

Economics, Politics, Public Policy and Law in Japan, Australasia and the Pacific: Corporate Governance, Financial Crisis, and Consumer Product Safety in 2008

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Abstract: This is an updated collection of my own postings on the new East Asia Forum blog.* Created primarily by political economists from the Australian National University in mid-2008, the blog is attracting a wide readership and regular contributions from experts interested in or based throughout the rapidly evolving Asia-Pacific region. My starting point involves taking seriously Australian Prime Minister Kevin Rudd's call, just before his

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* East Asia Forum — Economics, Politics and Public Policy in East Asia and the Pacific, <http://eastasiaforum.org/> . Updates or further reflections regarding my original postings are primarily indicated by asterisked footnotes; the numbered and other footnotes indicate original citations or cross-references.

visit to Japan around the same time, for a new East Asian Community.

Thematically, my postings focus mainly on FDI and corporate governance, financial markets and consumer credit regulation, product safety regulation, and different countries' media coverage of these and other issues in the region. Geographically, postings mainly examine developments affecting Japan. But this is done often expressly in connection with Australia, as well as other countries in the Asia-Pacific region (including China, India, New Zealand, and the United States), with links also to developments in the European Union (EU).

Chronologically, postings were originally from July-October 2008, a particularly tumultuous period, but the events often connect to longer-term developments. They can be read one after the other, and the original order has been preserved. I tried to sequence each posting to link back especially to the previous one, as well as other postings by myself or other contributors to the blog, while addressing hot topics of the times. The hope, very loosely inspired by how Ronald Dworkin views judge-made law emerging like a 'chain novel',* is that readers can begin to see my own (and perhaps others') underlying empirical and normative views on some important 'gradual transformations' in Japan and beyond.**

The story continues at <http://eastasiaforum.org/author/lukenottage/>, and readers' comments are most welcome.

Keywords: Japanese law, Asian law, comparative law, regional architecture, political economy, foreign direct investment (FDI), corporate governance, financial markets regulation, product liability and safety regulation, consumer law and policy, arbitration.

1. Taking the Australia-Japan FTA negotiations to new levels

(3 July 2008)[†]

As we know from postings to this Forum, especially by Peter Drysdale, Hadi Soesastro and Hugh White,** it was not clear what Prime Minister Kevin Rudd had in mind when, on 4 June before his first trip to Japan as PM, he proposed a better regional

* Cf Ronald Dworkin, *Law's Empire* (Harvard UP, 1986) 146. Another inspiration, dare I say it, is Paul Krugman, *The Great Unraveling* (WW Norton, 2003). That is a collection of his *New York Times* columns, which are longer and more reflective than true blogs. But of course I cannot hope to match the analytical prowess of that new Nobel Prize winner in Economics, nor his superb writing style.

** Luke Nottage, Leon Wolff and Kent Anderson (eds), *Corporate Governance in the 21st Century: Japan's Gradual Transformation* (Edward Elgar, November 2008).

† Based on Luke Nottage, 'PM Takes Our Japan Trade to New Levels', *Australian Financial Review*, 13 June 2008, 73.

*** See eg, respectively, Peter Drysdale, *The Asia Pacific Community idea* <http://eastasiaforum.org/2008/06/19/the-asia-pacific-community-idea/> (19 June 2008); Hadi Soesastro, *Kevin Rudd's architecture for the Asia-Pacific* (9 June 2008) <http://eastasiaforum.org/2008/06/09/kevin-rudds-architecture-for-the-asia-pacific/>; Hugh White, *Regional architecture and the reality of power politics* (19 June 2008) <http://eastasiaforum.org/2008/06/19/regional-architecture-and-the-reality-of-power-politics/>. For subsequent views similar to mine expressed here, see also now Andrew McIntyre, *Rudd's Pacific plan: dead or alive?* <http://eastasiaforum.org/2008/10/03/rudds-pacific-plan-dead-or-alive/> (3 October 2008).

architecture for the Asia-Pacific region. Views differ even further about whether such reforms are politically feasible.

Some, particularly in the mainstream media, interpreted him as proposing some European Union-like institutions for the Asia-Pacific. The analogy is not necessarily a bad one, and it's time to take this idea more seriously. After all, the EU has emerged from small beginnings back in 1958, and is itself still a work-in-progress.* Yet regional arrangements have many advantages. They can generate more transparency and public participation, and hence legitimacy, than multilateral systems. They can also minimise parochial impulses often found in national and even bilateral approaches. Such impulses may also threaten the free-trade agreement (FTA) being negotiated between Australia and Japan.

Regional arrangements need not replicate all the 'hard law' and supporting institutions gradually built up into the EU. But the Asia-Pacific could institutionalise more regulatory cooperation, for example in setting the minimum product safety standards permitted under the WTO. The head of the new 'Consumer Agency' mooted now for Japan** could join the New Zealand minister on Australia's Ministerial Council on Consumer Affairs. In specific areas, such as food regulation, we could add other countries like Japan and China to the agency that Australia has developed jointly with New Zealand. We could add looser commitments to other business law harmonisation, as Australia and New Zealand did in 1988 following its FTA of 1982. That also underpins their negotiations for a treaty allowing readier enforcement of judgments from each others' courts, as among EU states.*** We don't need to bind ourselves yet to a supranational court like the European Court of Justice.

Softer innovations like these might restore more genuine sovereignty than we have now under the WTO or the lopsided Australia-US FTA. They should also undermine the objection that Australasia remains too diverse to take collaboration to new levels. Diversity has anyway been turned into a strength within the EU, now with 27 countries of all shapes and sizes (plus three more candidates, including Turkey).

More collaboration in regional initiatives could help Japan finally get over the dark legacy it left in the region during World War II, like the EU did for Germany. Former PM Paul Keating also over-exaggerates Japan's 'mono-culturalism and insularity'. The

* See generally now eg Philomena Murray et al (eds), *Europe and Asia: Regions in Flux* (Palgrave, 2008).

** See further below, Parts 5 and 15.

*** Eg in consumer credit and financial markets regulation: see below, Parts 4 and 12. See also <http://www.courts.govt.nz/pubs/reports/2006/trans-tasman-working-group-report/chapter-1.html> and http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2008_ThirdQuarter_23July2008-Treatytoimprovetrans-Tasmanlegalcooperation. But compare a recent case where the Tokyo District Court refused enforcement of a divorce judgment from an Australian court, as lacking international jurisdiction (as defined by Japanese law) and as against public policy: Heisei 17 (u) 8624 (delivered 19 January 2006; noted in 1362 *Jurisuto* 132).

week before his remarks to the Australian media, Japan's Supreme Court declared unconstitutional aspects of the Nationality Law (No. 147 of 1950), benefitting thousands of children of mothers particularly from South-East Asia.¹⁾ Indeed, Australia should learn from Japan how a Bill of Rights can be entrenched in a Westminster-style democracy.

Former PM Bob Hawke was also reportedly sceptical. Yet he, too, acted unexpectedly when proposing what became the Asia-Pacific Economic Cooperation forum in 1989. Officials, politicians and other leaders still managed to make that work. But after two more decades of closer integration in our region, it's time to consider adding some lessons from the EU.

2. Whaling: What can law add to science, economics, ethics and politics ?

(4 July 2008)

As an Australian/New Zealander lawyer who has spent almost eight years on and off in Japan since 1990, I am concerned that both sides tend to adopt internally inconsistent positions on whaling. What can the law add to this controversial topic ?

Kent Anderson rightly points out the Japan reveals a major 'blind spot' in underestimating antipodean objections nowadays to commercial whaling.²⁾ But some Japanese commentators are all too aware of those objections; it's just that they think them to be hypocritical. That is, when Australia brings claims against Japan under the WTO (or potentially, soon, under our FTA), it insists that any measures impeding its agricultural trade need to be based on science and economics, not the cultural values invoked by Japanese farming communities or their politicians and bureaucrats. Yet 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 highlighting kangaroo culling or ethically debatable farming practices in Australia.

But the Japanese government's position is also inconsistent. When it defends WTO claims, at least to its own citizens, it invokes culture and ethics. Yet 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.

1) Heisei 19 (Gyo tsu) 164 (delivered 4 June 2008); Heisei 18 (Gyo tsu) 135 (delivered 4 June 2008). See the extended case note by Professor Yasuhiro Okuda and Dr Hitoshi Nasu, (2008) 26 *Journal of Japanese Law* 101, also at http://www.law.usyd.edu.au/anjel/content/anjel_research_pap.html .

2) Kent Anderson, *Blind spots in the Australia-Japan relationship* (28 June 2008) <http://eastasiaforum.org/2008/06/28/blind-spots-the-unappreciated-aspects-of-the-australia-japan-relationship-that-can-inhibit-the-obvious-dynamics> .

How can the law help in such tense situations? One influential ('systems') theory of law argues that modern societies evolve into increasingly specialised sub-systems, such as law or science. Each has its own function and 'discourse' or way of interacting with the others. This is mainly a descriptive socio-legal theory. But one normative implication may be the need to preserve the relative autonomy of each, so that their complexities promote overall stability of the social system.* Accordingly, the law should not simply rubber-stamp the substantive conclusions of scientists, nor their own processes of generating those conclusions. Nor should the law be completely subsumed into politics or economics. Unfortunately, that tends to be happening too much with the Whaling Convention and the IWC.** Going to the other extreme, and prioritising ethics over other subsystems' discourses, is dangerous too.

For law to add value to the controversy over whaling, we need to open it to the various subsystems just enough to allow the law to apply and develop its own discourse to complex socio-economic problems. That, in turn, can feed back into the other subsystems in more productive ways for contemporary society. The way WTO law brings in economics and science is instructive, although not perfect. On whaling, even a soft bilateral (or trilateral) agreement involving Australia and Japan may help; we don't necessarily need to wait for a new multilateral regime. Especially if the law does what it does best, which is to institutionalise transparent processes of reasoned debate, intersecting with multiple discourses evolving in other social subsystems.***

3. Australia also should 'Rail at Australian's Tabloid Trash' about Japan

(5 July 2008)

Justin Norrie writes critically for the *Sydney Morning Herald* about online Mainichi Daily News' suspension of its chief editor, Australian Ryann Connell. Japan's bloggers and other media finally reacted to Connell's 'WaiWai' column, which adapted mostly sleazy

* K. Alex Ziegert, 'The Thick Description of Law: An Introduction to Niklas Luhmann's Theory', in R. Banakar & M. Travers (eds) *An Introduction to Law and Social Theory* (Hart, 2002) 55. Cf eg Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World-Society' in idem (ed) *Global Law Without A State* (Dartmouth 1996) 3 or many of his other voluminous works listed at http://www.jura.uni-frankfurt.de/~ifawz1/teubner/Person_englisch/PublikaEngl/index.html.

** See now also Charlotte Epstein, *The Power of Words in International Relations: Birth of an Anti-Whaling Discourse* (MIT Press, 2008), reviewed at <http://blogs.usyd.edu.au/japaneselaw/>.

*** Here I betray my lingering sympathy for the more normative socio-legal theory of Juergen Habermas (Rehg trans) *Between Facts and Norms* (MIT Press, 1996). That is a more normative theory, although rooted in empirical studies—for example by Jean Piaget. Yet, to elaborate how 'reasoning' truly operates, potentially even in legal settings, we should take more seriously work of more recent social psychologists: see eg Susan Bandes, 'Emotions, Values, and the Construction of Risk' (June 20, 2008). 156 *Pennsylvania Law Review* 421 (2008) also at <http://ssrn.com/abstract=1148994> and Gerd Gigerenzer *Gut Feelings* (Viking, 2007).

stories from the Japanese-language tabloid press.³⁾

But the overall quality of this English-language online version of the big Mainichi newspaper has been declining for years. Even its regular articles have focused increasingly on sensationalist crimes and other ‘social interest’ stories more likely to titillate its English-speaking readership. I used to check quite regularly the MDN website for current affairs and basic research, which also had a useful free database of articles, but then I moved to the Japan Times Online. Perhaps the MDN switched focus to appeal to the growing group of more diverse English-speakers living especially in Tokyo, following financial markets liberalisation in the late 1990s and the broader revival of the Japanese economy from 2002.

MDN articles, especially by Connell, sometimes reek of ‘Orientalism’ — projecting ‘the East’ as fundamentally ‘other’ to ‘the West’.* Edward Said criticised this powerfully in his 1978 book regarding Western views on the Middle East, but such views and as well as similar views on East Asia seem to be re-emerging both in those parts of the world and in ‘the West’.⁴⁾ The shift towards tabloid journalism also reflects an unsavoury dimension of globalisation and contemporary economic pressures on the media world-wide.

The *Sydney Morning Herald* is not immune to such trends, as we can see from some of Justin Norrie’s own writing on Japan. As well as providing many articles on crime or nationalist tendencies, occasionally intriguing but mostly irrelevant to everyday life in Japan, he often reports on unusual aspects of social life especially in Tokyo. On 31 May, for example, it was ‘Hungover ? Tired ? Pop out of the office for a quick intravenous drip’.

But how many healthcare providers in Japan offer vitamin supplement drips, compared to other services like remedial massage, and how many people actually use them ? More importantly, why do they use them ? Are workers feeling more stress from changes in socio-economic labour markets and corporate governance in the 21st century ? Has Japan already implemented a neo-liberal revolution (as ANU Emeritus Professor Gavan McCormack insists⁵⁾), or is there more of a ‘gradual transformation’ taking multiple forms (as we conclude after a major study for the Australian Research Council⁶⁾) ? These are the sorts of questions about Japan that I would like to see raised and investigated by Australian journalists.⁷⁾

3) ‘Japan rails at Australian’s tabloid trash’, *Sydney Morning Herald*, 5-6 June 2008, 21.

* Not always, of course. Compare eg the balanced and well-researched article on the safety of *konnyaku* jelly snacks, below n 104 (Part 15).

4) Edward Said, *Orientalism* (Routledge, 1978). For his interesting retrospective recently on this classic work, see <http://www.counterpunch.org/said08052003.html> .

5) Gavan McCormack, ‘Japan, through the US looking glass’, *Asia Times Online*, 26 June 2008 <http://www.atimes.com/atimes/Japan/JF26Dh01.html> .

6) Luke Nottage, Leon Wolff and Kent Anderson, ‘Japan’s Gradual Transformation in Corporate Governance’ (2008) *Sydney Law School Research Paper* No. 08/29 <http://ssrn.com/abstract=1121510> .

7) See also Peter Drysdale, *Japanese media on Rudd; Australia’s Japan correspondent?* <http://eastasiaforum.org/2008/06/22/japanese-media-on-rudd-australias-japan-correspondence> (18 October

The best way to deal with more sensationalist and superficial media reporting is basically to ignore it, while occasionally correcting its most egregious errors or omissions. We should respect freedom of expression, expressly entrenched in a written Bill of Rights in Japan (but not yet in Australia). Outer limits are set by market forces and defamation laws, which are quite strictly enforced in Japan (as Professor Mark West shows in his highly readable yet carefully-researched 2006 book on *Secrets, Sex and Spectacle: The Rules of Scandal in Japan and the United States*). Those of us who want more than tabloid reporting on Japan need to support more serious media outlets, like the new East Asia Forum.

4. Consumer over-indebtedness in Japan, Australia and the US

(8 July 2008)[†]

Japan's recent re-regulation of unsecured consumer credit provides another major example of the growing consumer voice in law and policy-making in that country since the 1990s. It also highlights another 'blind spot' in the Australian media's coverage of Japan.⁸⁾ This is despite similar underlying problems in this country, and a belated awareness of the risks involved in consumer lending following the sub-prime loans crisis in the US.

The situation does seem worse in the US. Consumers ramped up enormous unsecured loans primarily through credit cards. Applying insights especially from social psychology, such as people's 'over-optimism bias', Columbia Law School Professor Ronald Mann wrote a book in 2006 identifying credit cards as particularly risky instruments.⁹⁾ Multiple reform proposals by him and others went unheeded. Meanwhile, borrowers were increasingly induced into sub-prime (high-interest, low-documentation) home mortgage loans. On the supply side, the bandwagon was pushed along by burgeoning securitisation of both types of loans. Parties to the sales and financing of these loans lacked incentives and supervision to price and control risks adequately.* Some now argue that the net socio-economic costs have become so apparent that sub-prime loans effectively should be banned, by limiting the interest rate chargeable. Others suggest we take other techniques and insights from product safety regulation, and apply them to 'unsafe' consumer credit services.**

2008).

[†] See also Souichirou Kozuka and Luke Nottage, 'Re-Regulating Unsecured Consumer Credit in Japan: Over-Indebted Borrowers, the Supreme Court, and New Legislation' (2007) *Sydney Law School Research Paper* No. 07/62 <http://ssrn.com/abstract=1019392> (and our works in press or forthcoming, cited therein)

8) Anderson, above n 2.

9) Ronald Mann, *Charging ahead: the growth and regulation of payment card markets* (Cambridge UP 2006).

* As became tragically apparent in the subsequent financial crisis in the US and then worldwide: see below, Parts 10-12.

** See, respectively, Alan White, 'The Case for Banning Subprime Mortgages' (2008) 76 *University of*

Australia has also developed high levels of credit card and home mortgage debt, not helped by our national addiction to gambling. Fortunately, our levels of sub-prime lending and securitisation are much lower than in the US. But the socio-economic consequences of the lending boom, followed by growing defaults, are also disturbing.

Japan has been grappling with similar issues since the 1980s. Unlike the other two countries, unsecured consumer loans come primarily in the form of cash advances. But they too ballooned for similar reasons over the 1990s. Those included advances in IT (such as ubiquitous automated ‘loan application and dispenser’ machines) and more targeted marketing (aimed at lower-income men). Aggressive sales and debt collection (sometimes involving yakuza gangsters), combined with remarkably high interest rates: the ‘three evils of loan-sharking (*sarakin san-aku*)’. The results included growing numbers of debt-related suicides and other socio-economic problems. But the market also generated large profits for non-bank lenders, including several that linked up to Japan’s large banks or foreign investors.

From the late 1990s, even Japan’s highest court—quite conservative, like highest courts tend to be everywhere—decided that enough was enough. In a series of judgments from the late 1990s, adopting sometimes purposive and sometimes literal interpretations of various laws, the Supreme Court started ruling in favour of consumers. The nail in the coffin came in January 2006. The Court required repayment of excessive ‘grey zone’ interest, ruled not to have been paid ‘voluntarily’ when loan contracts included (as most do) ‘acceleration’ clauses in the event of default. The legislature was forced to respond. A package of amendments was introduced in December 2006, including (from 2010) the abolition of all grey zone interest. Although Japan’s traditional and ongoing emphasis on interest rate caps seems somewhat crude, it has also tried many other techniques to restore some fairness and integrity in the consumer credit market. Caps may be a necessary back-up for any regulatory arsenal directed at this persistent socio-economic problem area in all industrialized democracies.

5. Dodgy foods and Chinese dumplings in Japan

(11 July 2008)[†]

Australia’s Productivity Commission recommended in 2006 several ways to improve our consumer product safety regulatory regime, which dates back to the 1970s. This year it published a more comprehensive Inquiry Report to strengthen our entire consumer law

Cincinnati Law Review, also at <http://ssrn.com/abstract=1133609> ; Oren Bar-Gill and Elizabeth Warren, ‘Making Credit Safer’ (2008) 157 *University of Pennsylvania Law Review*, also at <http://ssrn.com/abstract=1137981> .

[†] See also Luke Nottage and Joel Rheuben, ‘Dumplings and Dodgy Foods in Japan: Implications for the Australia-Japan FTA’ (2008) 19 (4) *Australian Product Liability Reporter* 1, manuscript also at www.law.usyd.edu.au/scil/pdf/SCILWP5July08.pdf .

and policy framework^{*}. Several recommendations, like an obligation on suppliers to report serious product-related accidents to regulators, will start to bring Australia up to the higher standards expected and implemented in Japan since the 1990s. Those track the higher priority given recently to consumer protection particularly in the EU.

Japan and the EU illustrate the thesis of ANU Professors John Braithwaite and Peter Drahos that ‘global business regulation’^{**} can accommodate both economic deregulation of protected sectors domestically, and improved ‘social regulation’ or a safety net for vulnerable groups of citizens. Japan also shares with the EU a greater concern about risks potentially affecting consumers or the environment. By contrast, as Berkeley Professor David Vogel has pointed out, especially since the 1990s the US has become much more concerned about risks to national security.^{***} Australia seems to have gone the same way. Yet such differing risk perceptions remain under-appreciated, particularly in the Australia-Japan context.

Addressing this tension is particularly important as both countries negotiate their FTA. No doubt, as under the multilateral WTO regime, it will allow each state to take measures to prevent health risks. Such measures must not be discriminatory or disguised trade barriers, and should draw on risk assessments influenced by international scientific and technical standards. Yet disputes decided by the WTO show that science cannot provide all the answers, and that states do and arguably should have significant leeway in their attitudes towards risks.

Already, Australian exporters and legal advisors need to be aware of another round of sensitivity particularly regarding food safety issues on the part of Japanese citizens and their government — politicians, not just bureaucrats. Although hardly reported in Australia, 2007 saw a wave of whistle-blowing and intense media scrutiny regarding foods mislabelled by Japanese companies. This year, a major diplomatic row erupted regarding dumplings (*gyoza*) imported from China. Why, how, and when pesticides got into the dumplings is still controversial. But volumes and reputations of many Chinese exports into Japan have taken a pounding. More recently, completing the circle, a Japanese supplier of eels was found to have mislabelled large volumes as being from a well-known coastal town in Japan. In fact they were imported from China, and routed through an inland village with the same name, not known for its eels. Only the dumplings directly raise safety issues, but all these incidents highlight Japanese consumers’ renewed concerns about food quality.

One way forward for Australia, Japan and China is to formalise intergovernmental cooperation, going beyond conventional FTAs, along the lines of Food Standards Australia New Zealand. This would also represent another step towards more EU-like infrastructure

* See <http://www.pc.gov.au/projects/inquiry/consumer> .

** Cambridge UP, 2000.

*** See eg <http://faculty.haas.berkeley.edu/vogel/bjps.pdf> .

(or mentality) within the Asia-Pacific.¹⁰⁾

6. FDI and corporate governance in Japan

(17 July 2008)

With Non-Performing Loans finally under control and economic recovery underway since 2002, Japan has also experienced a revival in FDI outflows. Many commentators focus on the large stocks built up in China, but there has also been steady interest in investing in Australia. Rather than tourism and property developments, Japanese firms have been quietly investing in infrastructure projects, and Nomura is reported recently as a possible buyer of the Australian investment banking arm of ABN AMRO.

A more remarkable development is the expansion of inbound FDI, particularly under the former Koizumi government. Fueled by a broader boom in M&A world-wide, Japan's inflow rebounded to US\$ 22 billion in 2007, and foreign investment stocks doubled over the last five years. But flows and stocks are still low by OECD standards relative to GDP, especially compared to the US, the UK and now Australia.

The Fukuda government has also sent more mixed messages recently. The Transport Ministry tried to include a blanket one-third cap on foreign shareholdings in Japanese airports. But others including the Financial Services Agency objected that this would choke off other inbound FDI, so this provision was dropped in March. The government is now considering the introduction of measures that more directly regulate the understandable security concerns arising from operating airports. Macquarie Airports Management Ltd, which already owns 19.9 per cent of Haneda Airport, will be following this ongoing debate especially carefully.

A more recent incident involves the government's first rejection of a foreign investment under the Foreign Exchange and Foreign Trade Law (*gaitame-ho*), as significantly liberalised in 1998. The Children's Investment Fund based in the UK (TCI) had applied for the pre-approval still needed under the Law for investments of more than 10 per cent in listed sectors deemed potentially critical to national security. The government rejected its proposal to take 20 per cent of wholesaler Electric Power Development Co (J-Power), citing energy security risks.

The US, in particular, has also recently invoked national security to block FDI. Australia's Foreign Investment Review Board blocked Shell's bid for Woodside in 2001 and was criticized for lack of transparency by the Financial Times in 2005 when it was investigating Xstrata's bid for WMC. The Rudd government must have given a lot of thought to China's BG Group's hostile takeover bid for Origin Energy in March 2008, especially since the US had blocked Chinese investors interested in Unocal.

10) See 'Taking the Australia-Japan FTA negotiations to new levels', above Part 1.

Still, Japan's rejection of TCI's proposal might have been presented better. It left much speculation that this was less about national security and more about preventing foreign management turning up pressure on a major Japanese company. Some also tie this to the Supreme Court's decision in 2007 upholding of a post-bid rights issue (by Bulldog Sauce) discriminating against a hostile bidder (US hedge fund, Steel Partners), or to the hundreds of listed Japanese companies that have recently implemented pre-bid 'Advance Warning System' anti-takeover measures (a type of 'poison pill').¹¹⁾

Yet this overlooks the significant emphasis on shareholder approval of anti-takeover measures contained in that judgment, as well as in Guidelines (re-)issued by the Ministry of Justice and/or the Ministry of the Economy, Trade and Industry*. Incumbent target company directors retain much more discretion in the US, and therefore generally implement much more powerful poison pills despite stricter requirements for independent non-executive directors on American boards. That is why News Corporation recently relocated to the US from Australia, where instead we follow the English tradition in even more strictly controlling poison pills. The Anglo-Australian tradition also makes it easiest to launch hostile takeovers by promptly resolving disputes through a Takeovers Panel, rather than the formal court process.

Nonetheless, at least compared to Anglo-Austcapien law, Japanese law does give incumbent managers considerable leeway to protect themselves against hostile takeovers. This helps explain why none has yet succeeded for a major Japanese company, although the threat is now real. Japanese firms also still tend more to acknowledge (legally or in fact) the interests of a broader array of stakeholders. This occurs despite a considerably greater contemporary focus on shareholders, as well as some concomitant declines in the influence of 'main bank' creditors and even (a shrinking core of) 'life-long employees'.

Unsurprisingly, investors have also experienced mixed results from trying to force changes 'from within' to extract greater shareholder returns more quickly. Steel Partners did force venerable wigmaker Aderans to change its management at a shareholders' meeting in May. But in their June 2008 meeting other J-Power shareholders rejected TCI's proposals to change management, elect more outside directors, limit cross-shareholdings, buy-back shares, and further increase dividends.

In sum, as we explain in our new book, both FDI regulation and corporate governance in Japan is still undergoing a 'gradual transformation', underway since the political and then socio-economic upheavals of the 1990s 'lost decade'.¹²⁾ A similar shift towards more market-oriented solutions is evident in other industrialized democracies, such as Germany, as shown by Professor Wolfgang Streeck in Cologne. This partially winds

11) 27 September 2007, 1983 *Hanrei Jiho* 56.

* See further below, Part 9.

12) Luke Nottage, Leon Wolff and Kent Anderson (eds), *Corporate Governance in the 21st Century* (Edward Elgar, November 2008).

back what Karl Polanyi described in 1944 as ‘the great transformation’, which included welfare state reactions to the rise of the market economy. Japan reveals its own combination of mechanisms for achieving some changes, while maintaining some continuity. These involve a few relatively immutable baselines, like FDI restrictions in the national interest; and some flexible rules for more everyday situations, as now with takeovers and permitted counter-measures.

7. Investor-state arbitration for Indonesia, Australia and Japan

(24 July 2008)[†]

Interesting responses by Andrew MacIntyre and others follow Peter McCawley’s recent posting throwing light on Indonesia’s electricity crisis.¹³⁾ Further to my subsequent posting on burgeoning FDI into Japan,¹⁴⁾ yet the recent blocking of a English fund’s bid to expand shareholdings in the J-Power wholesaler, I wonder what Indonesia’s overall experience has been in attracting foreign investment into power projects. From Wells and Ahmad, *Making Foreign Investment Safe*^{*}, I do know of three major investments that resulted in arbitrations after Indonesia suspended many projects following the Asian Financial Crisis a decade ago. These already involved some involvement from Australia and especially Japan. Hence the question: why and how should we provide for investment arbitration in the Australia-Japan FTA or in ASEAN+ agreements?

Two investment disputes directly or indirectly involved Japanese interests. Tomen, a major Japanese general trading company was a 9 per cent partner in the Karaha Bodas power project consortium, led by two US companies, which was awarded US\$ 261 million in arbitration. Sakura Bank helped finance the Dieng and Patuha power projects, where a consortium led by CalEnergy (in the US) obtained US\$ 570 million out of US\$ 3 billion claimed against PLN (Indonesia’s utility company), from a first tribunal including an Australian arbitrator. This consortium then initiated a second arbitration against the

[†] See also Luke Nottage and Kate Miles, “Back to the Future” for Investor-State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests’ (2008) *Sydney Law School Research Paper* No. 08/62 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1151167, forthcoming in (2009) *Journal of International Arbitration*.

13) Peter McCawley, Throwing light on Indonesia’s electricity crisis (13 July 2008) <http://eastasiaforum.org/2008/07/13/throwing-light-on-the-electricity-crisis>. In an online comment on my blog, McCawley adds (25 July 2008):

Indonesia’s experience in attracting FDI into the electric power sector has been bitter. A very useful survey of the very unsatisfactory process was published in the *Bulletin of Indonesian Economic Studies* recently. It is Louis Wells, ‘Private power in Indonesia’, BIES, 43 (3), Dec 2007. Of course, there is a lot of FDI in the Indonesian oil and gas sector. But oil and gas is generally a different story to investment in infrastructure.

14) See ‘FDI and corporate governance in Japan’, above Part 6.

* Oxford UP, 2007.

Indonesian government itself, alleging sovereign performance guarantees. A third investment involved Enron's withdrawal from the Pasuruan gas-fired power plant project. Wells and Ahmad are quite critical of these American companies' limited experience or lack of long-term commitment to such overseas infrastructure developments.

Yet arbitration, often triggering payouts in political risks insurance provided by the home state (of the investor), now often provides significant relief not only against local firms partnering in the investment, but also against the 'deeper pocket' of the partners' host state. Foreign investors not only conclude arbitration agreements directly with the host state, allowing them to claim if the state expropriates or otherwise discriminates against the investment. More often nowadays, investors can invoke commitments to arbitrate made towards the investor's home state by the host state, in Bilateral Investment Treaties (BITs, like the one between Indonesia and Australia) or in investment chapters of FTAs (like the just-negotiated Australia-Chile FTA). The main attraction is a procedure largely autonomous of the host state's courts, but other benefits include the expertise of the arbitrators in the public international law and specialist procedures typically involved in such disputes.

Treaty-based Investor-State Arbitration (ISA) is clearly most attractive for the (actual or potential) net capital exporter, such as Australia vis-à-vis developing countries. Conversely, the Australian government was quick to agree to the US proposal to omit ISA from their 2004 FTA. This occurred after the US belatedly had found itself on the receiving end of adverse ISA rulings under NAFTA's investment chapter; and later US FTAs have reinstated ISA with some adaptations.

Yet even a net capital importer, such as Australia vis-à-vis Japan, has some significant interests in including ISA in an FTA. Short-term, for example, there may be Australian firms investing in Japan, such as Macquarie in Haneda Airport. If the Japanese government discriminates against their investment, for example by invoking national security, Macquarie probably would prefer to bring a direct claim for compensation before a specialist arbitral tribunal rather than suing in local courts, or relying on a 'diplomatic protection' claim brought on their behalf by the Australian government in the International Court of Justice. Long-term, for example, we can expect regional FTAs (rather like NAFTA) that combine net capital importers and exporters, as well as developing and developed countries. It should be easier to include ISA in such regional FTAs, like an ASEAN + FTA involving both Australia and Japan, if countries like Australia and Japan already have committed to ISA in their respective bilateral treaties.*

* Japan has since announced agreement in principle on further FTAs not only with Vietnam, but also Switzerland: 'Switzerland, Vietnam FTAs almost ready' (30 September 2008) *The Japan Times*, 9. The latter includes investment arbitration provisions (<http://www.mofa.go.jp/region/europe/switzerland/joint0809.html>). This is despite it being concluded between two countries with highly developed economies and democracies (a mostly *tatema* or superficial reason advanced for not including such arbitration in the Australia-US FTA of 2004). Another interesting development is that since 22 September the US has commenced negotiations to join the 'Trans-Pacific Strategic Economic

Still, developing countries that have mostly been on the receiving end of arbitration claims (especially in South America) are concerned about the Arbitration Rules provided in treaty-based ISA. Critics point out that ISA disputes involve a wider range of legitimate public interests than strictly commercial arbitration between private firms. Adapting the Rules at the multilateral level is difficult, for reasons unsurprising to those familiar with the WTO. An alternative is to make changes in bilateral treaties, such as the greater transparency obligations detailed in the Australia-Chile FTA.

But another possibility, which I favour at this stage, is to encourage institutions like the Australian Centre for International Commercial Arbitration to develop even more ambitious Arbitration Rules balancing private and public interests in ISA. They should then get the Australian government to include those ISA Rules in their FTAs, as another option for investors to select if proceeding to arbitration. Investors dedicated to Corporate Social Responsibility, or (more instrumentally) wanting to minimize hassles when seeking execution of any arbitral award, would then be advised to choose such Rules over the older ones that some countries remain wary about. This would represent another small but significant step towards PM Kevin Rudd's East Asian Community.¹⁵⁾

8. Rivals: China, India and Japan - Economic, not Olympic ?

(22 August 2008)

Ryan Manuel's posting on 'Market failure, the state and Olympic sport'¹⁶⁾ generated further thought-provoking views, from Dominic Meagher, as well as a follow-up on 'switching costs'.¹⁷⁾ Relatedly, in the *Sydney Morning Herald* last Saturday, Hamish McDonald asked: 'Billion Indians, but where are all their medals?'.¹⁸⁾ We might pose a similar question about Japan, in contrast to China. This provides a springboard for

Partnership Agreement between Brunei Darussalam, Chile, New Zealand and Singapore'. This already brings together quite developed countries throughout the region but does not yet include provisions on investment other than in relation to certain services: see <http://www.mfat.govt.nz/Trade-and-Economic-Relations/Trade-Agreements/Trans-Pacific/index.php> and more generally Gary Hawke, *Foreign policy and the election* (28 October 2008) <http://eastasiaforum.org/2008/10/28/new-zealand-foreign-policy-and-the-election/> .

15) See 'Taking the Australia-Japan FTA negotiations to new levels', above Part 1. The need for a rebalanced investor-state arbitration regime is further highlighted by the nationalizations of financial institutions and other emergency measures adopted subsequently by developed as well as developing countries to address the US financial crisis: see Parts 10-12 below.

16) Ryan Manuel, *Market failure, the state and Olympic sport* (15 August 2008) <http://eastasiaforum.org/2008/08/15/market-failure-the-state-and-olympic-sport> .

17) Ryan Manuel, *Switching costs and sports* (20 August 2008) <http://eastasiaforum.org/2008/08/20/switching-costs-and-sports> .

18) Hamish McDonald, 'Billion Indians, but where are all their medals?', *Sydney Morning Herald*, 16 August 2008 <http://www.smh.com.au/news/world/billion-indians-but-where-are-all-their-medals/2008/08/15/1218307232471.html> .

introducing and assessing the new book by the former editor of *The Economist*, Bill Emmott's *Rivals — How the Power Struggle Between China, India and Japan Will Shape Our Next Decade*.[#]

In the *Herald*, McDonald writes: 'China has gone to ridiculous excess in hosting the current Games, combining the fanaticism of a Maoist 'rectification' drive with East German-style incubation of athletes in its drive to be top medal winner. . . . India, almost alone in the world, seems to apply the notion that sport is all about participation, not winning'. He finds in this 'something truly Olympian', and concludes that 'something sort of noble will be lost' if Shashi Tharoor is right that 'the newly globalised India can no longer content itself with mediocrity in this global competition'. McDonald also quotes Rajeev Srinivasan as critical of India's failure in 'identifying an overarching goal: that of being the best in the world', along with other obstacles such as rural poverty and ill-health as well as sporting bureaucracy cronyism.

Japan seems to have more efficient bureaucrats, and certainly fewer socio-economic inequalities along with better sporting facilities throughout the nation. So perhaps its own relatively poor medal tally reflects a similar 'Olympian' ideal of participation, rather than of winning at all costs. And maybe that has lessons for us when reading Emmott's book. The latter neatly reviews Japan's socio-political transformation since the 1990s and its economic revival since 2002, as well as China's now very visible rise. Emmott also identifies some remarkable recent developments in India's economy, no longer just the world's source of cheap outsourcing services. Indeed, the book begins by highlighting the US administration's rapprochement in security matters in 2005, to counterbalance China's military expansion, paralleling Nixon's rapprochement with China during the Cold War. Emmott's thesis of economic and geopolitical rivalry, already evident between China and Japan but also foreseeable as economic development accelerates in India, certainly helps makes sense of contemporary events. One recent example is Benjamin Reilly's posting on 'Japan's aid to the South Pacific and the China factor'.¹⁹⁾

Emmott's book also suggests some striking historical parallels between China now, and Japan from around the time of the 1964 Tokyo Olympics, when it too rejoined the world by dazzling us with gleaming facilities. China's per capita GDP is similar, and its economy

Allen Lane/Penguin, 2008.

19) (6 August 2008) <http://eastasiaforum.org/2008/08/06/japan%e2%80%99s-aid-to-the-south-pacific-and-the-china-factor> . Relatedly, a new development has been the merger of the Japan International Cooperation Agency (JICA) with the yen loans section of the Japan Bank for International Cooperation (JBIC). This creates one of the world's largest ODA organizations, with operations worth more than a trillion yen, but Japan had dropped to fifth place and there have been concerns about waste and corruption (eg in Vietnam): Editorial, 'New ODA Organization' (21 October 2008) *Asahi Shimbun*, 22. Other government entities also still provide ODA, and five or organizations under their supervision were recently reported to have wasted funds or manipulated records: 'Board reports cases of wasted ODA funds' (10 October 2008) *Asahi Shimbun*, 15. Such reports also rather stole the thunder from the reorganization announced by the new Aso government (see below, Part 14).

also involves massive investment, an undervalued currency and access to cheap credit. Japan managed very well through to the 1980s, but will China achieve a softer landing than Japan and other more market-based major economies? Looking even further forward, can India's better demographic profile be matched with further reductions in inequality, improved education, less red tape, and a more functional legal system?

Even so, will this mean such intense rivalry as Emmott envisages, and hence the need for all the radical reforms to regional and global institutional infrastructure that he proposes? Perhaps India and Japan, at least, will prove a little more 'Olympian' in addressing some of the pressure points he addresses, such as global warming (discussed also by Yongsheng Zhang²⁰). I hope so, for everyone's sake.

9. The politics of Japan's new Takeovers Guidelines

(31 August 2008)

As outlined above, in the context of growing inbound FDI and M&A activity, Japan is developing a hybrid approach to setting parameters for hostile takeovers.²¹ It is worthwhile taking a closer look at a third Report recently from a Study Group playing a major role, along with the courts, in elaborating Guidelines on permissible defensive measures. The Group's membership seems to be changing, and differences are emerging compared to both the Anglo-Australian and American approaches to substantive rules on takeovers as well as the process for defining them.

One extreme approach is the UK City Code model dating back to 1968. It completely disallows poison pills issued by target firms' incumbent directors, and resolves disputes through a very informal and quick 'Takeovers Panel'. This generates much higher levels of hostile takeovers and success rates compared to the US, where Delaware courts allow target directors much more leeway. News Corp reincorporated there because Australia tends towards the stricter UK model, although our own Takeovers Panel came much later and is more formalised. In Japan, some commentary in 2005 viewed some renewed hostile takeovers and case law (such as Horie's Livedoor adventures) as a shift towards the Delaware model. But in some ways Japan's substantive rules governing takeovers disputes, and the process by which they are generated, may be viewed as lying between Delaware and the stricter Anglo-Australian approach towards promoting a market for corporate control.

Substantively, the 2007 Bulldog Sauce judgment from the Supreme Court confirms that Japanese law gives much greater weight to approval of at least some types of poison pill by shareholders, compared to Delaware law's deference to incumbent (but supposedly

20) Yongsheng Zhang, *Bush wrong on India and China and climate change* (22 July 2008) <http://eastasiaforum.org/2008/07/22/bush-wrong-on-india-and-china-and-climate-change> .

21) See 'FDI and corporate governance in Japan', above Part 6.

independent) directors. This tendency is reinforced by a third Report issued on 30 June 2008 by the Corporate Value Study Group within the Ministry of Economy, Trade and Industry (METI). These note the importance of shareholder approval when actually activating poison pills, following a hostile takeover bid. Guidelines initially published by the Group in 2005, under the joint aegis of METI and the Ministry of Justice (MoJ), had discussed this more in the context of initially deploying defensive measures, including situations before a bid had emerged. The extra emphasis on shareholder approval in this year's Report, elaborating the Guidelines, has come as quite a surprise.

Some skeptics may object that this emphasis is unrealistic given the inexperience and relative passivity of shareholders in Japan, despite the dramatic rise in foreign ownership of listed companies. Such views may be especially common among those familiar with the US approach, or from law firms keen to market US-style poison pills to incumbent directors in Japanese companies. From an Australian perspective, it is interesting that the 1969 'Eggleston Principles' transplanted from the UK its strict substantive rules against other defensive measures, which also give much weight to shareholder approval, even when Australia had (and still has) many more block-holders and less active institutional investors. Yet a hostile takeovers market did eventually become a more significant part of Australia's corporate governance landscape, even though other features remain less favourable to dispersed shareholders²²⁾. Perhaps Japan's policy-makers are hoping for a similar long-term transformation in their own corporate governance mix.

Regarding the process by which these substantive rules are being elaborated, Japan is also a hybrid. There is not much awareness or interest in a more informal Takeovers Panel (although an Australian lawyer advocates this model in my new co-edited book²³⁾). Yet the case law now emerging from regular Japanese courts seems to have quite a symbiotic relationship with the publications of the Study Group. The judgments sometimes reflect and therefore consolidate the Group's views, but sometimes influence them in new directions. On a more regular basis, Takeovers Panels in the Anglo-Commonwealth tradition not only resolve pending takeover disputes, but also issue new or updated guidance notes on specific topics.

One key question in tracking and predicting developments in Japan, therefore, is the composition of the Study Group issuing takeovers Guidelines and other reports. The strict UK rules favouring takeovers were entrenched in 1968 after a political as well as economic battle won by institutional investors over incumbent directors and their merchant bank advisors. Within Japan's Study Group, therefore, are representatives of the former (or

22) 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 <http://ssrn.com/abstract=1105639> .

23) See Geread Dooley, 'Streamlining the market for corporate control: a takeovers panel for Japan?' in Luke Nottage, Leon Wolff and Kent Anderson (eds) *Corporate Governance in the 21st Century* (Edward Elgar, November 2008) 155.

other pro-takeover interests) growing relative to representatives of the latter (or other interests preferring more managerial discretion and safeguards)? Perhaps so, as suggested by the appended Table.²⁴⁾

The 2005 Study Group, whose 21 members generated the initial Guidelines, was succeeded by a second in 2006, whose 28 members compiled a Report arguably giving more weight to shareholder interests. The seven additional members in that second Study Group comprised representatives from two universities (assumedly more neutral), two extra securities firms (probably also more interested in increased takeover activity) and two institutional investors (including the increasingly influential Pension Fund Association), versus only one merchant banker. The 2008 Study Group, whose 29 members compiled the recent further Report, no longer included the Association's representative; but the Group added a pension fund, an investment fund and a hedge fund, as well as a private equity association. A life insurer was replaced by its research institute, and, two more professors were added as well as a law firm (albeit American!). A journalist was no longer in the Group, but the most noticeable change was the loss of four major manufacturers—including Toyota, long sceptical about hostile takeovers.

We need closer analysis of all institutions represented in the Study Group since 2005, but this does suggest some shift towards those more minded to restrict defensive measures deployed and activated by incumbent managers of takeover targets. Admittedly, the 2008 Study Group and its Guidelines were generated under the aegis of METI. But the joint involvement of the MoJ was quite unique in 2005—needed to assuage concerns in the business community following the Horie saga, along with the implementation of a final major consolidation of corporate law. And perhaps Professor Leonard Schoppa is correct in suggesting that METI itself is transforming itself, at least in some cases and relative to other influential policy-makers, as a champion of market liberalisation.*

Don't get me wrong. As in Australia, it may take decades for the 'law on books' in this field to make much real difference within the overall corporate governance system. Australia's Takeovers Panel only took over from regular courts from 2000, and had to survive another constitutional challenge in 2008. For the foreseeable future, Japan is likely to keep shoehorning complex M&A disputes into the courts, even if they get indirect assistance from the work of the Study Group and other experts. And stronger defensive measures than those permitted in Australia or the UK can still be deployed and activated in Japan, especially if approved by shareholders, which may well turn into a formality. Also remember that no hostile takeover of a major Japanese company has yet succeeded. For better or worse, the interests of stable shareholders and main banks, incumbent managers and (arguably diminishing) core 'lifelong' employees, remain important. Under these circumstances, it may still make more sense (and yen) for the more activist

24) See Appendix.

* See eg (2006) *Journal of Japanese Studies* 440.

shareholders to displace dubious directors directly, as Steel Partners did with wig-maker Aderans in May 2008.

10. Tables turned in Japanese and US financial markets

(29 September 2008)

In 2003, financial journalist Gillian Tett wrote a book with a self-explanatory title: *Saving the Sun: How Wall Street Mavericks Shook Up Japan's Financial World and Made Billions* (Harper Collins). It epitomized a school of thought proclaiming a dramatic shift in Japan towards US-style corporate governance more generally.²⁵⁾ On 24 September 2008, still writing for the *Financial Times*, Tett concluded that if she were writing her book again, she 'would give it a more upbeat slant. Anyone know the Japanese for 'eating humble pie'?'²⁶⁾ The Japan Society of Scotland has already suggested *sunao ni ayamaru* ('to apologise obediently without protesting') or *memboku wo ushinau* ('to lose face')!²⁷⁾ Japan's big financial institutions are certainly now back on the world stage, picking up some big pieces from America's own financial crisis. And Japanese policy-makers and other commentators now want to lecture the US on how to deal with it.

Who would have thought, even a year ago, that Nomura Securities would be buying up the now-insolvent Lehman Brothers' operations in Asia (including those in Australia, involving a total 3000 employees—with half in Tokyo) and then Europe (2500 employees)? And for just US\$ 225m and 'a nominal sum', respectively, out of cash reserves of almost US\$ 6b Nomura has raised since April? Or that Mitsubishi UFJ, which spent US\$ 3.5b to buy out the Union Bank of California, would now be committing up to US\$ 9b to take 10-20 per cent of Morgan Stanley, another precarious 'Big Five' Wall Street investment bank? Or that Sumitomo Mitsui, which recently spent US\$ 1b for 2 per cent of Barclays bank in the UK (which in turn has bought Lehman's US operations), is prepared to invest US\$ 1-3b in Goldman Sachs if requested by that other precarious Wall Street firm? Or that Mizuho would have recently pumped US\$ 1.2b into Merrill Lynch, another troubled firm that took refuge with the Bank of America in a US\$ 50b merger announced on 15 September?

Morgan Stanley and Goldman Sachs have also become bank holding companies, subjecting themselves to stricter regulation (including lower leverage requirements) to try to regain some trust in the marketplace. Bear Stearns, the other 'Big Five' investment bank, had already failed and was sold to the JPMorgan Chase banking group in March.

25) See 'FDI and corporate governance in Japan', above Part 6.

26) Gillian Tett, 'Why US woes are a taste of honey for Japan' (24 September 2008) *Financial Times*, 18.

27) Charles Edmond, Sakai Yazaki and Emiko Samamoto, 'On the Japanese for "eating humble pie": answers at last' (26 September 2008) *Financial Times* <http://www.ft.com/cms/s/0/14f9aa7e-8b63-11dd-b634-0000779fd18c.html> .

The editorial in the Wall Street Journal proclaims all this ‘The End of Wall Street’.²⁸⁾ Only much smaller pure investment banks remain, such as Rothschild (which advised Lehman on disposing of its Asian operations) and Lazard (which advised on its US operations sale). Eschewing involvement in complex financing deals, and relatively untainted by cross-selling and conflicts of interest, they hope to have preserved reputations for more independent strategic advice in M&A.

One implication of such dramatic events for Japan has not yet been fully appreciated. They should complicate the possible tension between those more likely to promote rules constraining hostile takeovers (including some investment bankers, as well as Japan’s ‘main banks’) and those more likely to favour more liberal rules (requiring informed shareholder consent to defensive measures, rather than deference to target management discretion).²⁹⁾ But anyway these events, tied to a much broader financial crisis in the US, will dampen aggressive M&A activity there and world-wide for quite some time.

These developments are also significant in other ways for the Asia-Pacific region. A few months ago, Nomura was reportedly interested in purchasing the investment banking operations of ABN AMRO in Australia.³⁰⁾ Could they or another Japanese financial institution now be interested in Macquarie Bank? The latter must be feeling the pinch as well, which in turn should impact on that group’s interest in Haneda Airport and other infrastructure investments (and hence concerns about appropriate FDI regulation) in Japan and throughout the region. And where in all this are Chinese financial institutions or the China Investment Corp sovereign wealth fund set up last year with US\$ 200b in China, Japan’s ‘rival’?³¹⁾ They had made some large foreign investments, such as CIC’s US\$ 5b purchase of Morgan Stanley shares at US\$ 50.08 each, but are now looking at big paper losses. CIC was reportedly interested in buying more shares in Morgan Stanley as well as in Lehman, but bowed out to Japanese investors: The lesson China’s cautious leaders seem to have taken from the worsening global crisis is similar to the one they took away in Beijing at the start of the decade - ‘do not mess with things you do not understand’.³²⁾

Japan’s financial institutions, by contrast, are hoping they have learned enough about more complex financial products as a result of financial deregulation and foreign investment in Tokyo since the late 1990s to be able to invest profitably now in Wall Street, and to learn (and earn) even more. The mega-banks, in particular, have finally cleaned up their Non-Performing Loans and regained strong capital asset ratios. They have accumulated ever-more deposits as the Japanese public becomes concerned about investing in the US, as well as likely slowdowns in the world and Japanese economies, and are

28) ‘The End of Wall Street’ (23 September 2008) *The Wall Street Journal* <http://sbk.online.wsj.com/article/SB122212648830465179.html> .

29) See ‘The politics of Japan’s new Takeovers Guidelines’, above Part 9.

30) See ‘FDI and corporate governance in Japan’, above Part 6.

31) See ‘Rivals: China, India and Japan — economic, not Olympic?’, above Part 8.

32) Jamil Anderlini, ‘Prudence Guides China’s Outlook’ (24 September 2008) *Financial Times*, 2.

looking to boost profitability in some offshore markets.

Even Japanese insurance companies, hard hit by Japan's 'lost decade' over the 1990s, may find the time is ripe to diversify overseas. Tokyo Marine Holdings had already spent US\$4.7b in July to buy out Philadelphia Consolidated in the US. Presumably it and others are considering the broader ramifications of the US government recently taking 79.9 per cent equity in exchange for a US\$85b lifeline to the American International Group (AIG). The latter's liquidity crisis, resulting from providing too many credit default swaps (guaranteeing debts owed by third parties), triggered panic as far away as Singapore. Thousands of that nation's 2.6 million policy holders lined up to cash in their investments, even at significant cost, and despite the announcements from the US.

Already by mid-September, 20 per cent of Japan's outbound FDI over the previous year had been into financial services. Perhaps they are moving too quickly, or paying too much (for example, Mitsubishi UFJ to become Morgan Stanley's largest shareholder) for too little (only one board seat, apparently). But Sumitomo realised handsome profits from a US\$0.5b investment in Goldman Sachs when it was struggling back in 1986, unlike many Japanese firms that invested in US or Australian real estate in those heady times (remember Mitsubishi Real Estate's disastrous acquisition of the Rockefeller Centre in 1989?).

Japanese financial institutions stopped investing abroad over the 1990s, instead often finding themselves bought out from the late 1990s. Merrill Lynch bought Yamaichi Securities when it collapsed in 1997, and invested in (Mitsubishi) UFJ Bank in 2003. Ripplewood made a handsome profit from acquiring in 1999 the Long-Term Credit Bank of Japan (now the Shinsei Bank), nationalised in 1998. Goldman Sachs invested in Mitsui Sumitomo in 2003, and Citigroup turned Nikko into a wholly-owned subsidiary as late as 2007. How the tables turned in 2008!

11. Lessons from Japan for the US financial crisis

(1 October 2008)

Many commentators are belatedly* pointing out parallels between the financial markets boom and bust cycle in Japan over the 1980s and 1990s, and that now afflicting the US. However, especially when it comes to solutions for the US and hence the world economy, things are not quite as simple as envisaged by Japan's then financial services minister, Yoshimi Watanabe, who proclaimed in March 2008: 'The US should follow Japan's example and tackle its sub-prime loan problem using public money. The situation

* This may be exacerbated by what social psychologists have often identified as our 'hindsight bias'. Indeed, that may be stronger for those from or with extensive interaction with East Asia: see Richard Nisbett, *The Geography of Thought: How Asians and Westerners Think Differently . . . And Why* (Free Press, 2003).

is exactly like what Japan saw 10 years ago’.*

Significant parallels clearly do exist between Japan then and the US now. Gillian Tett emphasizes a real estate bubble followed by initial denial by the government, then a hefty bailout — although pointing out that the final taxpayer bill turned out much less than the 60 trillion yen (US\$ 567b) yen earmarked because some of the Japanese government funds were recouped.³³⁾ Kwan Weng Kin, Japan correspondent for the *Straits Times*, agrees that a common root cause was easy monetary policies, but that Bernanke (then an economist at Princeton, now head of the US Federal Reserve Bank) had also sharply criticised Japan’s central bank for failing to lower interest rates in the early 1990s, after the collapse of share and real estate markets.

Kwan also points out that it took Japan six years from the collapse to inject some public funds and then until 2002 (led by Koizumi and Takenaka) to force Japan’s banks to accept more funds to write off bad debts, amounting by then to 43 trillion yen. Yet the former Tokyo bureau chief for Forbes draws parallels between the grand rescue plans periodically announced by the Japanese government over the 1990s and those proclaimed by the US since the subprime mortgage market collapse last year: ‘Stock markets dutifully took off, only to fall back within days as reality sank in and investors realized the real estate collapse continued unabated, along with the unfolding carnage’.³⁴⁾

Hugh Cortazzi, a frequent commentator on Japan since serving as British ambassador to Japan from 1980 to 1984, also notes that ‘the basic lesson that asset prices do matter was not learned’.³⁵⁾ Among some important differences, he points out that the main problem in the US (and the UK) has been overlending to individuals with their homes as collateral, whereas in Japan it was secured overlending to companies (although Japan also had its *jusen* home mortgage debacle over the early-mid 1990s). Cortazzi also emphasizes how

* Quoted in Kwan Weng Kin, ‘Tokyo lessons for Bernanke’, <http://www.asiaone.com/Business/News/Story/A1Story20080923-89531.html>. A deeper underlying difference may lie in how Americans allegedly tend to go about ripping off others, compared to the Japanese. As summarized by one Taisho era novelist writing historical fiction about Edo (Tokyo) detectives solving crimes during the early Meiji era last century, when Japan was just reopening to the West:

[Underling] ‘Most Americans sit right out in broad daylight and cheat you. They move things around in ways you can’t possibly follow and they make things appear from nowhere. When it comes to picking a pocket no one in the world does it better than us Japanese. But when it comes to cheating right out there for everyone to see we have a lot to learn. You have to sort of admire them. And think that anyone who lets himself get cheated deserves to be cheated.’

[Boss — *okappiki* Hanshichi Torimonochō] ‘Not the sort of remark a person expects from an officer of the law. I’ll pretend I never heard it.’

See Edward Seidensticker, based on works by Okamoto Kido, *The Snake That Bowed* (Printed Matter Press, 2006) 69 (reviewed by Donald Ritchie at <http://search.japantimes.co.jp/cgi-bin/fb20060423dr.html>).

33) Tett, above n 26.

34) Neil Weinberg, ‘Rewind: Is the US Financial Crisis in Danger of Turning Japanese?’ (29 September 2008) *Forbes Asia*, 18.

35) Hugh Cortazzi, ‘Will Bankers Ever Learn?’ (25 September 2008) *Japan Times*, 17.

lenders in the US, in particular, had 'packaged their loans and sold them in ways that disguised the true risks involved' (for example, through securitisation), and that bankers failed to assess such risks. He believes 'the remedies adopted by the US, where investors have suffered severe losses while mortgage lenders have been saved by the taxpayer, will inevitably discourage investment in financial institutions that remain', and that there are likely to be further property price declines and re-regulation of financial markets.

However, just as occurred during Japan's financial crisis in the late 1990s, economists are starting to come up with considerable variations on these main themes. On the causes of the US asset bubble and its collapse, Berkeley's Barry Eichengreen also points to deregulation of commissions to stockbrokers in the 1970s, and removal of the 1933 Glass-Steagall Act's restrictions on mixing commercial and investment banking in 1999.³⁶⁾ Unintended consequences followed from these arguably sensible policy decisions (both, incidentally, a major part of Japan's 'Big Bang' financial markets deregulation in the late 1990s). They eroded investment banks' traditional profits, encouraging them to branch into riskier businesses (such as originating derivative securities) and to pursue higher returns through higher leverage, outside the purview of banking regulators.

Eichengreen also highlights the Bush administration's decision to cut taxes, and the Fed's cut in interest rates in response to the 2001 recession. This boosted US spending and reduced savings, matched by inflows particularly from China into US treasury bonds but also the government-backed mortgage lenders, Fannie Mae and Freddie Mac. This fed the securitisation machine, as well as propping up the dollar and reducing the cost of borrowing for US households. Eichengreen expects the bloated US financial sector to retrench considerably, with US households being forced to save more, reducing the US current-account deficit and the Asian surplus.

As for concrete measures to get to a more balanced situation both within the US and globally, many economists were critical of the proposal by US Treasury Secretary Henry Paulson (supported by Bernanke) to commit US\$ 700b to buy up troubled assets, mainly the mortgage-backed securities. Martin Wolf believes it fails to address massive increases in US household, financial sector and aggregate debt levels in the US between 1980 and 2007.³⁷⁾ This system is now threatened by fears of mass insolvency, not just the illiquidity of some assets, which can result in the 'debt deflation' described by Irving Fisher in 1933 and experienced by Japan over the 1990s.³⁸⁾

Paul Krugman basically agrees.³⁹⁾ Paulson's 'Trash for Cash' plan *might* indeed break the vicious circle whereby financial institutions selling assets in turn drives their prices

36) Barry Eichengreen, 'Anatomy of a Crisis' (23 September 2008) *The Straits Times*, A 23.

37) Martin Wolf, 'Why Paulson's Plan Was Not a True Solution' (24 September 2008) *Financial Times*, 1.

38) See also discussions at <http://www.ft.com/wolfforum> .

39) Paul Krugman, "'Cash for Trash' Just Doesn't Make Sense", reproduced from the *New York Times* in *The Straits Times*, 23 September 2008, A 23.

down even further. But even so, the financial system will remain undercapitalized, following the losses caused by the collapse of the asset bubble, unless the government (at taxpayers' expense) hugely overpays for the distressed assets. Krugman therefore urges instead recapitalization by the government in return for ownership of the bad financial institutions themselves, as happened earlier in September with Freddie and Fannie (now sometimes referred to as 'Fraudie' and 'Phoney'!).

William Isaac, former chairman of the Federal Deposit Insurance Corp, proposed revisiting a FDIC scheme from the 1980s that helped struggling Savings and Loan associations by issuing them promissory notes to shore up their capital base, so they could resume lending to worthy borrowers. Paulson himself also seems to have endorsed banks selling distressed assets to give some sort of equity warrant to the government, so taxpayers can share in any profits. And last Thursday, House Republicans proposed that the government sell insurance policies to struggling banks to help shore up their distressed assets, along the lines of a paper by Laurence Kotlikoff and Perry Mehrling.⁴⁰⁾ The deal tentatively struck between the Bush Administration and the US legislature* apparently allows, but does not require, the government to insure some assets rather to buy them.⁴¹⁾

Other economists had proposed various alternatives. Government exposure can be reduced by lending to distressed firms, with their assets as collateral. Or the government can purchase only the better assets, like a hedge fund. Or it can find ways to reduce the amount of debt owed by struggling homeowners, for example by working to restructure the underlying loans.⁴²⁾ A precedent for the latter comes from a Depression-era institution, the Home Owners Loan Corporation.⁴³⁾ Bush had already signed a Bill, taking effect from 1 October 2008, that aims to prevent foreclosures by allowing an estimated 400,000 homeowners to swap their mortgages for more affordable loans, but only if their lender agrees to take a loss on the initial loan.

But an even more comprehensive solution should include re-regulation of the marketing and contract terms used by consumer credit suppliers, who have increasingly taken advantage of borrowers' behavioural biases and other characteristics of this field. Requirements for more responsible lending—in home mortgages, but also credit card lending (also in Australia) and cash advances (also in Japan)—would reduce risks of

40) 'Will the \$ 700 Billion Bailout Turn A Profit for Taxpayers?' (30 September 2008) *The Japan Times*, 11.

* As most readers will remember, this deal did not go through as expected because of renewed opposition from the legislature, leading to some of the worst sharemarket falls ever in the US and worldwide. Revised legislation was enacted the following week.

41) 'US House Girds for Bailout Vote' (30 September 2008) *The Japan Times*, 1 and 11.

42) Anthony Faiola and David Cho, 'Alternative Cures to Save Economy', *Washington Post* reprinted in *The Japan Times*, 25 September 2008, 13.

43) 'Beyond Crisis Management: Bold Ideas for Solving America's Financial Mess' (20 September 2008) 388 (8598) *The Economist*, 89.

default, as well as incentives for financiers to avoid whatever new regime is introduced to regulate how they raise funds for lending to consumers. This therefore constitutes a complementary 'demand-side' measure to address another root cause of the current debacle in the US. It should also be useful for other countries in our region struggling with rising consumer over-indebtedness.⁴⁴⁾

Free market advocates may complain about the possible costs of such further re-regulation, but they pale into insignificance compared to the trillions of dollars incurred directly or indirectly in clearing up contemporary financial crises.* Government attempts to staunch such crises over the last three decades have cost 16 per cent of GDP, according to a recent IMF Working Paper.⁴⁵⁾ Yet prevention is usually better than cure.

12. The financial crisis - and loansharks in Japan and NZ

(9 October 2008)

In Japanese banking, the big boys are back, as I explained last week: *The Economist* now confirms it.⁴⁶⁾ Indeed, the latter suggests that 'if Japanese banks have any unique skill, it may well be in coping with crisis'. Not an obvious point, as evidenced by the collective dithering after Japan's financial markets collapsed in the early 1990s or the almost completely unexpected 1995 Kobe earthquake. But I suppose the Japanese can be very good at responding systematically, once they establish the broad parameters of the problem.

Anyway, Mitsubishi UFJ has now proceeded to take 21 per cent of Morgan Stanley, and is now considering further integrating its securities subsidiary (involved in US\$ 18.3b of M&A advisory work involving Japanese companies in 2007) with Morgan's Japanese arm (which did US\$ 17.9b). This would challenge Nomura, which did US\$ 34.2b;⁴⁷⁾ but the latter has also snapped up Lehman's operations in Asia (mostly Tokyo), hoping to retain many staff to grow its own business.

And the US government finally agreed on a public bailout plan for up to US\$ 700b, which I reviewed critically earlier in the week.⁴⁸⁾ Along with US\$ 85b for AIG and US\$

44) See 'Consumer over-indebtedness in Japan, Australia and the US', above Part 4; and below Part 12.

* As noted even by Francis Fukuyama, famous for pronouncing the *End of History* (Free Press, 1992), we have now definitely reached the end of the era of laissez-faire Reaganism and its variants abroad: 'The Fall of American, Inc' (13 October 2008) *Newsweek*, 25 at 26. See also Yoichi Funabashi, 'Signs of a "non-polar" world emerging amid financial crisis' (9 October 2008) *Asahi Shimbun* 21.

45) Luc Laeven and Fabian Valencia, 'Systemic Banking Crises: A New Database' (September 2008), outlined by *The Economist*, above n 43.

46) See respectively, 'Tables turned in Japanese and US financial markets', above Part 10; 'The big boys are back' (25 September 2008) 388(8599) *The Economist* http://www.economist.com/research/articlesbysubject/displaystory.cfm?subjectid=348969&story_id=12306044 .

47) 'Aiming to Rival Nomura' (4-5 October 2008) *Asahi Shimbun*, 25.

48) See 'Lessons from Japan for the US financial crisis', above Part 11.

29b for Bear Stearns, this amounts already to 5.8 per cent of GDP, ‘well above the 3.7 per cent of the savings-and-loan bail-out in the late 1980s and early 1990s’ and significantly less than the 24 per cent of GDP committed by Japan after 1997.⁴⁹⁾

But Paul Krugman persuasively maintains his critique that buying up distressed loans is a hastily drawn up and politically-charged plan that is unlikely to be enough — ‘a much better-conceived rescue of the financial system . . . will almost certainly involve the US government taking partial, temporary ownership of that system, the way Sweden’s government did in the early 1990s’.^{*}

The editorialist in the *Kyoto Shimbun* agrees, drawing parallels also with nationalisation in Japan in the late 1990s, concluding that the US ‘needs to implement comprehensive crisis management, in line with the true situation and without excluding any possible scenarios’.⁵⁰⁾

Again, an intriguing remark about how different countries’ policy-makers respond to actual and potential crises — an issue that the Australian Network for Japanese Law (ANJeL) therefore decided to make a theme for its annual conference in Tokyo on 14 February 2009.^{**} Anyway, in the context of the current financial crisis, I believe we also need to examine broader risks and responses in our Asia-Pacific region — including revisiting how we approach consumer over-indebtedness in countries as seemingly diverse as Japan and New Zealand.

Ongoing economic upheaval seems likely in the US. *The Economist* acknowledges the danger of a ‘second-round effect’ as the financial crisis affects the economy, leading to further problems in finance: ‘Mortgages may be the problem asset of the moment but next

49) ‘The doctors’ bill’ (25 September 2008) 388(8599) *The Economist* http://www.economist.com/finance/displaystory.cfm?story_id=12305746 (21 October 2008).

* ‘Edge of the abyss’, http://www.nytimes.com/2008/10/03/opinion/03krugman.html?_r=1&partner=permalink&expod=permalink&oref=slogin. Readers will realize that Krugman proved persuasive. The British subsequently announced a plan to inject funds directly into its banking system, which made the US take this option more seriously: ‘US considers buying stock in banks’ (10 October 2008) *International Herald Tribune*, 1. (Parallels with Japan were immediately noted: Martin Fackler ‘Been There, Done That’, *idem.*) Major central banks world-wide, including those in Japan and the Asia-Pacific, also coordinated interest rate cuts: Bettina Wassener ‘Asia joins global campaign to bolster ailing markets’ (10 October 2008) *International Herald Tribune* 13. G7 central bankers and Finance Ministers then agreed on further joint initiatives to calm financial markets, which were supported by the International Monetary Fund: ‘G-7 plan gets IMF backing’ (13 October 2008) *The Daily Yomiuri* 1. The Philippines then announced that ASEAN nations had agreed with Japan, China and South Korea to set up a multi-billion dollar fund to buy toxic debts and support banks in the region. The World Bank was reportedly willing to commit initially \$10b, with the possibility of contributions also from the Asian Development Bank and the IMF. Earlier in the year East Asian countries had proposed expanding a currency swap scheme set up after the 1997 Asian financial crisis: ‘Philippines says Southeast Asia agrees to set up crisis fund’ (16 October 2008) *The Daily Yomiuri* 8.

50) ‘*Bei Kinyu Anteikaho: Fukaketsu daga Banno dewanai* [US Bailout Plan: Necessary but Imperfect]’ (5 October 2008) *Kyoto Shimbun* <http://www.kyoto-np.co.jp/info/syasetsu/20081005.html>.

** Details via <http://www.law.usyd.edu.au/anjel/>.

year the worry may be about credit cards, car loans and corporate debt'.⁵¹⁾ Other media are already reporting problems in those areas. And then we have the risk of a boomerang effect back from countries with their own problems of weak banks and underlying over-indebtedness.* The UK has already seen a big bailout of Northern Rock, plus HBOS forced into a merger with Lloyds.** But two banks have also recently been bailed out in Belgium, and things are not looking good either in Denmark, Spain and even Germany.⁵²⁾ In our region, for example, there was a run on the biggest Chinese bank in Hong Kong (the Bank of East Asia), triggered by exposure to AIG — with creditors lining up like they did for the AIG subsidiary in Singapore.⁵³⁾

I agree with Cornell University's Robert Frank that a more comprehensive solution requires us to '*Limit Credit Before Bubbles Start Bursting*'. The root problem is not just inadequate information, which is demanding better disclosure. It stems from two conditions: (1) people confronting 'a gamble that offers a small gain with near certainty and a significant loss with only a very small probability', plus (2) 'rewards received by market participants depend[ing] strongly on relative performance'.⁵⁴⁾ Those conditions also explain why we get too many dwellings built in earthquake zones and excessive workplace safety risks in unregulated housing and labour markets, as well as athletes who persistently take performance-enhancing drugs. Frank concludes that 'asset bubbles cause real trouble only when investors can borrow without restriction to expand their holdings', so we must restrict such borrowing.⁵⁵⁾

We also need better enforcement of such a new regime. The *New York Times* and then then *International Herald Tribune* carried a disturbing expose on regulatory failures by the Securities and Exchange Commission especially from around 2004.*** Again, though,

51) 'A fate worse than debt' (25 September 2008) 388(8599) *The Economist* http://www.economist.com/finance/displayStory.cfm?source=hptextfeature&story_id=12306060 .

* See also eg Yiping Huang, *China not immune from the financial crisis* (6 October 2008) <http://eastasiaforum.org/2008/10/06/china-not-immune-from-the-us-financial-crisis/>; 'South Korea struggles to protect its banks' (10 October 2008) *International Herald Tribune* 18; Editorial, 'No economy is an island' (21 October 2008) *International Herald Tribune* 6.

** Bradford & Bingley has been nationalized as well: 'UK lender B&B nationalized' (30 September 2008) *The Japan Times*, 11. For concerns that such developments will in turn lead to excessive concentration of market power and risk, however, see 'Downsizing the risk factors' (21 October 2008) *International Herald Tribune*, 15.

52) 'While Rome burns' (25 September 2008) 388 (8599) *The Economist* http://www.economist.com/finance/displaystory.cfm?story_id=12306037&fsrc=rss . Iceland was also later hit very hard.

53) 'Text P for panic' (25 September 2008) 388(8599) *The Economist* http://www.economist.com/finance/displaystory.cfm?story_id=12306030&fsrc=rss .

54) (4-5 October 2008) *International Herald Tribune*, 15. See also his related article: Robert Frank, 'The dangers of leverage', *ibid.*, <http://www.iht.com/articles/2008/10/03/business/wbview04.php> .

55) *Ibid.*

*** 'US agency lets banks build debt and risks' (4-5 October 2008), *Asahi Shimbun*, 1. This is also picked up now by eg David Caploe 'US crisis is intellectual, too' (16 October 2008) *The Daily Yomiuri*, 13; and Stephen Grenville, *Who's to blame for the financial crisis?* (16 October 2008) <http://>

I would go further in re-aligning incentives. It is necessary but not sufficient to rethink how we set and enforce limits on how financial institutions raise funds, either directly or via restrictions on the activities of key ‘gatekeepers’ like rating agencies.*

I propose also re-regulating the ability of financial institutions to readily offload any and all funds they do raise from investors, through certain financial services to consumers. This is especially true for services that have negative externalities or exploit information and behavioural biases of consumers.** The latter encompass much more than mortgage loans where borrowers were actually ‘lied to by brokers about the reset rates on adjustable-rate mortgages and other elements of their loans’.⁵⁶⁾ Ronald Mann details how credit card loans are a potentially much bigger problem area not only in the US, but also other economies such as the UK and Australia.⁵⁷⁾ The way they are marketed and drafted is also likely to become a growing problem on Japan, somewhat ironically, after it clamped down in 2006 on its own unsecured consumer credit boom — hitherto mostly driven by cash advances through increasingly ubiquitous ATMs. In addition, however, we find an analogous problem with cash advances through ‘payday lenders’ in the US (recently partially re-regulated) and some ‘predatory lenders’ in Australia.

For a recent public lecture in New Zealand, I also discovered some interesting parallels between fringe lending particularly in rural Japan, and that involving Pacific Islanders in South Auckland. As part of its routine monitoring of the Credit Contracts and Consumer Finance Act 2003 (CCCFA, in force from 2005), the Consumer Affairs Ministry’s qualitative study in 2007 found that they turned to fringe lenders for (1) everyday household expenses, then (2) large items (especially cars, involving the most potentially exploitative lender practice), but also (3) to meet social and cultural obligations (such as funerals). The latter area, like the first, often required access to ‘instant cash’ and —

were usually for events for which people cannot easily plan, so increasing their potential susceptibility to unreasonable and oppressive credit provider practices. . . . The researchers concluded that experiences and perceptions expressed by the interviewees challenged the notion

eastasiaforum.org/2008/10/16/who%e2%80%99s-to-blame-for-the-financial-crisis/ .

* See generally John Coffee, *The Gatekeepers: Professionals and Corporate Governance* (Oxford UP, 2006); and his (and some others’) views expressed more recently in a recent Sydney Law School conference volume: R P Austin (ed) *The Credit Crunch and the Law* (Ross Parsons Centre, 2008) available via <http://www.law.usyd.edu.au/parsons/> .

** For some steps now by Australia in this direction, compare eg http://www.cornwalls.com.au/article_creditAlert08.htm .

56) Bethany McLean, ‘Hypocrisy on Main Street’ (3 October 2008) *International Herald Tribune* <http://www.ihf.com/articles/2008/10/03/opinion/edmclean.php> . See also Bethany McLean, ‘The Borrowers’ (2 October 2008) *The New York Times* <http://www.nytimes.com/2008/10/03/opinion/03mclean.html> ; and, generally and more critically, (with Peter Elkind) *The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron* (Portfolio Trade, 2004).

57) Mann, above n 9.

that, if certain information is available (through improved disclosure), consumers will use it to make the decisions that will shape the development of a competitive credit market. Even those Pacific consumers with reasonably high levels of financial literacy and awareness of the high costs involved in the fringe credit market felt they had limited choice about the conditions under which they accepted the credit they sought. The research report also suggested that the ways in which information is provided (small print, technical language, [and so on]), and by whom, can prevent the consumer arriving at the understanding needed to make an informed decision. The research noted that Pacific consumers expressed a fear that questioning or complaining about the credit contract would prevent them from being able to borrow at all. Furthermore, seemingly important questions appear not to be asked by Pacific consumers because of the trust placed in the credit provider, especially when the credit provider is a member of the same ethnic community.

Despite this, the NZ government's response identified only the following priority work areas:⁵⁸⁾

- continued enforcement effort where traders are not complying with the law;
- providing a means by which consumers can work their way out of debt;
- an information and capability building programme to address consumers' lack of access to information about their rights in a transaction or how to get redress;
- addressing overly-aggressive marketing practices;
- engaging at the government, community and business level to develop potential solutions to the problems;
- completing the review of the CCCFA.

If this problem is so serious, NZ probably needs a stronger policy response, along the lines of that in Japan from 2006 and emerging in some fields in the US. Credit suppliers could be subjected to suitability rules (requiring assessments of consumers' ability to repay, and/or certain bright line rules based on net income), or interest caps (set high enough to cut out the worst suppliers, even at the cost of some excess demand — some demand which seems to be heavily manipulated anyway). Another possibility, not yet found anywhere but drawing from recent re-regulation in consumer product safety (at least in Canada, Japan, the EU, and earlier the US), is to require suppliers to notify regulators when a particular type of marketing practice and/or credit contract leads to abnormally high levels of socio-economic stress to borrowers and their communities (for example, insolvency, imprisonment, and so on).

The aim is to change both the economics and the social norms of market segments that are deemed too destructive or risky for most individuals and/or broader communities.

58) Ministry of Consumer Affairs (New Zealand), 'Pacific Consumers' Behaviour and Experience in Credit Markets, with Particular Reference to the 'Fringe Lending' Market: Research Findings Report and Government's Response Strategy' (2007), available at <http://www.consumeraffairs.govt.nz/policylawresearch/Research/fringe-lenders/response-report/response-report.pdf> (accessed 21 October 2008).

In both South Auckland and increasingly poor parts of Japan, for example, this means encouraging borrowers either to go without a luxury item or to turn more quickly to a social welfare net, rather than (mostly) prolonging the agony for the benefit of the lenders. Such measures to address consumer over-indebtedness, across many credit markets, could collectively also help to minimize the risk of the huge financial meltdown now facing the US and potentially the world economy.

13. Consequences of melamine-laced milk for China, NZ, Japan and beyond

(14 October 2008)

For weeks I have been tracking this latest evolving food safety scandal, but reports and reactions vary markedly across the region. Media coverage is likely to remain disparate. But the saga should provide lessons for developing bilateral and regional infrastructure to 'trade up' to a more harmonized regime, better securing consumer product safety in our FTA era.⁵⁹⁾

At a news conference recently the Chinese Health Ministry announced melamine limits for dairy products, but declined to provide updated statistics on those so far harmed by tainted products. In September 2008, the figures given had been 53,000 children sickened, 13,000 hospitalised, and at least three dead from kidney stones due to drinking products made from milk that suppliers or intermediaries had bolstered with this chemical to hide the fact it had been watered down.⁶⁰⁾ Yet the government demands notification if Chinese lawyers decide to represent victims.

Cui Weiping, a leading Chinese intellectual, posted a blog saying she wasn't surprised at this latest food safety scandal. In 2005 a cousin had explain how local farmers were deliberately selling pesticide-laced rice to people far away in Shanghai, yet even Cui decided that officials would do nothing if this matter was reported to them.⁶¹⁾

The Chinese government has belatedly begun to clamp down on the dairy industry, arresting 27 people in Hebei Province since investigating Sanlu, the company at the centre of the scandal. Officials are blaming farmers and milk collecting stations.⁶²⁾ But a local farmer has pointed out that Sanlu was a monopsonist in his village, controlling the only milking station. Farmers were subjected to huge pressure when Sanlu reduced its buying price in response to government calls to reduce food price inflation. Another farmer insists that they lacked the skills to adulterate milk. Others point the finger instead at Sanlu as well, saying that it also developed and controlled all injections into the local dairy herd, yet

59) See 'Dodgy foods and Chinese dumplings in Japan', above Part 5.

60) Edward Wong, 'China announces permissible levels of melamine in milk' (9 October 2008) *International Herald Tribune*, 4. Most subsequent news reports mention at least 4 deaths.

61) 'Behind the Milk Scare, A Frightening Silence', *The Washington Post* reproduced in the *Yomiuri Shimbun*, 1 October 2008, 16.

62) *Yomiuri Shimbun*, *ibid*, 5.

now complains that the milk contains excessive antibiotics residues.⁶³⁾

Although this is China, so we may never know, it does seem plausible that this large joint venture company is not being investigated all that vigorously. Certainly, top leaders have avoided much scrutiny; 'whether because of traditional deference to Beijing or clever state media management, public anger is directed more at second- or third-tier officials at the local level'. Yet problems seem to have been covered up for months.⁶⁴⁾ Many have suggested that this was to avoid marring the Olympics over August 2008. After all, on 16 July Gansu Province had told the Health Ministry about kidney stones in children who had all drunk the same brand of powdered milk, but the Ministry says it didn't establish causation until 1 September. Fonterra, an offshoot of the New Zealand Dairy Board that owns 43 per cent of Sanlu, says it learned about problems on 2 August but tried unsuccessfully to get local officials to order a recall. Instead, Sanlu began a clandestine recall, until Fonterra informed the NZ government, which in turn informed Beijing on 8 September. This led to Chinese media reports about melamine on 10 September, a comprehensive recall on 11 September, and a first news conference by the Health Ministry on 13 September. Even then, the Communist Party only permitted investigation by the most trusted media.⁶⁵⁾

Regional Reactions

Some robust criticism has come from Singapore — of all places, some might say — with complaints that: 'just like the SARS outbreak [in 2003], the latest dairy product scare merely pointed to deeper problems — decades of under-investment in essential public services, an unaccountable political system and a lack of independent channels for problems on the ground to be heard'.⁶⁶⁾ On Friday 19 September, milk products from China were supposed to have been recalled from the Singaporean market — although the next day when reporters challenged one of many stores that still seemed to have them, the owner replied 'We're just displaying them. We're not selling them'!⁶⁷⁾

Taiwan also ordered a ban after melamine was found in a popular brand of coffee mix made with creamers from China (and also exported to Germany). Major retailers in Hong Kong, where at least two children have been diagnosed with kidney stones, voluntarily withdrew Chinese-made Nestle products after one tested positive.⁶⁸⁾ Cadbury recalled

63) 'China's Dairy Farmers Angered by Accusations' (4-5 October 2008) *International Herald Tribune*, 5; see also 'China's Dairy Farmers Feel The Squeeze' (21 September 2008) *The Straits Sunday Times*, 16

64) 'China Leaders Dodge Milk Fallout' (25 September 2008) *The Japan Times*, 4. Relatedly, Ryan Manuel now re-emphasises the huge disparity in funding provided to central versus local government projects and administration in China: 'The milkman versus the spaceman: China's dilemma' (29 October 2008) <http://eastasiaforum.org/2008/10/29/the-milkman-versus-the-spaceman-chinas-dilemma/> # more-1536 .

65) 'China's Baby-Milk Scandal' (20 September 2008) 388(8598) *The Economist*, 38.

66) Chua Chin Hon, 'No More Excuses, China' (24 September 2008) *The Straits Times*, A 16.

67) 'China Milk Products Still on the Shelves' (21 September 2008) *The Straits Sunday Times*, 1.

68) 'Melamine in Coffee Mix Forces All-Out Taiwan Ban' (23 September 2008) *The Straits Times*, A 3.

China-made chocolates in Taiwan, Hong Kong and Australia.⁶⁹⁾ The Philippines ordered testing of all infants hospitalized with kidney stones, Italy stepped up testing, Kenya banned all Chinese milk products, and altogether over a dozen countries introduced such bans or took other counter-measures.⁷⁰⁾ By 1 October, China's food safety administration had found melamine in 31 further batches of milk powder, nine produced by Sanlu but bringing to 20 the total number of producers of contaminated products. And the Hong Kong food safety agency reported that its tests had found melamine also in a Japanese-brand ('Lotte Cream') cheese cake made in China.⁷¹⁾

It is fair to ask what was known by the Japanese government until September about possible problems with Chinese milk products, given Japan's keen interest in food safety in China after the imported *gyoza* (dumplings) scandal. Yet that very media attention in Japan makes it unlikely that much was known, but covered up, by Japanese authorities unwilling for example to reignite food safety disputes during the Beijing Olympics. On the other hand, any detente seems to be well and truly over. Almost every day Japanese newspapers carry another story about more melamine found in a range of foods sourced from China. But this is partly a positive sign, reflecting belated but better testing. And so far there have been no reports of health problems in Japan, because most contaminated products are aimed more at adults and less regularly consumed than infant milk formula.

On 30 September, for example, Kyoto health officials reported tainted pastries made by an Osaka company (Marudai) from milk imported from the large Yili dairy company, sold to two nursing homes.⁷²⁾ They also found problems in goods carried by nine other supermarkets and retailers, and therefore set up special information counters in the Town Hall and health centres.⁷³⁾ A large trading company (Kanematsu) then reported that its egg tart cake had been found to contain smaller quantities of melamine.⁷⁴⁾ Small quantities have also been found in *takoyaki* (octopus balls) imported through a Tokyo company.⁷⁵⁾ Another Osaka importer (MS International) has apologized for being ordered to recall one product, and announced a 'voluntary' recall of four others. In the press conference, interestingly, the president claimed not only that the Shanghai manufacturer 'had used milk products from NZ and Australian companies', but also apparently that melamine had been

69) 'Cadbury Recalls China-made Sweets' (30 September 2008) *The Japan Times*, 4. For an update on Australia's response, extended now to a 'Boxer Lovers Body Pen Set', see <http://www.foodstandards.gov.au/newsroom/factsheets/factsheets2008/melamineinfoodsfromchina/index.cfm>.

70) Above n 64.

71) 'Food Scandal Expands at Dairies and in Hong Kong' (2 October 2008) *International Herald Tribune*, 3.

72) 'Tainted Food Found in Nursing Homes' (30 September 2008) *The Japan Times*, 2.

73) '*Melamin Mondai Sodan Madoguchi Kaisetsu* [Melamine Counselling Centre Opens]' (30 September 2008) *Kyoto Shimbun*, 27.

74) '*Reito Kashi kara Meramin* [Melamine in frozen sweets]' (2 October 2008) *Kyoto Shimbun*, 29.

75) '*Takoyaki kara Melamin Kenshutsu* [Melamine found in octopus balls]' (8 October 2008) *Kyoto Shimbun*, 25.

found in Korea in milk powder exported by a New Zealand company.⁷⁶⁾

Lessons for our FTA Era

Surprisingly, however, the Japanese media does not seem to be reporting that Sanlu itself is 43 per cent owned by a large New Zealand company.* Let alone the role the New Zealand government played in spurring the Chinese authorities into clamping down on the problem, however belatedly. That role was exercised in the context of the new China-NZ FTA, even though it does not expressly provide for regulatory collaboration in such situations. This highlights an important issue as Australia and Japan negotiate their own FTA, and for other countries joining the FTA bandwagon as well, especially in potential broader groupings involving China.

First, these countries should build in express obligations for each government to notify the other as soon as they become aware of serious product safety problems, involving not only goods exported from the home country but also those produced by major investment vehicles in the other that are partly owned by home country firms. Secondly, to make this work better, each country must impose obligations on its own firms to notify its own government about serious accidents related to such products. In some countries there may already exist such obligations for certain goods, such as foodstuffs or automobiles, at least for the company's own goods. But New Zealand (and Australia) have not yet followed the lead of the US, the EU (more efficiently since 2004), Japan (since 2006) and Canada (since 2008) regarding general consumer goods.

Major exporters and investors overseas that are keen to protect their global reputations, like Fonterra, should be keen to promote this sort of example of what Berkeley Professor David Vogel famously described as *Trading Up*.⁷⁷⁾ And it should help bolster the overall utility and legitimacy of FTAs, especially in countries like Japan that retain powerful agricultural lobby groups liable to seize on problems with foods imported from anywhere to resist further agricultural trade liberalisation — full stop.

76) 'Melamin Gashi — Kensa-chu 3-shohin mo Kaishu [Melamine sweets: three products recalled during checks]' (5 October 2008) *Kyoto Shimbun*, 31. Melamine has also been found subsequently in pizza bases, already consumed through 542 stores but with no reports yet of injuries: 'Pizza genryo ni melamin' (12 October 2008) *Kyoto Shimbun*, 29. But media attention was diverted to another problem, namely extremely high concentrations of organic phosphate pesticide (dichlorvos) found in green beans (*edamame*) from China: 'Chinese Beans Sicken Woman' (16 October 2008) *The Daily Yomiuri*, 1.

* This could be related to Japanese food importers/processors being keen to maintain a good relationship with Fonterra, which is being sorely tempted to wind down even longstanding contracts in favour of deals with new customers in China and other emerging economies in the Asia-Pacific. Downplaying Sanlu's NZ connection may also appeal to Japan's Foreign Ministry and METI for similar reasons, and specifically to promote the chances of a favourable FTA with NZ (following ex-PM Fukuda's agreement to launch a feasibility study) — especially now that NZ has one with China.

77) Harvard UP, 1995.

14. Political dynasties in Japan, the US, Australia . . . but not NZ ?

(21 October 2008)

I was hoping to share some views on Japan's general election for its all-important Lower House, as a counterpoint both to the US presidential election scheduled for 4 November 2008, and the distinctly less widely publicised general election called for 8 November in New Zealand. But Japan's new Prime Minister Taro Aso now seems unlikely to call an election very soon.⁷⁸⁾ So instead I share some comparative observations on the prevalence — even, perhaps, the intensification — of family dynasties in Japanese politics.

A recent survey found that popular support for Aso's cabinet had dropped 3.6 per cent compared to soon after its inauguration in late September.⁷⁹⁾ This is despite the financial crisis⁸⁰⁾ that spread from the US this month. Fortuitously, the latter made it easier for Aso to assert the need for extra budgetary stimulus for the Japanese economy (legislated on Thursday, with another dose envisaged for January 2009⁸¹⁾).

Japan's citizens are likely to be even more unimpressed now that its closest ally, the US, has just removed North Korea from its list of terrorist 'rogue nations'. That occurred with little, if any, prior discussion with Tokyo about what this would imply for the problem of those Japanese abducted by North Korea over many years.⁸²⁾

The ruling LDP had been hoping that the excitement of electing a new leader, like the outspoken Aso, would create momentum towards calling an early election well before it has to — by September 2009. Japanese law allows for that possibility, like other Westminster democracies including New Zealand. This contrasts with US law.⁸³⁾ America's otherwise remarkably fluid and complex electoral system sets a bright-line rule for when elections must take place — even if its financial system crashes !

But the new LDP government lost its opportunity for various reasons. Aso emerged as the clear favourite to take over from PM Yasuo Fukuda, who resigned abruptly after popular support for his Cabinet plummeted from an initial 57.5 per cent after only a year in office. People were also distracted by food safety scandals, such as rice condemned for human consumption being sold ostensibly for glue-making but ending up in food products (including school lunches), as well as melamine-laced dairy products from China.⁸⁴⁾ And

78) Shiro Armstrong, *Aso's overdue trip to China* (20 October 2008) <http://eastasiaforum.org/2008/10/20/asos-overdue-trip-to-china> .

79) 'Approval rating for Aso Cabinet falls to 46%' (15 October 2008) *The Daily Yomiuri*, 2.

80) See 'The financial crisis — and loansharks in Japan and NZ', above Part 12.

81) 'Aso won't submit 2nd extra budget until January' (16 October 2008) *The Daily Yomiuri*, 3.

82) 'US removes DPRK from terrorism list' (13 October 2008) *The Daily Yomiuri*, 1. On which linkage, however, see Peter Drysdale, *Tokyo, Washington, Pyongyang and getting real* (16 October 2008) <http://eastasiaforum.org/2008/10/16/tokyo-washington-pyongyang-and-getting-real> .

83) L Sandy Maisel, *American Political Parties and Elections: A Very Short Introduction* (OUP, 2007) 8-10.

84) See 'Consequences of melamine-laced milk for China, NZ, Japan and beyond', above Part 13.

Aso's Transport Minister, Nariaki Nakayama, had to resign soon after appointment due to an outcry over his slurs on the Japan's Teachers' Union (*Nikkyoso*) particularly in Oita Prefecture. Another blow came when former PM Junichiro Koizumi suddenly announced, the day after the Aso cabinet was inaugurated, that he would not seek re-election. This even fuelled some speculation that he and others may split from the LDP to form a more reformist party.⁸⁵⁾

Even without these events, Japanese citizens would probably have soon realised that the Aso government represented a return to pre-Koizumi traditional LDP values and policies. The latter include support especially for small businesses, rural communities and the US, as well as appointing politicians to Cabinet because of important local constituencies rather than for their views and capacities concerning crucial policy issues. It was not only NYU Professor Edward Lincoln who noticed that 'of 18 Cabinet posts, four have gone to politicians with fathers or grandfathers who were prime ministers, and ten cabinet ministers are the children of former LDP parliamentarians'.⁸⁶⁾ Shiro Armstrong has also remarked that one feature of 'the Aso cabinet circus'⁸⁷⁾ was the appointment of 34-year-old Yuko Obuchi (whose father Keizo died in the PM's office in 2000) and of the inexperienced Fumio Nakasone as Foreign Minister (whose father Yasuhiro persevered as PM over 1982-7).

Nepotism is further highlighted by the fact that even Koizumi, in announcing that he would not be seeking re-election, anointed a son to go into politics. And Yasuo Fukuda was the son of Takeo Fukuda, prime minister over 1976-8 (and for whom Koizumi once worked as a political secretary). The maternal grandfather of Shinzo Abe, who succeeded Koizumi as prime minister over 2006-7 and preceded Fukuda (Jr), was Nobosuke Kishi — prime minister over 1957-60 (and Commerce Minister over 1941-5 in Hideki Tojo's cabinet, which got Kishi arrested as a suspected Class A war criminal in 1948 — although he was never brought to trial). Abe's paternal grandfather and father were also conservative politicians.

Aso himself, as Tobias Harris⁸⁸⁾ reminds us in contrasting the nationalism of Aso (proud of Japan's post-War system) and Abe (still less impressed), is the grandson of Shigeru Yoshida, former diplomat and prime minister twice over 1946-54. Indeed, as Kwan Weng Kin pointed out, Aso is also the great-great-grandson of Toshimichi Okubo, one of the founders of modern Japan.⁸⁹⁾ Okubo was a samurai from Satsuma (in Kyushu)

85) Tetsuya Harada, 'Political weather hard to gauge' (1 October 2008) *The Daily Yomiuri*, 4.

86) Christian Caryl with Akiko Kashiwagi, 'Mr More-of-the-Same' (27 September 2008) *Newsweek*, 39; <http://www.newsweek.com/id/161160> .

87) Shiro Armstrong, *The Aso cabinet circus* (25 September 2008) <http://eastasiaforum.org/2008/09/25/the-aso-cabinet-circus> .

88) Tobias Harris, *Aso's beautiful country* (28 September 2008) <http://eastasiaforum.org/2008/09/28/asos-beautiful-country> .

89) Kwan Weng Kin, 'Aso elected by a landslide' (23 September 2008) *The Straits Times*, A 6.

who served as Finance and then Home Affairs Minister until his assassination in 1878. Okubo's second son was adopted into another political family, as Nobuaki Makino, becoming a famous diplomat and politician until retiring in 1935. And Aso's wife is the daughter of Zenko Suzuki, prime minister over 1980-2 (and whose son Shunichi is himself a Lower House politician).

Comparing Japan's Money Politics/Political Dynasties Nexus

Does 'money politics', reinforced now by the impact of the mass media, underlie this phenomenon of political dynasties? The US also has such dynasties—the Bush family in the White House, of course, but consider also the Kennedys or the high proportion of congressmen related to former congressmen.* Australia seems susceptible to this phenomenon too. Think of former Foreign Minister Alexander Downer—whose father was Immigration Minister and grandfather, Premier of South Australia.⁹⁰⁾ Or, from the Labor Party side, the current Trade Minister Simon Crean—son of a former Trade Minister and brother of a former Labor member in Tasmania. Or former Deputy Prime Minister Kim Beazley, whose father was Gough Whitlam's Education Minister.**

By contrast, Winston Peters remained suspended as NZ's Foreign Minister despite being cleared recently by the Serious Fraud Office, and this saga was one reason for PM Helen Clark calling the early general election in that country. Yet the campaign contributions allegedly unaccounted for in the case of Winston Peters are trivial in amount by Australian, American or Japanese standards. And it's hard to think of similarly entrenched 'political dynasties' in NZ, except perhaps among Maori (such as Whetu Tirikatene-Sullivan, daughter of Sir Eruera Tihema Tirikatene). There have been close links between some influential New Zealanders and politicians across several generations (as with the Fletcher family), but there doesn't seem to be the same tradition of politicians

* And on money politics in the US, see generally eg Maisel (above n 83) 100-12 and 112-4; and especially Robert Reich, *Supercapitalism* (Alfred Knopf, 2007). It is also still a pervasive problem in Japan, although often more directly challenged in mainstream media. The editorial in the *Kyoto Shimbun*, for example, sharply criticizes a recent controversy over a group exploiting a legislative loophole to 'lend' (not donate) money to conservative politicians. But it also objects to other recent irregularities, extending for example to purchase of tickets for parties to support politicians like Noda Seiko (the Minister in charge of consumer affairs) and in the opposition Democratic Party of Japan. See '*Kiseiho no kuhakuka yurusu-na* [Don't allow the evisceration of the Political Funding Law]' (22 October 2008) 7.

90) Australian Broadcasting Corporation, *Dynasties—A Liberal Legacy* <http://www.abc.net.au/dynasties/txt/s1010241.htm> (24 October 2008).

** Joel Rheuben also suggests: Martin and Laurie Ferguson (brothers), both Federal MPs and sons of the former Deputy PM of NSW; the Anthonys (Larry, Doug and Larry), three generations of Country/National Party MPs from the same seat; Mike Baird—Liberal MP in the NSW State Parliament and son of former Federal MP and NSW minister Bruce Baird. He also notes several Labor "power couples" in Australian politics, including John Della Bosca (NSW) and Belinda Neal (Federal), and Anthony Albanese (Federal) and Carmel Tebbutt (NSW).

succeeding their parents or even grandparents.* That now seems particularly unlikely to emerge in the Mixed Member Proportional representation electoral system implemented since 1996, although MMP itself seems to be getting quite bad press recently in NZ.

Testing such correlations between money politics and political dynasties, and drawing some normative implications for improving democracies especially in the Asia-Pacific region, deserves a multi-national regression analysis. That should control also for electoral law rules, media patterns, and perhaps population size. North Korea may be difficult to add to such a study, though!

Meanwhile, it remains to be seen whether Japan's next general election will finally bring victory to the Democratic Party of Japan (DPJ), the main opposition party already in control of the Upper House. After many false dawns (depending on one's perspective), that might just begin to institutionalise two-party alternate rule characteristic of Westminster democracies, but also especially the US. But can DPJ leader Ichiro Ozawa, despite being himself somewhat of a blast from the past, indeed respond⁹¹⁾ and do it again — precipitating another fall from power for the LDP, as in 1993?

15. A New Consumer Agency for Japan? Consumer Redress, Contracts and Product Safety

(31 October 2008)

The *Kyoto Shimbun* reported recently the first de facto victory by a consumer representative group in injunction proceedings regarding unfair contract terms. The same page mentioned the Education Ministry's response to the recent death of a sixth-year elementary student, who choked on some bread provided in school lunches — basically, 'chew well'! By contrast, Japan's largest manufacturer of *konnyaku* (konjac) jelly snacks, MannanLife, halted all production after a one-year-old boy choked to death on 29 July.⁹²⁾ But that situation is rather different. It also more directly highlights when and how a new Consumer Agency (*shohisha-cho*) might emerge in Japan. Ex-PM Fukuda's Cabinet approved a Bill, but it then resigned. It is unclear when and how PM Aso will submit a new Bill, and what line the opposition DPJ will now take, especially given the uncertainty about a possible early general election.⁹³⁾

* But Gary Hawke now points to: Eric Holland — son of PM Syd Holland; John Kirk — son of PM Norman Kirk; and more recently Roger Douglas — son of Cabinet minister, Norman Douglas (and brother to another Labour Party politician, Malcolm Douglas). I may be suffering from the 'availability heuristic' (below n 106), having left NZ more than 10 years ago. On the other hand, the regression analysis might still give statistically significant results (which tells you something important about that statistical method, increasingly beloved by social scientists — especially in the US).

91) Tobias Harris, *Ozawa responds* (4 October 2008) East Asia Forum — Economics, Politics and Public Policy in East Asia and the Pacific <http://eastasiaforum.org/2008/10/04/ozawa-responds> .

92) "'Konnyaku" jelly production halted' (9 October 2008) *The Asahi Shimbun* <http://www.asahi.com/english/Herald-asahi/TKY200810090067.html> .

93) See 'Political dynasties in Japan, the US, Australia . . . but not NZ?', above Part 14.

Consumer Contracts and New Redress Mechanisms

Japan enacted a Consumer Contracts Law (No. 61 of 2000) addressing both unfair terms (partly influenced by a 1993 EU Directive), and unfair tactics by suppliers in contract negotiations with consumers (now addressed more comprehensively by a 2005 Directive). The Act was amended with effect from June 2007 to allow injunction proceedings by consumer representative groups, again following a lead from EU law. Six groups⁹⁴⁾ have been accredited by the Japanese government, including the 'Kyoto Consumer Contracts Network' NPO (or NGO). In August the Network filed for an injunction preventing a lessor from enforcing a clause stating that lessees would be unable to obtain any refund of a deposit (*shiki-kin*), usually given only to cover any expenses required to restore the vacated premises to a reasonable state. The lessor provided an undertaking in the Kyoto District Court that it would not enforce this clause against the 12 existent lessees, declaring that it 'didn't intend to go against the trend of respecting consumers'.⁹⁵⁾

Meanwhile, since 2007 I have been involved in two comparative research projects for Japan's Cabinet Office⁹⁶⁾ (with primary responsibility for consumer policy, since absorbing the Economic Planning Agency in the 2001 reorganisation of central government bodies). The Office is investigating the possibility of allowing new representative actions for damages under consumer legislation. Again, this parallels intense interest in the EU for better 'collective redress' mechanisms for consumers, even if not necessarily the model of (opt-out) 'class actions' pioneered in the US, and more recently adopted in Canada and Australia. Australia has allowed such class actions since 1992 for federal legislation and since 2000 for claims under state law in Victoria. Although comparatively few suits have proceeded to final judgment, and have dropped off since Australia's 'tort reforms' since 2002,⁹⁷⁾ they have helped give rise to several major plaintiffs' law firms (including one listed company).

Health Hazards from Bread and (again) Konnyaku Jelly Snacks

But what of the other consumer law development mentioned more briefly on the same page of the *Kyoto Shimbun*? On October a 12-year-old elementary student choked to death after biting into a 10-cm round bun provided with the lunch at his public elementary

94) *Zenkoku no Tekikaku Shohisha Dantai* [Nationally Accredited Consumer Organisations], <http://www.consumer.go.jp/seisaku/cao/soken/tekikaku/zenkoku/zenkoku.html> (last accessed 24 October 2008).

95) '*Shohisha Dantai, Hatsu no "Shoso"* [Consumer Organisations, First Litigation Victory]' (22 October 2008) *Kyoto Shimbun*, 26.

96) *Shohisha no Mado* [Window for Consumers], Cabinet Office, Government of Japan <http://www.consumer.go.jp/english/index.html> (accessed 24 October 2008).

97) Jocelyn Kellam, *Product liability and class actions: The litigation leagues table* (23 October 2008) Product Liability Law Australia — Clayton Utz http://www.claytonutz.com/areas_of_law/controller.asp?aolstring=30&na=1851 .

school, and then breaking the rest in half to stuff into his mouth. The Education Ministry later told prefectural boards to instruct students to chew their food properly.⁹⁸⁾ But staff at one elementary school in Kyoto also apparently told students that the accident happened because the boy had got into an eating race with his classmates. Even if that's not true, this seems quite a freak accident that does not require much more government action, except perhaps for further investigation into the pervasiveness of such accidents.

We are too often 'Fooled by Randomness', as Professor Nassim Taleb explained in his tour-de-force first published in 2004 (a prescient critique also of most other Wall Street traders, which investors and regulators in the US and worldwide should have taken more seriously).⁹⁹⁾ It turns out that 4407 died by choking in Japan in 2006, but only one was aged 10-14 while 85 per cent were over 65. And *o-mochi* (sticky rice cakes) remained the top culprit, followed by rice, bread and *o-kayu* rice porridge.¹⁰⁰⁾ Bans or recalls therefore seem unnecessary, despite the tragedy of another boy's death this month, and despite the strong public and media attention these days on food safety in Japan (indeed, perhaps because of that very attention — social psychologists often point to a general propensity to over-estimate remote risks).

It might be different, for example, if bread suppliers have changed their recipes or the shape of buns to make them significantly more likely to cause accidents. Even then, actual or potential private law claims may generate a more fine-grained framework for weighing such increased risks against overall social welfare gains, although this indirect incentive to establish optimal safety levels depends crucially on the ability to file such claims and may seem harsh on those (initially) injured. Such claims would be increasingly based on the Product Liability Law (No. 85 of 1994), similar to the 1985 EC Directive and Part VA added in 1992 to Australia's federal Trade Practices Act (Cth) 1974. Negligence can also be alleged against intermediaries under the Civil Code, or the government under the State Compensation Act. Local and central government is often sued especially in mass-claim situations, perhaps even more than in other civil law tradition countries like Germany, as with the judgment against Sakai City on 10 September 1999 due to O-157 bacteria in its school lunches.

Applying this framework, *konnyaku* jelly snacks seem rather different. The case for regulation is stronger, due to higher probability of fatal harm. Manufacturers have designed out some major defects, but seem to be having trouble updating and communicating adequate warnings. However, even in this case an argument remains that consumers overall deserve to be able to keep buying such snacks, at least in Japan where

98) 'Sixth-grade boy chokes to death' (22 October 2008) *The Japan Times* <http://search.japantimes.co.jp/cgi-bin/nn20081022a7.html> .

99) *Foiled by Randomness: The Hidden Role of Chance in Life and in the Markets* (Penguin ed, 2007). In the same vein, see also now his *The Black Swan* (Random House, 2008).

100) 'Boy was among 4,000 annual choking deaths' (24 October 2008) *The Japan Times* <http://search.japantimes.co.jp/cgi-bin/nn20081024f4.html> .

they are eaten in large quantities and most people are still conscious of the major risks — like they are for *o-mochi*. Maybe private lawsuits are still enough. Yet the arguments are more finely balanced.

In 2000, I published an analysis of how these snacks started to become popular from around 1995, only to lead to several fatal choking accidents among infants and the elderly.¹⁰¹⁾ Various efforts were made to improve safety features over the late 1990s, especially by the government's Consumer Lifestyle Centres (CLCs, *shohi seikatsu senta*), other regulators in consultation with the relevant industry association, and the manufacturers themselves. Mostly, manufacturers were encouraged to add quite prominent warnings about risks (further heightened if the snacks are frozen). But they were also encouraged to change shapes or sizes (to make them harder to swallow in one mouthful), as well as the texture (especially by reducing the *konnyaku* root powder proportion, to make the snacks softer and easier to swallow).

Eight deaths had been reported over 1995-6, and at least two cases were filed regarding accidents that occurred in 1996. One based on the PL Law was filed in 1998 against MannanLife, which settled in 2001.¹⁰²⁾ The other settled in 1997, against an unknown manufacturer and based on the Civil Code (perhaps because the lawyer wasn't confident of proving that the jelly snack was supplied after 1 July 1995, when the strict-liability PL Law came into effect).¹⁰³⁾

Despite these developments, more deaths have occurred especially in recent years: two in 1999, one each in 2002 and 2005 (including a second caused by MannanLife snacks), two each in 2007, and this year's third death from a MannanLife product — bringing the total to at least 17 fatalities. Ace Bakery products caused one of the 2007 fatalities, as well as another in 1996,¹⁰⁴⁾ and was sued in June 2007 (along with Mie Prefecture, which operated the child-care centre that provided the snack to the 7-year-old).¹⁰⁵⁾

Again, social psychologists might explain this in terms of the 'availability' heuristic, which makes people remember recent or prominent matters.¹⁰⁶⁾ Perhaps the memory of the deaths and safety issues, highlighted in the mid-1990s, had faded. Parents or carers providing the snacks may have stopped reading or 'registering' the warnings, which

101) Luke Nottage, 'The Present and Future of Product Liability Dispute Resolution in Japan' (2000) 27 (1) *William Mitchell Law Review* 215, also available at <http://ssrn.com/abstract=837925> .

102) Case No. 15 in my list of PL Law case filings: Luke Nottage, 'Case Filings and Judgments under the PL Law (July 1995 — July 2005)' (2007) <http://www.law.usyd.edu.au/anjel/documents/ResearchPublications/Case%20Filings%20and%20Judgments%20under%20the%20PL%20Law.pdf> .

103) Case No. 45 of indicative Civil Code product liability case filings since 1990, in Table 3 of para 3-110 of the *CCH Japan Business Law Guide*.

104) 'Holes in consumer safety laws could lead to further konjac jelly deaths' (22 October 2008) *The Mainichi Daily News* <http://mdn.mainichi.jp/mdnnews/news/20081022p2a00m0na001000c.html> .

105) 'Konnyaku jelly maker sued for 75 million yen for boy's death' (16 June 2007) *The Japan Times* <http://search.japantimes.co.jp/cgi-bin/nn20070616a7.html> .

106) See, for example, Marc Gergstein, *Flirting with Disaster* (Union Square Press, 2008) chapter 2.

moreover now are spread liberally over all sorts of products in Japan — arguably, sometimes, counter-productively. Few are likely to have noticed the new warnings about risks to infants or the elderly that the industry association required its members to add to the front of the snack packaging. The MannanLife product involved in this year’s fatality, at least, seems to have involved the newer shape and ‘soft’ jelly. But perhaps that company and the association should have launched a broader publicity campaign regarding the new warning labels. Now MannanLife may find itself subject to a PL Law suit, and the whole industry may even be re-regulated.

Manufacturers may have become too complacent in other ways as well. Indeed, he boy’s father apparently informed MannanLife about his son’s fatal accident in August. But the company did not report this to its industry association, as required, or propose new safety measures. The government and ex-PM Fukuda learned of the accident on 9 September at the ‘National Conference to Realise a New Consumer-Led Administrative Body’. The company’s delays, and initial lack of apology (still very important when resolving disputes in Japan), incensed the family and made them engage a lawyer.

The case has also highlighted differences in regulatory responses world-wide. Bans and/or recalls were mandated for certain types of *konnyaku* jelly snacks in the US and Australia from 2001, then the EU, and South Korea in 2007. Hitotsubashi University Professor Tsuneo Matsumoto argues that Japan needs to expand the scope of the Food Sanitation Law (No. 233 of 1947^{*}) to regulate risk factors like size and hardness, rather than just food hygiene. He also points out that ‘if a [C]onsumer [S]afety [L]aw is passed, it would be possible to ban sales of konjac jelly for posing the risk of similar accidents’.¹⁰⁷⁾ The existing Consumer Product Safety Law (No. 31 of 1973) was revised in 2006 to impose obligations on suppliers to report *actual* serious accidents, and anyway doesn’t apply for

* This Law was extensively amended in 2003, when the Basic Law on Food Security was enacted, in the wake of Japan’s ‘mad cow’ (BSE) scare (on which see eg. Luke Nottage with Melanie Trezise, ‘Mad Cows and Japanese Consumers’ 14 (9) *Australian Product Liability Reporter* 125-136 (2003) also at <http://ssrn.com/abstract=837064>). For further discussion about improving food safety regulation in Japan, see the special issue in 1359 *Jurisuto* (July 2008).

107) Above n 105. In Australia, to be more precise: there was a nationwide recall in November 2001: Australian Competition and Consumer Commission, *Jelly Cups with Konjac* (19 November 2001) Product Recalls Australia http://www.recalls.gov.au/view_recall_detail.php?Recall_ID_Auto=7994 (25 October 2008); bans in NSW, Victoria and Western Australia (Department of Health, Western Australia, ‘Ban on mini jelly cups with konjac’ (21 December 2001) http://www.health.wa.gov.au/press/view_press.cfm?id=178 ; then nationwide temporary (2002) and permanent (2004) bans restricted to jellies up to 45mm in height or width: Australian Competition and Consumer Commission, ‘Jelly cups containing konjac’ (2004) <http://www.accc.gov.au/content/index.phtml/itemId/780159> . For the US, see, for example, ‘FDA bans more konjac products’ (8 April 2002) *Food Navigator* <http://www.foodnavigator.com/Legislation/FDA-bans-more-konjac-products> . For the EU see ‘Europe bans konjac in jelly sweets’ (12 February 2003) *Confectionery News* <http://www.confectionerynews.com/Formulation/Europe-bans-konjac-in-jelly-sweets> (25 October 2008) and now Lindsey Partos, ‘UK detects banned additive from China in mini jelly cup’ (9 October 2008) AP Food Technology <http://www.ap-foodtechnology.com/Formulation/UK-detects-banned-additive-from-China-in-mini-jelly-cup> .

products covered by other specific laws like the Food Sanitation Law.¹⁰⁸⁾ Similarly, the *Daily Yomiuri* earlier reported that ‘the government said it has not come up with any radical measures to address the problem because there is no governmental agency with clear responsibility for the matter’.¹⁰⁹⁾

A new Consumer Affairs Agency ?

One of the last actions of the cabinet of ex-PM Fukuda had been to approve bills including a broader Consumer Safety Law, to be enforced by a new Consumer Affairs Agency. The Bill envisaged allowing the Agency, set up independently under the Cabinet Office, to obtain information about all sorts of risks from other government bodies and then take measures to prevent the occurrence or expansion of harm to consumers. It would also consolidate and expand the functions of CLCs, including allowing them to be involved in more formal dispute resolution methods, instead of their traditional functions of ‘shuttle diplomacy’ mediation between firms and consumers (mostly not face-to-face).*

However, since April 2008 the DPJ had sought instead a ‘Consumer Affairs Ombudsman’ appointed by and responsible directly to parliament, who would have clear power also over the Cabinet Office itself.¹¹⁰⁾ There had also been controversy over what should happen to Japan’s new Food Safety Commission, which had mainly focused on the dispute over (potentially ‘mad cow’) beef especially from the US. The Fukuda government had indicated that it would remain a separate Cabinet Office organ.¹¹¹⁾ But the main issue was whether the LDP itself was prepared to undermine the vested political and bureaucratic interests associated with segments of the government demonstrating more or less commitment to consumer protection.¹¹²⁾

The expansion of the Cabinet Office was a notable development under the Koizumi government (2001-6). For example, it had a major impact in coordinating judicial system reform legislation (over 2001-4), despite differing concerns of the Ministry of Justice (which runs the public prosecutors), the Supreme Court (which administers the court

108) See ‘Consequences of melamine-laced milk for China, NZ, Japan and beyond’, above Part 13.

109) ‘Boy’s death shows choking risk from jelly’ (1 October 2008) *The Daily Yomiuri*, 2.

* The local government CLCs are looking for a new lease of life, as is their coordinator at the central government level (National Consumer Affairs Center of Japan, www.kokusen.go.jp), despite Japan’s greater commitment to consumer law and policy. The NCAC was reorganized in 2003 into a special administrative body (*tokubetsu gyosei hojin*, like national universities and many other bodies as well). This was part of a plan just to get some “public servants” off the books (while still undertaking public functions with public funding!) but partly also to encourage them to look for new roles and efficiencies.

110) ‘Consumer affairs agency to take off next year’ (23 April 2008) *The Asahi Shimbun* <http://www.asahi.com/english/Herald-asahi/TKY200804230056.html> .

111) ‘Food Safety Commission to be kept separate from Consumer Agency’ (17 July 2008) *The Japan Times* <http://search.japantimes.co.jp/cgi-bin/nb20080717a4.html> .

112) Kazuaki Nagata, ‘Noda: The time is ripe for consumer agency’ (27 August 2008) *The Japan Times* <http://search.japantimes.co.jp/cgi-bin/nn20080827a4.html> .

system), the Bar Associations (traditionally not overly keen to expand the numbers of *bengoshi* lawyers), and the Education Ministry (instead quite keen to expand numbers, so it could get more budget to support the establishment of additional postgraduate 'Law School' programs).

Although the new Aso government claims it still wants to establish a Consumer Affairs Agency, it is very much an open question whether it will be prepared to resolve Japan's traditional bureaucratic turf wars in this field, especially as a general election approaches. Ongoing food safety problems recently should have set the stage for action, so the immediate prognosis is not promising.

But consumer law and policy development has also slowed lately in some other countries. In Australia, in 2006 the Productivity Commission recommended changes to product safety regulations less extensive than those enacted by Japan in 2006. The Commission had to repeat those proposals in a more comprehensive set of reforms to law, policy and institutions in Australia proposed in April 2008, including belated nationwide legislation on unfair contract terms.* Yet, ironically, it has recently been reported that the federal and state governments finally 'are keen to see these reforms introduced *swiftly*, with efforts being made to see the changes implemented by the *end of 2011*'!¹¹³⁾

* See <http://www.pc.gov.au/projects/inquiry/consumer> (including many public Submissions, including my own).

113) Andrew Morrison, Sara Dennis and Mary Sheargold, 'National consumer protection laws one step closer' (23 October 2008) Product Liability Law Australia — Clayton Utz http://www.claytonutz.com/areas_of_law/controller.asp?aolstring=30&na=1852 (emphasis added).

Appendix: Composition of Japan's Takeovers Guidelines Study Groups

2005		2006		2008		Position
Surname	Given Names	Surname	Given Names	Surname	Given Names	
Kanda	Hideki (Chair)	Kanda	Hideki (Chair)	神田 秀樹	Kanda Hideki (Chair)	Professor, University of Tokyo Graduate Schools for Law and Politics
				赤井 泉	Akai Izumi	サリヴァン・アンド・クロムウェル外国法共同事業法律事務所弁護士 (Sullivan & Cromwell, Tokyo)
Adachi	Toshio	Adachi	Toshio			Executive Corporate Director, Group General Manager, Tokyo Branch, Sharp Corporation
				蟻川 靖浩	Arikawa Yasuhiro	早稲田大学大学院ファイナンス研究科准教授 (Professor of Finance, Waseda University)
Ishiwata	Gaku	Ishiwata	Gaku	石綿 学	Ishiwata Gaku	Attorney at Law, Mori Hamada & Matsumoto
Umemoto	Takeki	Umemoto	Takeki	梅本 建紀	Umemoto Takeki	Executive Officer, Director, Information Planning Department, RECOF Corporation
Osawa	Toshio	Osawa	Toshio			Executive Corporate Director, Corporate Administration Division Head, Astellas Pharma Inc
Osugi	Kenichi	Osugi	Kenichi	大杉 謙一	Osugi Kenichi	Professor, Chuo Law School
				木村 裕基	Kimura Yuki	企業年金連合会年金運用部コーポレートガバナンス担当部長 (Corporate Governance Division Head, Corporate Pension Fund Federation)
Kubota	Masakazu	Kubota	Masakazu	久保田 政一	Kubota Masakazu	Director, Economic Policy Bureau, Japan Business Federation Nippon
				蔵元 康雄	Kuramoto Yasuo	フィデリティ・ジャパン・ホールディングス株式会社取締役副会長 (Vice-President, Fidelity Japan)
				笹沼 泰助	Sasanuma Taisuke	日本プライベート・エクイティ協会会長 (President, Japan Private Equity Association)
Sayama	Nobuo	Sayama	Nobuo	佐山 展生	Sayama Nobuo	Professor, Graduate School of International Corporate Strategy, Hitotsubashi University, CEO, GCA Co Ltd
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		Hatchoji	Takashi	八丁地 隆	Hatchoji Takashi	Senior Vice President and Executive Officer, Hitachi Ltd
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