16 April 2009) <<http://www8.cao.go.jp/teiju-portal/eng/taisaku/index.html>> (accessed 3 August 2009).

¹⁵⁸ Minoru Matsutani, 'Radical immigration plan under discussion' (19 June 2008) *The Japan Times Online*, <<http://search.japantimes.co.jp/cgi-bin/nn20080619f1.html>> (accessed 4 August 2009).

allow permanent residents the right to vote in local government elections.¹⁵⁹

These political manoeuvres are paralleled by the Cabinet Office's 'Portal Site on Policies for Foreign Residents' unveiled in April 2009 (with information in Japanese, English, Portuguese and Spanish – but not Chinese or Korean!).¹⁶⁰ On the other hand, on 15 June 2009 an government expert panel proposed to PM Aso that Japan needed reform five areas to construct a 'secure' society amid widening social and financial disparities: child rearing, education, medical care, pensions and especially employment – but with no mention of comprehensive measures to expand immigration.¹⁶¹

As in many other parts of the world, including Australia, immigration politics and policy is in a state of flux – exacerbated by the GFC and the faltering world economy. But for the first time, immigration is starting to appear on the agenda in Japan, which is being forced to make difficult socio-economic choices amidst a declining and ageing workforce.

13. Australia, Social Justice and Labour Reform in Occupation Japan¹⁶²

(5 July 2009)

This is the sub-title to a fascinating recent book by University of Wollongong CAPSTRAN Research Fellow, Dr Christine de Matos, *Imposing Peace and Prosperity*.¹⁶³ This eminently readable work is based on her PhD dissertation submitted to the University of Western Sydney in 2003. But those readers (like myself) who do not specialise in history per se may like to fast-forward first to her 'Concluding Thoughts' in Chapter 8, 'The Context of Australian Policy Towards the Japanese Labour Movement':¹⁶⁴

The United States came to promote a capital-led economic recovery in postwar Japan, while the Chifley government [in Australia, 1945-9] favoured a labour-led one. These essential differences could never be reconciled in terms of Allied labour policy in Japan. A labour-led recovery was essential to the pragmatic Australian aims of security, trade and maintenance of 'White Australia'. A labour-led recovery would negate the traditional fear held towards a 'yellow'

¹⁵⁹ Arudou Debito, 'Komeito leader agrees with DPJ proposal to give NJ Permanent Residents the right to vote', <<http://www.debito.org/?p=1008>> (accessed 4 August 2009).

¹⁶⁰ 'Portal Site on Policies for Foreign Residents', <<http://www8.cao.go.jp/teiju-portal/eng/index.html>> (accessed 4 August 2009).

¹⁶¹ 'Gov't proposes reforms in 5 areas to achieve 'secure' society' (16 June 2009) *Japan Today*, <<http://www.japantoday.com/category/politics/view/govt-proposes-reforms-in-5-areas-to-achieve-secure-society>> (accessed 16 June 2009).

¹⁶² An abridged version of this review is forthcoming in *Japanese Studies* (2009).

¹⁶³ Australian Scholarly Publishing, North Melbourne, 2008.

¹⁶⁴ *Ibid.*, pp. 328-9.

nation, once economically and militarily powerful, yet a nation with low living standards and an exploited workforce deemed inimical to living standards and jobs in Australia and Australian regional trade ambitions. For the United States, the Japanese labour movement was too radical, too militant and too political – thus the free rein given to labour was, after 1947, tightly drawn back. For Australia, the Japanese labour movement was not radical enough, or sincere enough, or had developed roots deep enough to play its integral role in Australian policy – a role for which permission and approval was never sought. Japanese workers were, in the end, not trusted by a nation steeped in suspicion, fear and insecurity. The United States enacted a controlled and superficial revolution from above; Australia envisaged the conditions and structures from outside that would, over time, nurture a controlled but penetrating revolution from below. Time was what Australian policy demanded; time was what US policy was not willing to concede.

Early in this Chapter 8 de Matos highlights ideological differences between Australia and the US. Chifley's Labor Party proclaimed democratic socialism, whereas the US favoured a more 'laissez-faire model with minimal government intervention', with transitory 'influence of the [American] New Dealers and other left-liberals in the GHQ/SCAP [General Headquarters of the Supreme Commander of the Allied Powers in Japan, namely General Douglas MacArthur, commanding the Australian-led British Commonwealth Occupation Forces]'.¹⁶⁵ Yet she follows RN Rosecrance¹⁶⁶ in suggesting that both 'frontier countries', aware of their distinctiveness from parent European societies, tended to feel entitled to pass judgment on others. Accordingly:¹⁶⁷

The Allied Occupation of Japan became a forum of conflict between competing 'frontier ideologies'. In Australian eyes, aspects of the Australian System, including State paternalism and [compulsory] wage arbitration, could help create a more equitable society in Japan, which would in turn serve Australian interests in protecting Australia's industries and export market, and its 'White Australia' policy. The primary difference between Australia and the United States was, of course, that the United States had far more political, military and economic resources and power at its disposal in order to attempt the 'Americanisation' of postwar Japan.

¹⁶⁵ p. 278.

¹⁶⁶ *Australian Diplomacy and Japan, 1945-51* (Melbourne UP, Parkville, 1962).

¹⁶⁷ Above n163, pp. 276-7.

Thus, Australian ideology of that era fed into three pragmatic assumptions.¹⁶⁸ First, future security could be attained by turning Japan into a real democracy, but one underpinned by a strong labour movement and redistributivist policies. Relatedly, trade with Australia could be advanced by encouraging stable long-term growth (securing an export market less susceptible to the booms and busts of laissez-faire capitalism), underpinned by better conditions for the Japanese labour force (even at a cost to Japanese industry, hence dampening further floods of cheap imports into Australia). Likewise, underpopulated but ecologically fragile ‘White Australia’ could be preserved against overpopulated countries like Japan by addressing social, political and economic discontent at their source (as urged more generally by an Australian diplomat around the 1940s, WD Forsyth).

Perhaps I am not the only reader to detect some continuity even in contemporary Australian foreign policy more generally. Think of security affairs (including AusAID’s projects to develop the Rule of Law and human rights particularly in the Asian region); cross-border trade and investment (tempered by a greater appeal to market forces since the 1980s, but now challenged by the GFC); and immigration (despite the dismantling of the White Australia policy essentially in 1973). But in Japan during the Occupation, the pragmatic elements and some supporting ideology were not enough for Australia to leave too much influence. As de Matos points out, the nation was hampered by various ‘internal factors and contradictions in Australian policy’.¹⁶⁹ Not just its relative paucity of resources, power and authority internationally, but also the fact that more immediate ‘retributive aims had greater resonance with [Australian] public opinion than reformist aims’.¹⁷⁰

De Matos further suggests that external factors were also not conducive for Australia. Japan’s diplomatic rights were terminated on 25 October 1945, and communications were then channeled through SCAP – under the dominance of MacArthur and the Americans – even in Japan’s dealings with other Allied Powers. Further, some initial influence of New Dealers and reformists on US policy was paralleled by strong anti-communist elements, and those intensified from 1947 (spreading through the State Department) along with the Cold War. Indeed:¹⁷¹

Not only was the Russian bogey exploited by some US officials, but so was the ‘Australian bogey’. US officials played upon Japanese fears of alleged Australian retributivist policies and attitudes in order to scare Japanese officials into support of US policies. For example, in the case of the postwar constitution, Japanese

¹⁶⁸ Ibid., pp. 290-304.

¹⁶⁹ p. 305.

¹⁷⁰ p. 307.

¹⁷¹ pp. 320-1.

leaders were informed that if they ‘procrastinated’ over the US draft, the issue would be ‘taken up by the newly-formed Far Eastern Commission, where less charitable and generous attitudes towards the emperor could be anticipated’. Australian fears of a future remilitarized and vengeful Japan were cited by MacArthur to encourage the adoption of pacifist Article 9 in the postwar constitution.

De Matos succeeds in a major aim of her work by challenging, with the benefit of hindsight and archival research, a still-common ‘simplistic notion that the Australian government’s policies towards Japan during the Allied Occupation were solely ‘harsh’ or vengeful’.¹⁷² On the other hand, she extends the argument of JW Dower that advancing reforms in Japan – compared, for example, to postwar Germany – reflected neocolonialism and ‘orientalism’ by ‘denaturing an oriental adversary and turning it into at least an approximation of an acceptable, healthy, westernized nation’.¹⁷³ Australian policy had parallels, De Matos contends, in pressing for ‘an acceptable, healthy, Australianised labour movement’.¹⁷⁴ Further, she considers that ‘Australian Orientalism, like that of the United States, was hierarchical in its application’ – entrenching a special role for Japan compared to its Asia-Pacific neighbours.¹⁷⁵

These provocative views present a salutary warning even today. Australians examining contemporary developments in corporate and securities law, for example, may well question empirical or normative claims of further ‘Americanisation’* – but at the risk perhaps of over-promoting ‘Australianisation’. Instead, we should remain conscious of another aim of this book – ‘to explore paths of possibility otherwise forfeited to history’.¹⁷⁶

Indeed, not just in Japan. For it is worth remembering that Australia’s then Foreign Minister, ‘Doc’ Evatt, not only appealed for the entrenchment of social and economic rights in Occupation Japan. He and the Australian government were also central in having them included in the United Nations’ Universal Declaration of Human Rights in 1948, the basis for many subsequent conventions and national constitutions. Evatt was even the first to suggest a European Court of Human Rights to make all such human rights more readily enforceable, at least in that continent. Imagine, following the lead of Geoffrey

¹⁷² p. 4.

¹⁷³ *Japan in War and Peace: Selected Essays* (New Press, 1993), p. 281 (original emphasis).

¹⁷⁴ Above n163, p. 323.

¹⁷⁵ *Ibid.*, p. 326.

* Luke Nottage, Leon Wolff & Kent Anderson (eds), *Corporate Governance in the 21st Century* (Elgar, Cheltenham, 2008). See also Luke Nottage, ‘Corporate Governance and M&A in Australia: An Overview for Assessing Japan and the “Americanisation” Thesis’ (2008) Sydney Law School Research Paper No. 08/28, at <<http://ssrn.com/abstract=1105639>>.

¹⁷⁶ Above n163, p. 7.

Robertson, if such efforts had resulted then in enactment of some form of Bill of Rights for Australia itself – still being debated for application nation-wide, even as a mere statute rather than constitutional ‘supreme law’.¹⁷⁷ Ironically, Japan’s constitution of 1947 did end up including an expansive Bill of Rights that do represent supreme law, trumping inconsistent statutes.

De Matos’ work, like all good history books, is therefore highly thought-provoking for those from a variety of backgrounds – including international relations, economics and law – who are interested in deeper or novel perspectives on contemporary issues facing Australia and Japan. These readers will also find interesting observations and quotes littered throughout the first seven chapters. They, along with professional historians, should also find themselves neatly drawn into the detailed arguments and sources marshaled in support of her general conclusions outlined above.

Chapters 1 and 2 detail the influences that coalesced in the policies of the Australian government, both retributivist and reformist. Chapters 3 and 4, drawing primarily on archival sources, narrate chronologically how the policies played out in practice for Australian diplomats in the Occupation control machinery. Chapter 5 concentrates on Evatt in Canberra and his controversial visit to Japan in 1947. Chapters 6-7 refocus on Japan and the subsequent efforts of Australians to pursue the policies of Evatt and Chifley in civilian forums like the FEC in the shadow of SCAP, despite the worsening Cold War environment. The only additions I personally would have liked comprise a Glossary reminding me of the various acronyms, and a few more photos from the Occupation featuring fewer military figures, but perhaps such material is or can be made available separately online.

14. Who Defends Japan?

Government Lawyers and Judicial System Reform in Japan and Australia

(13 July 2009)

At the JSAA-ICJLE conference held at UNSW over 13-16 July 2009, I presented a pathbreaking comparative introduction into how the Japanese government delivers legal services, especially the central government in its high volume of litigated cases.¹⁷⁸ (I also contributed to a panel discussion on “Bridging the Gap between Japanese Language and Japanese Legal Studies’.¹⁷⁹)

¹⁷⁷ *The Statute of Liberty: How Australians Can Take Back Their Rights* (Vintage, North Sydney, 2009), pp. 30-8.

¹⁷⁸ ‘JSAA-ICJLE 2009 Conference Announcement’ (27 November 2008) University of New South Wales, <<http://jsaa-icjle2009.arts.unsw.edu.au/en/index.html>> (accessed 4 August 2009).

¹⁷⁹ See ANJeL, <<http://www.law.usyd.edu.au/anjel/>> (accessed 4 August 2009) for abstracts or

This presentation was based on a draft paper co-authored with Ritsumeikan University Associate Professor Stephen Green, a former lawyer for the Australian government and joint ANJeL-in-Japan Program Convenor, and Meiji University political scientist Professor Shinichi Nishikawa.¹⁸⁰ We are bringing together a detailed manuscript for a law journal, as well as a shorter version for the next proposed book by Wolff, Nottage & Anderson (eds) *Who Judges Japan? Popular Participation in Japan's Legal Process*. Our analysis begins to fill a significant gap in the literature comparing Japan's legal profession. This lacuna is all the more surprising, given Japan's efforts at comprehensive reform of its judicial system underway since 2001.

Commentators outside Japan have shown inordinate interest in the profession, but tend to focus on certain issues such as foreign lawyers' practice in Japan. Analysis of the legal profession is now complemented by much writing on Japan's reforms to legal education.* Those reforms are part of a (somewhat stalled) expansion of numbers permitted each year to pass the National Legal Education for qualification as a *bengoshi* lawyer, *kenji* prosecutor or (career) judge.¹⁸¹ The profession is also being liberalised by allowing quasi-lawyers, such as patent attorneys and shihoshoshi judicial scriveners, to represent clients in court to some extent as well as give legal advice out of court.

Such reforms form part of a broader deregulatory drive. This aims to shift Japan away from a system of socio-economic ordering through ex ante regulation primarily by public authorities, and towards a system based on private initiative, including more indirect ordering in the shadow of more credible claims for ex post relief if socio-economic actors deviate from the new rules. Access to the courts (and to Alternative Dispute Resolution) has therefore been strengthened for private law claims. And the Administrative Case Litigation Act was amended in 2004, loosening standing requirements and the like, to further constrain bureaucratic discretion.

Opinions diverge as to the short- and long-term impact of the judicial reform package. One way to test that, and also fill the gap in the literature, is to examine whether

Powerpoints.

¹⁸⁰ 'ANJeL Program Conveners', <http://www.law.usyd.edu.au/anjel/content/anjel_people_prog.html> (accessed 4 August 2009).

* See further Luke Nottage, 'Build Postgraduate Law Schools in Kyoto, and Will They Come - Sooner and Later?' (2005) 7 *Australian Journal of Asian Law* 241; Sydney Law School Research Paper No. 07/29 at <<http://ssrn.com/abstract=986529>>; and Stacey Steele and Kathryn Taylor (eds) *Legal Education in Asia* (Routledge, London, forthcoming 2009, <http://www.routledgelaw.com/books/Legal-Education-in-Asia-isbn9780415494335>>).

¹⁸¹ Luke Nottage, 'Interpreting the Results of Japan's first National Legal Examination for the New Postgraduate 'Law School' Programs' (18 October 2006), <http://www.law.usyd.edu.au/anjel/documents/ResearchPublications/Results_of_Japans_first_National_Legal_Examination.pdf> (accessed 4 August 2009). Compare now 'Law schools must put quality before quantity' (26 July 2009) *Yomiuri Shimbun* <<http://www.yomiuri.co.jp/dy/editorial/20090726TDY04304.htm>> (accessed 4 August 2009).

there have been any major changes in the way the Japanese government defends administrative and private law cases. In particular, our paper explore the evolving roles and activities of *shomu kenji*, based in the Ministry of Justice (MoJ).

We first find that there has not been any large aggregate increase in administrative law cases under the revised Act, nor indeed in other litigation involving the government. However, more litigation has emerged in certain categories, such as claims under official information disclosure law (leading also, for example, to more ‘taxpayers’ suits’ claiming wasteful expenditures by officials). There also seems to be more variance, hence the risk of large losses, as in tax litigation. Secondly, following further reforms to civil and court procedure in recent years, the pace at which cases proceed through trial has accelerated somewhat.¹⁸² Thirdly, the government lost some major cases around 2006 (hepatitis, lung disease, and nuclear incident victims) and is now facing further large-scale claims (asbestos).¹⁸³

So far, however, the system centred on *shomu kenji* has not changed too much. Specialised litigation involving competition or patent law remains the province of the JFTC and JPO anyway, under separate litigation. Litigation involving local governments is left largely to them, and they outsource this work to local *bengoshi*. The MoJ shares tax litigation extensively with National Tax Agency officials, acting like solicitors but also given the power by the MoJ to appear in court with *shomu kenji* as (senior) barristers. The Minister also nominates shitei dairinin from other ministries, notably now the Health Ministry in regard to suits that must proceed through the courts regarding hepatitis C claims, but within a framework now set by legislation.

Within the MoJ itself, *shomu kenji* mostly are rotated for one 3-year term from other (mostly criminal) work as kenji within the Ministry, or comprise judges seconded for 2-3 years (despite some doubts about this practice, from the perspective of the separation of powers)). The number of jimukan, usually with some legal training (but who have not passed the Examination) and who often can deal with mundane cases, has been increased to help process cases faster. Two more senior posts were added in 2006. But, except for large-scale and therefore long-term litigation, it remains rare for the MoJ to outsource work to *bengoshi*. Instead, it has used a 2004 Law allowing government departments to bring *bengoshi* in-house on contracts up to 5 years. This is linked to a strong preference to trying to maintain consistency and predictability in litigation practices – a preference also found

¹⁸² Luke Nottage, ‘Civil Procedure Reforms in Japan: The Latest Round’, 22 *Ritsumeikan University Law Review* 81 (2005), also via <<http://ssrn.com/abstract=837864>> (accessed 4 August 2009).

¹⁸³ Luke Nottage, ‘The ABCs of Product Safety Re-Regulation in Japan: Asbestos, Buildings, Consumer Electrical Goods, and Schindler's Lifts’ 15(2) *Griffith Law Review* 242 (2006), also via <<http://ssrn.com/abstract=929941>> (accessed 4 August 2009).

among kenji in criminal prosecution work.

Thus, as Takao Tanase suggests more generally, organisational and social structures are only adjusting slowly and in subtle ways.¹⁸⁴ On the other hand, agency still matters. Longer-term pressure may mount, as citizens call for further access to justice and state accountability, and as a new generation of *bengoshi* emerges with Law School training in administrative law.

Our paper concludes by outlining some possible lessons from Australia, where legal services to the government were liberalised in 1999. Outside lawyers were also bound to a 'Model Litigant Policy',¹⁸⁵ self-regulation by the government to give citizens a 'fair go' in their litigation, including for example a commitment to ADR.¹⁸⁶ It seems perfectly consistent with Japan's judicial reform project for Japan's government lawyers to bind themselves already to such a Policy.

Yet Australia also presents a cautionary tale for Japan. Australia is struggling to maintain momentum in improving ADR and access to courts both for firms (for example, through arbitration law reform¹⁸⁷) and consumers.¹⁸⁸ Relatedly, federal government expenditures on legal services have kept ballooning, to \$510 million in 2007-08.¹⁸⁹ Australia should look carefully at the Japanese government's approach both to managing legal expenses and disputes more broadly, as well as reforms to ADR.

15. Law and Community: A Critical Reassessment of American Liberalism and Japanese Modernity

(19 July 2009)

This is the title of our translated and edited collection of essays written in Japanese over the last two decades by a leading legal sociologist in East Asia and world-wide, Professor

¹⁸⁴ Luke Nottage, 'Translating Tanase: Challenging Paradigms of Japanese Law and Society' (2006), <<http://ssrn.com/abstract=921932>> (accessed 4 August 2009); updated and expanded as 'The Cultural (Re)Turn in Japanese Law Studies' (2009) 39(4) *Victoria University of Wellington Law Review* 755.

¹⁸⁵ 'Model Litigant Policy for Civil Litigation' Lawlink NSW, <[http://www.lawlink.nsw.gov.au/lawlink/lms/ll_lms.nsf/vwFiles/CabinetApp-MLP.pdf/\\$file/CabinetApp-MLP.pdf](http://www.lawlink.nsw.gov.au/lawlink/lms/ll_lms.nsf/vwFiles/CabinetApp-MLP.pdf/$file/CabinetApp-MLP.pdf)> (accessed 4 August 2009).

¹⁸⁶ Luke Nottage, 'Comparing ADR in Australia and New Zealand: Introduction and Update', Sydney Centre for International Law (2009) <http://www.law.usyd.edu.au/scil/pdf/2009/SCILWP22_Nottage.pdf> (accessed 4 August 2009).

¹⁸⁷ Above Part 7.

¹⁸⁸ Luke Nottage, 'Consumer ADR and the Proposed 'Consumer Law' in Australia: Room for Improvement' (13 April 2009) <<http://ssrn.com/abstract=1370106>> (accessed 4 August 2009).

¹⁸⁹ Nicola Berkovic, 'Federal legal costs blow out to more than \$500m' (20 March 2009) *The Australian*, <<http://www.theaustralian.news.com.au/business/story/0,28124,25212565-17044,00.html>> (accessed 4 August 2009).

Takao Tanase.¹⁹⁰ Leon Wolff and I hope to present an outline at the Inaugural East Asian Law and Society Conference to be held on 5-6 February 2010 at the University of Hong Kong, supported by a Collaborative Research Network within the (originally US-based) Law and Society Association.¹⁹¹

Tanase's empirically-based critique of legal legalism is important not only for the United States, which tends to represent an extreme case. It also helps in assessing developments in East Asian countries increasingly exposed or attracted to American views of how law does and should relate to society, including Japan - but also perhaps China.¹⁹² Tanase's neo-communitarian critique also presents a challenge to liberalism more generally, making his reassessment particularly timely for two reasons. First, the GFC was prompted partly by a particular liberal vision of how markets do or should operate.¹⁹³ Secondly, countries like Japan have now experienced a decade of reform discussions and initiatives allegedly aimed at 'Americanising' the judicial system and the legal profession.¹⁹⁴

Our presentation begins by introducing Tanase's hermeneutic approach, sceptical about sharp distinctions between facts and norms, as applied especially to lawyers' ethics. We then briefly sketch the key arguments and findings in ensuing chapters of Tanase's book, including family law, tort law and constitutionalism. (See also my earlier round-up,¹⁹⁵ along with others' reactions to our draft translations featured at a Sho Sato conference at UC Berkeley some years ago.¹⁹⁶) We then devote considerable attention to the final chapter of the book, which addresses a longstanding bone of contention among those developing and applying various paradigms or theories about how law interacts with society in Japan (and potentially elsewhere): civil litigation rates. Tanase's quantitative data, updated for this presentation, show the pull and power of social norms and structures – or community – in relation to the law. The empirical studies undertaken by others, combined with Tanase's interpretative framework, reinforce this lesson in the other socio-legal fields discussed.

Our presentation concludes first by suggesting, like Tanase, that this vision of law and society or community not only better describes the world around us. It also holds

¹⁹⁰ Takao Tanase (Luke Nottage and Leon Wolff trans and ed) *Law and Community: A Critical Reassessment of American Liberalism and Japanese Modernity* (Edward Elgar, Cheltenham, in press - forthcoming January 2010); see also 'Tanase Takao', Chuo University, <http://www.chuo-u.ac.jp/chuo-u/lawschool/tanase_takao_j.html> (accessed 4 August 2009).

¹⁹¹ 'Program for International Socio-Legal Collaboration', <http://www.lawandsociety.org/International/IC_sum.htm> (accessed 4 August 2009).

¹⁹² See, eg, Takao Tanase, 'Global Markets and the Evolution of Law in China and Japan' 27(3) *Michigan Journal of International Law* (2006).

¹⁹³ Above Part 10.

¹⁹⁴ Above Part 14.

¹⁹⁵ Nottage, above n184.

¹⁹⁶ 'Proceedings from the 2005 Sho Sato Conference in Honor of Takao Tanase', University of California Berkeley School of Law, <<http://www.law.berkeley.edu/2016.htm>> (accessed 4 August 2009).

some normative insights, although Tanase's theory also requires us to be critical also of certain types of community relations. Perhaps it is not such a bad thing, for example, for judicial system reform to proceed in Japan more slowly or less pervasively than hoped for by some proponents of liberal legalism.

Lastly, we locate Tanase's results and approach within the broader and evolving academic literature in English on Japanese Law. In particular, his work goes well beyond an earlier 'culturalist' paradigm, thereby joining a growing corpus of work that take culture and social norms more seriously in a variety of sophisticated ways.¹⁹⁷

¹⁹⁷ Luke Nottage, 'The Cultural (Re-)Turn in Japanese Law Studies', 39(4) *Victoria University of Wellington Law Review* 755 (2009).

Appendix: 'Birth (and Transfiguration?) of an Anti-Whaling Discourse'

(1 February 2009)*

Every Australian summer, relations with Japan heat up over whaling. This New Year of the Ox is no exception. On 8 January 2009, a Japanese official reportedly called on Australia to deny port access to the Sea Shepherd Conservation Society's protest ship, which has begun impeding the lethal research underway again by the Japanese whaling fleet in the Southern Ocean. But there is uncertainty over whether the ship's activities amount to the alleged 'sabotage', and about the implications under national and international law.¹⁹⁸ The editor of *The Australian* has also argued that Sea Shepherd is 'On the wrong course', and that Captain 'Paul Watson's zealotry at sea will not stop Japanese whaling'.¹⁹⁹

On the other hand, as a practical matter, it is hard for Australia to refuse entry to the ship. Sea Shepherd renamed it the *Steve Irwin*, after the nation's recently-deceased iconic figure for conservationism — still (in)famous for his own larrikin image. Such symbolism, and the public photo of Paul Watson 'standing resolute beneath a skull-and-crossbones flag' highlighted by the editorialist, illustrates the impact of images and wider discourse in framing the contested issue of whaling. And that is the main thesis of the University of Sydney's Dr Charlotte Epstein, in her new book on *The Power of Words in International Relations: Birth of an Anti-Whaling Discourse*.²⁰⁰ Her book should be required reading for government officials and others interested in this issue in Australia, Japan and beyond, because the work also helps explain the irony of each country adopting mutually contradictory positions when it comes to whaling.

That is, when Australia brings claims against Japan under the WTO (or potentially, soon, under the bilateral Free Trade Agreement under negotiation), it insists that any measures impeding Australia's agricultural trade must be based on science and economics, not the cultural values invoked by Japanese farming communities or their politicians and bureaucrats. But when whales are at stake, Australia insists that this is not about science and economics. The ethics involved in killing or keeping alive these magnificent mammals become a major factor — increasingly, it seems, a definitive one. Japanese commentators tend to see this as a double standard, which is why some of them delight then in

* Adapted with permission from 12(1) *Asia Pacific Journal of Environmental Law* 240-6 (2009).

¹⁹⁸ Matthew Denholm, *Whaling ship ban an option for Julia Gillard* (8 January 2009) *The Australian*, <<http://www.theaustralian.news.com.au/story/0,,24885910-2703,00.html>> accessed 19 March 2009.

¹⁹⁹ *On the wrong course* (30 December 2008) *The Australian*, <<http://www.theaustralian.news.com.au/story/0,,24853860-16382,00.html>> accessed 19 March 2009.

²⁰⁰ Charlotte Epstein, *The Power of Words in International Relations: Birth of an Anti-Whaling Discourse* (The MIT Press, Cambridge Mass./London, 2008), (distributed in Australia by Footprint Books), ISBN 978-0-262-55069-7, xii + 333 pages, in the Series on 'Politics, Science and the Environment'.

highlighting kangaroo culling or ethically debatable farming practices in Australia.

Yet the Japanese government's position is also inconsistent. When it defends WTO claims, at least to its own citizens, it invokes culture and ethics. But when it comes to whaling, the government and the media focus instead on economics and science. A major reason for this double standard, but also Australia's, is local politics. Rural communities retain disproportionate voting power in Japan, while an anti-whaling stance plays into growing public concerns about other environmental issues in Australia.²⁰¹ Nonetheless, internally inconsistent positions also seem more likely to prevail when such material interests interact with a broader 'discourse', which can persist in different forms in different countries at different times.

That final point is elaborated by Epstein's work, strongly influenced by Michel Foucault. Chapter 1 ('Making meaning matter in international relations') is aimed at those interested in applying social theory in her discipline. A more accessible version for non-specialists, and more detailed summary of the Chapters, can be found in Chapter 12 ('Conclusion: The Study of Identity in International Relations', followed by a useful Appendix chronicling key events involving whales and whaling since pelagic or Antarctic whaling began in 1904). The book is divided into three Parts. The first (Chapters 2-4) outlines the original (pro-whaling) 'Whaling Order'. Part II (Chapters 5-7) analyses the production of an 'Anti-Whaling Order' from around 1970, as part of new 'metanarratives' arising from the Cold War and the 'Saving the Planet' movement. Part III (Chapters 8-11) examines the various modes for 'Reproducing the Anti-Whaling Order'.

Chapter 2 ('An international political economy of modern whaling') reviews the transformation of whaling from a craft to a large-scale industry by the mid-20th century. This epitomised the second industrial revolution, and sometimes modernisation itself, with whales becoming an aspect of everyday life. 'Whaling nationalisms' also emerged — with Germany and Japan challenging Britain and Norway, and the Netherlands attempting a comeback after World War II — and a 'Whaling Olympics' began to threaten dwindling stocks. Epstein presents her first argument that national interests in whaling went beyond material interests. At this stage, this was because they endured well after whaling became uneconomical.

Chapter 3 ('Whaling, sovereignty and governmentality') looks more closely at how whaling became integrated into particular structures of power and knowledge implicated in

²⁰¹ Luke Nottage, *Whaling: What can law add to science, economics, ethics and politics?* (4 July 2008) Japanese Law and the Asia-Pacific <http://blogs.usyd.edu.au/japaneselaw/2008/07/whaling_what_can_law_add_to_sc.html> (accessed 19 March 2009).

forming the modern nation-state. It buttressed sovereignty within the state and expanded it outwards, for example by enlisting whalers in national defence or to help transport convicts from Britain to Australia, and in the ‘race to Antarctica’ after the War. National interests were also deeply entwined with the emergence of cetology, the new science of whales.

Chapter 4 (‘The society of whaling states’) tracks how some national regulation of whaling (especially in Norway) led to bilateral cooperation, the first Whaling Conventions (1931-7), and then the 1946 International Convention for the Regulation of Whaling (with the original ‘club of whalers’ establishing the International Whaling Commission (the ‘IWC’) in 1949). The regime centred on the IWC remains the key space where states reaffirm that their subjectivity in international discourse over whales, which have become more than the object of national interests or everyday life.

Epstein’s account reminds me of another episode where Japan also sought more than material interests, but also acceptance as a fully industrialised and ‘modern’ state, including under then-prevailing norms in international law and politics. That was Japan’s annexation of Korea over 1905-45, including the imposition of a legal system palatable to ‘Western’ eyes that also helped to complete recognition of Japan’s own ‘modern’ legal system.²⁰² A problem for Japan there, and then with whaling, was that norms and acceptable practices changed over the 20th century.

Chapter 5 (‘Making of a dominant global discourse’) shows how a pro-whaling storyline about noble whalers (taking on Herman Melville’s *Moby-Dick*, originally published in 1851) and ‘killer whales’ was recrafted into an anti-whaling discourse. Epstein identifies one of the first ‘image-events’ by Greenpeace in 1974, the year it was founded, as a founding moment in this transition.²⁰³ It involved film coverage of Paul Watson and another activist impeding harpooning by a Russian factory ship. This tied in, much more comfortably than Greenpeace’s initial opposition to nuclear weapons or the Earth First! campaign to save old-growth forests in the US, to the Cold War meta-discourse on capitalism and democracy. Opposing whaling pitted these new NGOs against another (collectivist) state, rather than their own (the US having stopped whaling in 1968).

The shift to an anti-whaling discourse also fitted into a second meta-narrative about protecting the environment, initially domestically (from the mid-1960s in the US, for example) and then world-wide. Epstein argues that a key event was the UN Conference on the Human Environment held in Stockholm in 1972.²⁰⁴ It consolidated a synecdoche

²⁰² Alexis Dudden, *Japan’s Colonization of Korea: Discourse and Power* (2005).

²⁰³ Epstein, above n200 at 97.

²⁰⁴ *Ibid.*, pp. 104-8.

whereby protection of the ‘environment’ was equated with protection of ‘endangered species’ in international forums, underpinned by a shift towards animal rights and away from utilitarian approaches to environmental law in the US from the 1960s. In particular, after its stance on other issues such as nuclear testing attracted widespread criticism, the US successfully championed a proposal for a ten-year moratorium on commercial whaling.

Chapter 6 (‘The power of science’) revisits the role of science, suggesting that it has improved increasingly in the IWC but has been decreasingly listened to. Epstein’s point here is that (context-specific) discourse is important not just vis-à-vis material interests: ‘If science speaks to us in a discourse that is completely at odds with our own — with the one we have chosen to speak, because it marks us in certain ways — then it is likely that we will simply not listen. What science does not have is the power to alter a society’s normative order. In fact, its own knowledge frames are informed by those underlying norms’.²⁰⁵ Dan Kahan, a social psychologist at Yale University, has similarly demonstrated with his colleagues recently how our specific cultural identities tend to frame risk cognition, resulting in differential responses to more or ‘better’ (scientific) information about at least some issues.

Chapter 7 (‘The anti-whaling campaign’) details how environmental NGOs succeeded by 1982 in getting the IWC to suspend whaling indefinitely. The campaign first targeted individuals, effectively appealing beyond nationalistic attachments at a time when whaling was petering out anyway, and engaging a nascent global media. This generated the political clout to be taken seriously by states. The campaign refocused on the IWC, with NGOs sometimes literally appropriating states’ voting powers. Epstein’s broader theoretical argument here, contrary to methodological individualists, is that ‘social actors — whether individuals or states — engage in the realm of action by first stepping into subject-positions, that is by taking on certain discourses. It is these discourses that make certain courses of action desirable’.²⁰⁶

Chapter 8 (‘Crafting the anti-whaler (I)’) is the first in Part III to examine how the newly dominant anti-whaling discourse has managed to persist. It offers ‘an applied discourse analysis’, focusing on an ad in 1974 by US environmental groups calling for a boycott of Japanese goods, to show how a new identity is implicated. The ‘others’ still engaged in whaling are set up in complete opposition to a vast ‘us’, an international and moral community ‘encompassing the global civil society, the community of scientists, heads

²⁰⁵ p. 249.

²⁰⁶ p. 249.

of states, literary figures, and the whales themselves'.²⁰⁷ Such ads invoking identity claims, also echoed in more contemporary slogans and images, result in whales continuing to matter again — but now for outright preservation, rather than sustainable consumption — despite the limited material interests involved for most.

Chapter 9 ('Crafting the anti-whaler (II)') looks not at what anti-whalers say, but at their 'consumptive practices'. These involve the whale as a more abstract whole, as a signifier for many ideas such as communion with nature or harmonious social organisation, and the eclipse of 'use value' by 'exchange value' in a post-modern and post-industrial system.²⁰⁸ The target of anti-whaling marketing, accordingly, becomes the global anti-whaler: 'a consummate Internet browser, dedicated to travelling, who cares about the environment'.²⁰⁹

The last two chapters turn back to 'State positionings'. 'Anti-whaling discourse' marks states as 'good' members of contemporary international society. They are ethical and civilised (whales have a moral right to life); democratic (citizens want their state to save the whales); and green (although Australia, the US and New Zealand joined with Japan and Canada to oppose measures to address climate change in the run-up to the 1997 Kyoto Protocol²¹⁰). Anti-whaling states also position themselves as neoliberal, opposed to protection of declining industries and in favour of market-led efficient resource reallocation to new opportunities like whale-watching.

Contemporary 'pro-whaling discourse' then shows, as we would expect from Foucault, how states (and others) continue to frame out alternative significations even in the face of a now-dominant discourse. Resistance occurs at the state level in different guises. Iceland is cautious but always postures as a 'whaling country', crystallising a tradition of resisting outside interference. Norway is the only country to persist fully in whaling, having never retracted its 1982 reservation on the IWC commercial whaling ban. Its 'attitude of prudent harvest and its stringent regulatory framework form part of a broader commitment to a rational, science-based utilization of its resources'.²¹¹ Japan relinquished its reservation in 1987, under US pressure, and has changed from 'whaling' to 'anti-anti-whaling' diplomacy'.²¹² It has not followed Canada, which permanently withdrew from the IWC and has quietly resumed some (indigenous or 'aboriginal subsistence') whaling. Instead, it has tried unsuccessfully to have the IWC recognise new types of

²⁰⁷ p. 181.

²⁰⁸ pp. 190-3.

²⁰⁹ p. 197.

²¹⁰ p. 212.

²¹¹ p. 223.

²¹² pp. 226-9.

whaling (namely ‘small type coastal whaling’ — currently generating around 300 tonnes of whale meat, compared to around 2000 tonnes from its ‘JARPA scientific whaling’, and about 700-1000 tonnes of small whale or dolphin meat not under IWC jurisdiction).

Such articulations of sovereignty also underpin resistance at the interstate level. Key themes are ‘food security’ (appealing also to developing countries with limited traditions of whaling, as in the Caribbean, and often linked to resisting foreign interference), or ‘sustainable use’ (appealing instead to an alternative neoliberal discourse). The latter also connects pro-whaling state discourse to alternative discourses within the state, notably involving some New Zealand Maori groups, which in 2000 hosted the third annual meeting of the ‘World Council of Whalers’. These discourses tend to try to refocus on ‘real’ whales, such as those traditionally used by indigenous peoples, and to appeal more generally to ‘localness’ and ‘community’. Epstein concludes that all such resistance involve attempts at reclaiming the power to define oneself.

Readers are left, like Oliver Twist, wishing for a little more — especially in terms of her views on the best way forward to address whaling, this most persistent thorn in the side of Australia-Japan relations. (Indeed, Neville Meaney²¹³ points out that, disastrously at the time and ironically by today’s standards: ‘Australia’s first encounter with Japan occurred in April 1831 when Captain Bourn Russell, in command of a leaking whaling ship, the *Lady Rowena* out of Sydney, sought refuge in Hamanaka Bay on the east coast of Japan’s northernmost island, Hokkaido’.)

Both Japan and Australia, as democratic post-industrial societies, could use whaling as a case study for rethinking what values and structure they wish to promote in the 21st century. Since 2001 Japan has embarked on a third wave of reforms to its judicial system, aimed at completing a progression towards ‘modern’ liberal citizen-state relations. But visions and norms of community tend to rebel against that model, even in the US.²¹⁴ This helps explain why the first wave of law reform (late 19th century) and the second (post-War Occupation) were not ‘successful’, and also the ‘gradual transformation’ of Japanese corporate governance despite the economic upheavals and many legislative amendments since the 1990s.²¹⁵

To be consistent, Japan might now commit to a particular neoliberal view of whaling, stressing efficient and sustainable use above all else. But this implies rolling back

²¹³ In *Towards a new vision: Australia and Japan across time* (2nd ed, 2007) at p. 68.

²¹⁴ Tanase, above n190.

²¹⁵ Luke Nottage, Leon Wolff & Kent Anderson (eds), *Corporate Governance in the 21st Century* (Elgar, Cheltenham, 2008). See the speech by the Chief Justice of New South Wales, Hon JJ Spigelman, launching this book: <http://www.law.usyd.edu.au/caplus/docs_pdfs/BookLaunchAddress.pdf>.

financial support to whaling communities, and certainly other agricultural groups. If instead Japan wishes to emphasise community, however, constitutional theorists and others like Tanase remind us of the risks for democracy of simply validating ‘conservative community’. Japan will need new structures and discourses to develop novel forms of community, local and nation-wide. Australia, too, stands at a crossroads after three decades of neoliberal discourse accompanied by a fundamental reshaping of its society and local communities.²¹⁶

As each state reframes the crisis occasioned by the whaling season each year, into an opportunity for revisiting more broadly their own patterns of governance combining both discourse and material interests, both Japan and Australia may be able to engage more constructively at bilateral, regional and multilateral levels. It may be too much to expect something like this to be addressed in their FTA (or ‘Economic Partnership Agreement’, as Japan now likes to call them). National interests and discourses are probably too entrenched. And a bilateral agreement will largely mirror the WTO, which involves particular roles for science and economics that may not be suitable for a more multifaceted issue like whaling. Yet, at the multilateral level, the IWC seems too dominated by politics in general. Longer-term, therefore, a regional agreement for Australia and Japan involving developing countries may help break the deadlock. From a different ‘systems theory’ or Habermasian approach to law and society, it is important that law, politics, science and economics all continue to play a part in new processes to deal with complex problems like whaling.²¹⁷

Epstein’s work provides theoretical insights, as well as enormous detail on all aspects of whaling, to be able to develop such longer-term strategies to resolving this contentious issue. I hope you can see now why I recommend this rich and innovative book to a broader audience, even if some parts are aimed more at readers steeped in the discipline of international relations.

²¹⁶ Mark Davis, *The Land of Plenty: Australia in the 2000s* (Melbourne University Press, 2008); Hugh Mackay, *Advance Australia ... Where?* (2nd ed 2008, Hachette, Sydney).

²¹⁷ See, with further references, Luke Nottage, ‘Economics, Politics, Public Policy and Law in Japan, Australasia and the Pacific: Corporate Governance, Financial Crisis, and Consumer Product Safety in 2008’ (2009) 26 *Ritsumeikan Law Review* 49, also at <<http://ssrn.com/abstract=1295064>> (accessed 4 August 2009). <<http://ssrn.com/abstract=1295064>> (accessed 19 March 2009).