The 12th

ANJeL JAPANESE LAW CONFERENCE

Japanese Law and Business Amidst Bilateral and Regional Free Trade Agreements

Friday 16 May 2014

The Hilton, Cairns

Proudly hosted by:

James Cook University

Sponsors:

Australian Network for Japanese Law

University of Sydney
Japanese Law and Business amidst Bilateral and Regional Free Trade Agreements

The Australian Network for Japanese Law (ANJeL) presents the Cairns Symposium on Japanese Law with special thanks to James Cook University. The Symposium's theme is well timed in light of the conclusion of negotiations for the Japan Australia Economic Partnership Agreement on 7 April 2014. However, as indicated by the abstracts below, speakers will cover various other fields including agricultural land law and policy, corporate law reforms, insolvency law and practice, long-term contracting, cross-border investment dispute resolution, tax treaties, emissions trading schemes and political participation rights.

We welcome you to Cairns and trust that you will not only gain from participation in the academic and social aspects of the symposium but will take the opportunity to enjoy Australia’s premier tropical city and its surrounds.

Professor Luke Nottage
Sydney University

and

Associate Professor Justin Dabner
James Cook University
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<td>8:30 am - 8:55 am</td>
<td>Registration (coffee and tea available)</td>
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<tr>
<td>8:55 am - 9:00 am</td>
<td>Welcome</td>
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<td>Luke Nottage</td>
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<td>9:00 am – 9:30 am</td>
<td>A comparison of the Australian and Tokyo Emission trading schemes</td>
<td>LN</td>
<td>Justin Dabner (James Cook University)</td>
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<td>9:30 am – 10:00 am</td>
<td>Corporate law reform in the era of Free Trade Agreements: Do Japan and its trade partners take the same or different paths?</td>
<td>LN</td>
<td>Souichirou Kozuka (Gakushuin University)</td>
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<td>10:00 am - 10:30 am</td>
<td>Challenges for Japanese Corporate Governance in the Age of Globalization</td>
<td>LN</td>
<td>Bruce Aronson (Hitotsubashi University)</td>
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<td>10:30 am – 11:00 am</td>
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<td>11:00 am - 11:30 am</td>
<td>Japanese insolvency law: Relationships between the courts and insolvency practitioners</td>
<td>JD</td>
<td>Stacey Steele &amp; Reegan Grayson Morison (Melbourne University)</td>
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<td>11:30 am - 12:00 am</td>
<td>TPP and Agricultural Policy in Japan: The reform of rural and environmental policy</td>
<td>JD</td>
<td>Satoshi Kurokawa (Waseda University)</td>
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<td>Investor-state arbitration provisions in Australia-Japan FTAs?</td>
<td>JD</td>
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<td>Lunch in the Executive Lounge</td>
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<td>1:30 pm – 2:00 pm</td>
<td>Changing the deal on Japan's long term gas contracts with Australia</td>
<td>JD</td>
<td>Paul Davis (Baker &amp; McKenzie)</td>
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<td>2:00 pm - 2:30 pm</td>
<td>Reclaiming the right to vote: political participation rights of adult wards in Japan and Australia”</td>
<td>JD</td>
<td>Trevor Ryan (University of Canberra)</td>
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<td>2:30 pm - 3:00 pm</td>
<td>Business Administrative Agreements and Tax Laws in Japan</td>
<td>JD</td>
<td>Yuri Matsubara (Meiji University)</td>
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<td>3:00 pm - 3:30 pm</td>
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<td>3:30 pm - 4:00 pm</td>
<td>The protection of intangible cultural heritage in Japan: a comparative assessment</td>
<td>LN</td>
<td>Stefan Gruber (Kyoto University)</td>
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<td>4:00 pm – 4:30 pm</td>
<td>TBA</td>
<td>LN</td>
<td>Heather Roberts (Australian National University)</td>
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<td>4:30 pm - 7:00 pm</td>
<td><strong>Close</strong> (invitation to visit the Cairns Wildlife Dome followed by post-conference drinks and aperitifs in the foyer)</td>
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1. A comparison of the Australian and Tokyo Emission trading schemes

Associate Professor Justin Dabner (James Cook University)

The Kyoto Protocol response to climate change envisages a world populated by emission trading schemes linked to form a worldwide market for carbon. Market forces would then help abate emissions. Around the same time both the Tokyo Metropolitan Government and Australia introduced ETSs but their structures are vastly different. This presentation will compare the two regimes. This is important as a lesson for the future design of ETSs and for the potential to link domestic regimes internationally.

2. Corporate law reform in the era of Free Trade Agreements: Do Japan and its trade partners take the same or different paths?

Professor Souichirou Kozuka (Gakushuin University)

In December 2013 the Bill to amend the Companies Act was submitted to the Diet, which, when approved, will make the first amendments to the Companies Act enacted in 2005.

Although the debates on the Bill commenced at the initiative of the Democratic Party of Japan (DPJ) right after their coming to the power in 2009, the ideas intended to appeal to the DPJ’s constituencies (such as labour representatives on the board of statutory auditors, kansayaku) were quickly replaced by “ordinary” technical reform proposals.

As compared with corporate law reforms in Japan’s major trading partners, including the US, Australia and Singapore, the resultant Bill of 2013 bears two unique features. On the one hand, the Bill introduces a third option of governance structure for large, public companies: a “company with audit committee.” By “upgrading” the outside statutory auditors to become board members (torishimariyaku) comprising the audit committee, the new option will enable Japanese companies to take on the appearance of having outsiders on the board while limiting the power of such outside directors primarily to audit and compliance monitoring. Thus, the Bill will promote convergence in the form of corporate governance, but not convergence in the concept of the monitoring model.

On the other hand, the same Bill proposes reforms to address the agency problems between the controlling and minority shareholders, including remedies for coercive squeeze-outs as well as for harm due to the appearance of a new controlling shareholder through the issuance of new equity. The protection of minority shareholders from the abusive behaviour of controlling shareholders is not the prominent issue for corporate governance in the US (or the UK), but is indeed the focus of discourse in most European and Asian jurisdictions.

Thus, this paper will conclude that the upcoming amendments to the Companies Act, as compared with the corporate law reform in Japan’s trading partners, on the one hand differs in a key concept (acceptance of the monitoring model for corporate governance) and on the other hand shares a major concern (protection of minority shareholders).
3. Challenges for Japanese Corporate Governance in the Age of Globalization

Professor Bruce Aronson (Hitotsubashi University)

Globalization of financial markets has led to increasingly stronger calls from global institutional investors for Japanese companies to expand the use of independent directors and strengthen the board’s monitoring function. At the same time, the growth and internationalization of the business operations of Japanese companies is testing the limits of the traditional Japanese management and governance structure. How can Japanese companies adapt their corporate governance system to these demands?

This presentation will discuss the responses of Japanese companies to these challenges, and will highlight three areas: (1) the ongoing experimentation at a number of leading Japanese companies to develop a “mixed” or “hybrid” system that seeks to incorporate more effective monitoring of management into the traditional Japanese corporate structure, (2) efforts to integrate overseas operations with traditional governance structures, policies and procedures, and (3) the important role of domestic institutional investors in monitoring and improving governance at Japanese corporations so that corporate governance reform is not perceived as foreign pressure.

4. Japanese insolvency law: Relationships between the courts and insolvency practitioners

Stacey Steele (Associate Director (Japan), Asian Law Centre, Melbourne Law School)  
Reegan Grayson Morison (Project Officer, Centre for Corporate Law and Securities Regulation, Melbourne Law School)

Japanese courts are heavily involved in insolvency proceedings despite increased flexibility post-reforms in the early 21st Century. Compared with other jurisdictions such as the United States of America and Australia, they perform important gatekeeper and regulatory roles in relation to Japanese insolvency practitioners. Their role includes potential involvement in choosing and appointing the insolvency practitioner, a trustee-lawyer, the setting of remuneration and overseeing proceedings. There have been few public complaints in relation to insolvency practitioners in Japan and their administration of insolvency proceedings, which may reflect the role the court plays in monitoring practitioners, who are themselves trained lawyers. The use of highly qualified professionals may assist in better outcomes on paper, but there are questions as to whether this comes at the expense of time, money and transparency.

This presentation examines whether the Japanese model has better outcomes for various stakeholders, including society, creditors, the debtor and the system itself in terms of reputation. In doing so, the regulation of practitioners’ remuneration will be explored; remuneration is set by statute but it is unclear how this will influence the court’s decision to appoint a particular practitioner. The regulation of remuneration deserves particular attention with the increasing prevalence of pre-packaged restructuring that prima facie appears to allow for greater freedom to set remuneration as between the practitioner and client. In reality however, pre-package restructuring is still supervised by the court so the relationship between the court and the practitioners remains ever important.
5. TPP and Agricultural Policy in Japan: The reform of rural and environmental policy

Prof Satoshi Kurokawa (Waseda University)

In order to protect Japanese farmers, the Japanese government is seeking to negotiate a favourable outcome in the Trans-Pacific Partnership. Japan is reluctant to abolish the tariffs in five farm product categories (586 items), including rice, wheat, beef and pork, dairy products and sugar. The government thinks that farm products produced in Japan could not survive in a market without protection by tariff. However, Japanese people come to wonder what should be protected by the agricultural policy. The agricultural policy in Japan has not been a policy which protects agriculture as an industry, but a policy intended to protect farmers and their cooperative unions. There had been strict legal restriction which kept business entities from acquiring farmland and operating large-scale agricultural businesses. It was intended to protect small scale farmers from competition.

Now in Japan most of farmers are elderly and small scale individual farmers with low productivity. Since small-scale agriculture does not make enough money to support the life of farmers, children of farmers are reluctant to succeed their parents and many farmlands have been abandoned. This has led to the degradation of the scenery of the countryside and loss of ecosystem there, which is well known as "satoyama". Therefore many people now think that it is not small farmers but farmland which should be protected and that TPP can be an impetus which accelerates the reformation of Japanese agriculture. This paper analyses recent changes in agricultural laws and farmland laws in Japan from the perspective of environmental law, and considers what comes after the TPP agreement.

6. Investor-state arbitration provisions in Australia-Japan FTAs?

Professor Luke Nottage (Associate Dean (International), University of Sydney Law School)

This paper explores the utility of, and the prospects for, the inclusion of treaty provisions allowing Japanese investors to bring arbitration claims directly against the Australian government for illegal interference with their investments, and vice versa. In April 2011 the Gillard Government departed from over 20 years of Australian treaty practice by announcing that it would no longer countenance any such provisions in future investment treaties or Free Trade Agreements. But from late 2013 the Abbott Government has reverted to a case-by-case assessment (http://dfat.gov.au/fta/isds-faq.html), and has included investor-state arbitration provisions in its newly-signed FTA with Korea (http://eastasiaforum.org/2014/01/01/arbitration-rights-back-for-the-south-korea-australia-fta/). This development has significant implications for the negotiations for a bilateral FTA with Japan, although ultimately the EPA announced on 7 April omitted such protections, as well as for regional agreements including both Australia and Japan such as the Trans-Pacific Partnership and RCEP (ASEAN+6 FTA).
7. Changing the deal on Japan's long term gas contracts with Australia

Paul Davis (Baker & McKenzie, Sydney / Tokyo)

Australia's recent major gas projects have been largely developed on the back of long-term offtake agreements, many of which are with Japan. Subsequent technological developments mean that gas is now going to be available to Asia from North American oil shale at far cheaper prices. The session will discuss the nature of Australia's existing LNG contracts with Japan and the opportunities under the contracts and at law for Japanese customers to renegotiate the price or escape from the contract altogether.

8. Reclaiming the right to vote: political participation rights of adult wards in Japan and Australia"

Trevor Ryan (Assistant Professor, University of Canberra, Faculty of Business and Government)

In 2013, the Tokyo District Court ruled that it was unconstitutional for the Public Offices Collection Act to disqualify adult wards from voting. The Japanese Diet subsequently removed the offending provision. The voting rights of adult wards has also become a topical issue in Australia as the number of persons of so-called unsound mind who are disenfranchised has increased considerably in an ageing society. This paper will therefore analyse this landmark Japanese case in a comparative context and assess future prospects for Australian adult wards to regain their political participation rights.

9. Business Administrative Agreements and Tax Laws in Japan

Dr Yuri Matsubara (Associate Professor of Tax Law, Meiji University)

In Japan the bilateral tax treaty network has been developed since 1965, when Japan joined the OECD. Until then the Japanese government concluded only a few bilateral tax conventions to avoid the economic effects of international double taxation on income. However, in the very early decades the Japanese treaty negotiators had neither a specific international tax policy nor a concrete international investment strategy. Thus, such old bilateral agreements had to be amended in later years.

Originally tax treaties were introduced within continental European countries in late 19th Century to remove the threshold between international transactions. A German tax expert, Prof. Klaus Vogel, elaborated the original treaty text into the modern style in cooperation with the task force of OECD in the mid-1960s. In his view, a tax treaty should be drafted neutrally between domestic/international transactions. However, Japan was geographically isolated and until the Nixon (oil) shock in 1971, Japanese citizens were not able to take abroad large amounts of foreign currency. In a similar way to other business administrative agreements, tax treaties in Japan gradually developed corresponding to the progress of the domestic economy.
Throughout the 70s and 80s the Japanese tax authorities had some intention to negotiate tax treaties with developing countries in which they should promote the outbound transactions of Japanese companies. As a result, they contained several clauses which benefit the other contracting state (e.g. tax sparing credit). In the meanwhile, treaties with developed countries (i.e. US or Western European countries) were not policy-oriented, but followed basically the original concept of the OECD model treaty.

The turning point was the amendment of the tax treaty between the USA and Japan (2004). The new tax treaty removed the obstacles to overseas financial transactions so that the witholding tax rates of dividends, interests and royalties between both states were nil. At the same time, the Japanese authorities undertook deregulation in the Japanese capital markets. In comparison with the last 50 years, the Japanese capital market has less barriers for foreign investors.

At of 1 April 2014, Japan has 60 tax treaties, applicable to 80 jurisdictions all over the world (including the former Soviet Union area). As a recent trend, the Japanese state has tried to conclude treaties with countries which are rich in natural resources, e.g. Australia and the UAE. Besides that, the Japanese tax authorities have concluded a so-called Exchange of Information clause on a bilateral basis (e.g. with the Netherlands and Macao) so that respective governments are better able to fight against international tax evasion.

10. The protection of intangible cultural heritage in Japan: a comparative assessment
Dr Stefan Gruber (Kyoto University)

Japan features one of the most fascinating continuous cultures in the world. Many of its diverse cultural heritage assets are protected by various domestic and international regulations with the 1950 Law for the Protection of Cultural Property as their centrepiece. This applies not only to the numerous historic sites, but equally to Japan’s rich intangible cultural heritage, which also includes indigenous culture, such as the Ainu. Similar to other countries, this has not always been an unproblematic endeavour, as the related attitudes and approaches by society and the authorities have been subject to constant change. The presentation will explore some of the present legal protection schemes and highlight their features, level of effectiveness, and also problems with comparative examples inter alia from Australia and China.

11. TBA
Dr Heather Roberts (Australian National University)