

THE HON T F BATHURST AC
CHIEF JUSTICE OF NEW SOUTH WALES
ASIAN LAW BOOK LAUNCH
‘CONTRACT LAW IN JAPAN’ BY HIROO SONO ET AL
‘ASEAN CONSUMER LAW HARMONISATION AND COOPERATION’ BY LUKE
NOTTAGE ET AL
WEDNESDAY 27 NOVEMBER 2019

1. I would like to begin by acknowledging the traditional custodians of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their Elders, past, present and emerging. It took a long time for our legal system to recognise the unique connection with this land which they have under their ancient law and customs. When it did, a door was opened to a greater understanding which had the potential to enrich both traditions and heal some of the wounds within our community inflicted by more unjust times.
2. In this way, our history demonstrates, rather starkly, the necessity for a dialogue between different systems of law.¹ A dialogue offers us the opportunity to take a glimpse into the workings of an unfamiliar system, and, in so doing, see our own in a different light. It may help us better appreciate the shortcomings and deficiencies of our own approach to important legal questions, and benefit from an understanding of how others have approached them. In short, it is never enough to compare two systems simply by pointing out the differences. It is necessary to go further, and reflect on how and why those systems differ, and what they can learn from each other.

¹ See also Uwe Kischel, *Comparative Law* (Oxford University Press, 2019) 46 ff.

3. The two books which we have gathered to launch today are fine examples of scholarly works within this tradition. Neither could be described solely as a work of “comparative law”, since neither has a narrow, solely comparative focus. For example, *Contract Law in Japan*² seeks to present Japanese contract law largely on its own terms, although this inevitably involves occasional reference to its French, German, and even American progenitors. In the same vein, *ASEAN Consumer Law*³ aims to treat the consumer law of ASEAN as a unified, or at least, unifying, entity, rather than as a simple agglomeration of the laws of its member states – although, as I quickly learned while reading, this is something much easier said than done.
4. On their own merits, both works would stand as comprehensive guides to the substantive law of the jurisdictions which they cover. However, it would be disingenuous for me to deny that both works invite and encourage the uninitiated reader, such as myself, to whom the contract law of Japan and the consumer law of the members of ASEAN has long remained a mystery, to draw their own comparisons with the law in their home jurisdiction, which in my case is, of course, Australia. In my brief remarks this evening, I would like to touch on some of the connections and contrasts between Australian, Japanese, and ASEAN law which appear from both works. To make such a large task feasible given the scope of the coverage in each book, I will focus on only two themes which I think have particular relevance to Australian law at present.
5. The first theme is concerned with the extent to which it is appropriate for a legal system to define causes of action, or otherwise enforce or restrict legal rights, based on broad, normative standards of conduct. In Australian law, we might take as an example the statutory prohibitions

² Hiroo Sono et al, *Contract Law in Japan* (Wolters Kluwer, 2019).

³ Luke Nottage et al, *ASEAN Consumer Law Harmonisation and Cooperation: Achievements and Challenges* (Cambridge University Press, 2019).

on “conduct that is, in all the circumstances, unconscionable”.⁴ No further explanation of the nature of “unconscionable” conduct is given, although the legislation does list a sizeable number of factors which might be relevant.⁵ Ultimately, it is left to the court to determine whether the conduct in a particular case is “against conscience by reference to the norms of society”,⁶ or more prosaically, whether it was contrary to “accepted community standards”.⁷

6. Now, while this does not simply amount to allowing a judge to proscribe conduct which they deem to be “unfair” or “unjust”,⁸ it may be thought to come closer than many other areas of law permit. We can see the consequences in the recent decision of the High Court in *ASIC v Kobelt*,⁹ where the Court split 4:3 on the issue of whether the provision of an informal system of credit by the owner of a general store in a remote, Indigenous community was “unconscionable”. The breadth of the standard makes it difficult to attribute the difference in opinion between the members of the Court to any legal error. Rather, the distinction between the majority and the minority appears to lie in their contrasting views about what the “norms of society” or “accepted community

⁴ *Competition and Consumer Act 2010* (Cth) sch 2 (‘*Australian Consumer Law*’) s 21(1); *Australian Securities and Investments Commission Act 2001* (Cth) (‘*ASIC Act*’) s 12CB(1).

⁵ *Australian Consumer Law* s 22(1); *ASIC Act* s 12CC(1).

⁶ *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90 at [41] (Allsop CJ, Jacobson and Gordon JJ); *ACCC v Medibank Private Ltd* [2018] FCAFC 235 at [239] (Beach J); *ASIC v Kobelt* [2019] HCA 18 at [57] (Kiefel CJ and Bell J), [87] (Gageler J).

⁷ *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* [2018] NSWCA 15 at [195] (Bathurst CJ); *ASIC v Kobelt* [2019] HCA 18 at [59] (Kiefel CJ and Bell J).

⁸ *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557 at 583 [120] (Spigelman CJ); cf *ACCC v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 64 [11] (Gleeson CJ).

⁹ [2019] HCA 18.

standards” actually require.¹⁰ Put this way, difference in opinion ceases to be unexpected, and perhaps, becomes inevitable.¹¹

7. This creates something of a dilemma for the law. If the “norms of society” or “accepted community standards” are so subtle and esoteric in their application to a particular set of circumstances that even some of the most experienced legal minds in the country cannot agree, then ought the final decision to really remain in their hands? In these circumstances, it would not be out of the question to believe that the legitimacy of the conduct should really be the subject of consideration by the representatives of the people in the legislature. A provision which is clearly directed to address a particular situation puts beyond doubt that a matter has been considered by the legislature. It defines its own standard by which the relevant conduct is to be judged. To be sure, any statutory provision may be capable of giving rise to its own difficulties of interpretation, but at least these problems are susceptible to the application of more familiar legal reasoning.¹²
8. It seems to me that this is an approach which has, to some extent, been adopted by Japanese contract law in analogous circumstances. Rather than relying on a broadly-expressed criterion of “unconscionable conduct” to define the situations in which a court would be prepared to set aside a consumer contract, it instead states the particular circumstances which will give rise to such a claim.¹³ One such example, which seems to reflect the narrower, general law doctrine of “unconscionable conduct” in this country,¹⁴ is where “a business stirs up

¹⁰ Ibid [75]–[79] (Kiefel CJ and Bell J), [101]–[111] (Gageler J), [124]–[129] (Keane J), [235]–[240] (Nettle and Gordon JJ), [296]–[302] (Edelman J).

¹¹ Ibid [95] (Gageler J).

¹² *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421 at 436–7 [58]–[59] (Allsop CJ), 442–3 [85]–[87] (Edelman J); cf *ASIC v Kobelt* [2019] HCA 18 at [267]–[268] (Edelman J).

¹³ *Sono et al* (n 2) 79 [168] ff.

¹⁴ See *Thorne v Kennedy* (2017) 263 CLR 85 at 102–3 [37]–[39] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

[the] excessive anxiety of a consumer without enough ability to judge due to [their] old age or mental disorder about [their] health or living conditions”.¹⁵ There are other similar examples, which spell out in some detail the types of conduct which are not regarded as acceptable business practice in Japan when it comes to consumer contracts.¹⁶

9. It is worth noting that these exceptions for consumer contracts were introduced even though Article 90 of the Japanese Civil Code provides that a contract is void if it is “against public policy”,¹⁷ perhaps a phrase of even wider import than “unconscionable conduct”.¹⁸ Even though the express exceptions for consumer contracts could very well have been analysed as being “against public policy”,¹⁹ it was still felt necessary to craft particular provisions to deal with these situations. It could well be thought that such an approach improves certainty, and promotes greater democratic legitimacy.
10. While there can be a need to resort to general standards of conduct to ensure that unforeseen and undesirable activities do not escape the supervision of the law, it seems to me that there is much to be said for resisting the temptation to make these standards the “first port of call” for regulation.²⁰ I think the Japanese approach to the grounds on which a consumer contract may be set aside for what we might describe as “unconscionable conduct” provides an interesting perspective on this issue. There is much more that could be said about this topic, and, no doubt, Japanese law might have difficulties of its own with overbroad standards of conduct. But the utility of the comparison should be

¹⁵ Sono et al (n 2) 80, quoting art 4(3)(v) of the *Consumer Contract Act* (Japan); cf *Blomley v Ryan* (1956) 99 CLR 362 at 405 (Fullagar J).

¹⁶ See also Sono et al (n 2) 83–4.

¹⁷ *Civil Code* (Japan) art 90.

¹⁸ Cf Sono et al (n 2) 81–3 .

¹⁹ See *ibid* 83 [182]–[183].

²⁰ *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557 at 583 [121] (Spigelman CJ).

apparent. It illustrates the different approaches which may be taken to a complex issue, and suggests alternative ways of resolving them.

11. The second theme I would like to touch on this evening is concerned with the role which regulatory bodies ought to play in policing and enforcing what might broadly be described as “consumer protection legislation”. Again, this is something that has been a live issue in Australia since the Hayne Royal Commission delivered its Interim Report in 2018, which strongly criticised how ASIC approached the enforcement of the financial services legislation for which it was responsible.²¹ The Report noted that ASIC’s “starting point” for responding to misconduct appeared to have been to attempt to resolve the issues by agreement and negotiation with the entity concerned,²² with a focus on remediation of harm caused rather than sanction for the misconduct itself.²³ In words which bear repeating in full, the Report stated:

This cannot be the starting point for a conduct regulator. **When contravening conduct comes to its attention, the regulator must always ask whether it can make a case that there has been a breach and, if it can, then ask why it would not be in the public interest to bring proceedings to penalise the breach.** Laws are to be obeyed. Penalties are prescribed for failure to obey the law because society expects and requires obedience to the law.²⁴

12. The rhetoric here is certainly characteristic of the direct and forthright attitude of the Commissioner. It is compelling and persuasive, with seemingly inexorable logic. However, I think it has somewhat directed attention away from an important anterior question: to what extent was ASIC conceived to be a “conduct regulator” prior to the Royal Commission? It must be admitted that now, in light of the Commission, public opinion overwhelmingly favours ASIC taking an active role as a “conduct regulator”. And ASIC has taken heed. Shortly after the publication of the Interim Report, in response to its criticisms, ASIC

²¹ See Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report* (September 2018) vol 1, ch 8.

²² *Ibid* 277.

²³ *Ibid* 296.

²⁴ *Ibid* 277 (emphasis original).

adopted what has been compendiously described as the “Why Not Litigate?” approach,²⁵ placing enforcement squarely at the forefront of its responsibilities, although it has been quick to point out that this is by no means equivalent to a “litigate first, and ask questions later” approach for any breach, no matter how trivial.²⁶ Was this always intended to be how ASIC operated?

13. Interesting light is shed upon this question by Mr Alan Cameron AO, a former Chair of ASIC and its predecessor from 1993 to 2000, in an address he delivered some months before the delivery of the Interim Report,²⁷ although at a time when many of the shortcomings in the financial services sector had already been exposed in hearings before the Commission. He reflected on the fact that, from its inception, ASIC has never seen itself solely as an enforcement body. It has also regarded itself as having a “market facilitation role”,²⁸ and, I might add, with some justification, because this objective is still reflected prominently in its enabling legislation today.²⁹ Indeed, even as late as 2014, in a “Statement of Expectations for ASIC” published by the Government, enforcement was not mentioned as part of its “key role”, or even as one of its objectives.³⁰

²⁵ Australian Securities and Investments Commission, ‘Update on Implementation of Royal Commission Recommendations’ (Paper, February 2019) 3.

²⁶ See, eg, Commissioner Sean Hughes, ‘ASIC’s Approach to Enforcement after the Royal Commission’ (Speech, 36th Annual Conference of the Banking and Financial Services Law Association, 30 August 2019).

²⁷ Alan Cameron, Reflections on Regulators, Without Casting Aspersions’ in Pamela Hanrahan and Ashley Black (eds), *Contemporary Issues in Corporate and Competition Law* (LexisNexis, 2019) 165. The speech was originally delivered on 26 June 2018.

²⁸ Ibid 167.

²⁹ *ASIC Act* s 1(2).

³⁰ Australian Government, ‘Statement of Expectations for ASIC’ (April 2014) <<https://www.asic.gov.au/about-asic/what-we-do/how-we-operate/accountability-and-reporting/statements-of-expectations-and-intent/statement-of-expectations-april-2014/>>; see also Cameron (n 27) 173.

14. It is striking the degree to which the same concerns and ambiguity about the proper role of a regulator appear in the topics discussed in *ASEAN Consumer Law*. While no single chapter discusses the work of consumer protection regulators as its primary focus, it is a background theme which recurs with surprising frequency in other chapters when discussing the efficacy of the substantive law. Importantly, one gets the sense that this results from much the same concerns which have motivated the discussion about the role of ASIC as a regulator in Australia: despite the introduction of relatively strong protections for consumers “on the books” in most members of ASEAN in recent years,³¹ there has been little tangible evidence that these protections have translated into better outcomes for consumers.
15. Even for those countries which have had consumer protection legislation for some time, there is often a dearth of filings in courts attempting to utilise these laws.³² Thailand appears to be an exception to this trend, but even then, there are few cases in which a consumer protection claim has proceeded to reported judgment. Most are settled.³³ Part of the reason for the slow uptake might be attributed to the lack of an effective and well-resourced regulator to educate the public about their rights as consumers, and where necessary, to step in and take appropriate enforcement action.³⁴ In many countries, it falls to consumer advocacy NGOs to raise awareness about consumer protection issues, in the absence of better-resourced government programs.³⁵ It should be no surprise that Thailand, with its higher filing rate, is also the country with the greatest consumer NGO activity.³⁶

³¹ See Nottage et al (n 3) chs 3–4.

³² Ibid 163–73.

³³ Ibid 167.

³⁴ Ibid 240–1, 246–7.

³⁵ Ibid 365–6.

³⁶ Ibid 165–7.

16. Now, it may be accepted that there are significant differences between the level of economic development between most members of ASEAN and Australia. Nevertheless, the experience of ASEAN ought to remind us that legislation needs to be coupled with an appropriate enforcement strategy if it is to be effective. Introducing legislation to prohibit undesirable conduct is one thing. Translating that legislation into practical outcomes for consumers is another. And, ultimately, it is that second step which proves difficult. As we have seen, perhaps there were grounds for believing that ASIC's former approach was too lenient. But it is a matter of balance. There is always a risk that things may swing too far in the other direction.
17. The themes I have discussed this evening are just two small examples of the way in which contemporary legal debate in Australia can be seen to overlap with those in other jurisdictions. This focus might have given the mistaken impression that I believe that comparative law is only useful for what it can tell us about our own system of law. This could not be further from the truth. But, I firmly believe that the first step in motivating policy-makers and lawyers to engage with comparative law is to highlight the connections and similarities which we have with other systems. It is only then that we can demonstrate that comparison opens a door to a dialogue from which both systems can benefit.
18. Both of the works being launched tonight are excellent examples of how such scholarship can incisively deconstruct unfamiliar legal systems and make them more accessible to a wider audience. And, what is more, each clearly exposes and explains the challenges which each system faces on its own terms. This is an admirable achievement, and one for which the authors deserve our congratulations.
19. Thank you.