**Dr Luke Nottage** ***BCA/LLB/PhD (VUW), LLM (Kyoto)***
Professor of Comparative and Transnational Business Law
Associate Dean (International), Sydney Law School
Co-Director, Australian Network for Japanese Law (ANJeL)

28 May 2014

Productivity Commission

By email: access.justice@pc.gov.au

Dear Sir/Madam

*Submission to Inquiry into "Access to Justice Arrangements"*

I commend the Productivity Commission for its work so far and make the following observations on the Draft Report. I specialise in comparative and international commercial and consumer law.[1] I have lectured in international commercial arbitration since 2001 and consumer law since 2006 at Sydney Law School, for example, and occasionally acted as expert witness in local and foreign court and arbitral proceedings, as well as a consultant for international organisations including with respect consumer redress (for the European Commission and ASEAN Secretariat) and justice system reform (for the UNDP, for Vietnam).

## 1. Business-to-business dispute resolution

The Report hardly mentions arbitration as a potentially more cost- and time-effective alternative means of resolving commercial disputes. Yet, somewhat belatedly, the federal and (almost all) state and territory governments have enacted new statutes since 2010 aimed at realising these advantages. There has also been some financial and in-kind public funding to expand activities of organisations such as the Australian Centre for International Commercial Arbitration (ACICA, on whose Rules Committee I have served since 2005), as well as more consistent support for arbitration from courts nation-wide. However, I agree with this recent assessment from a past President of ACICA:[2]

[1] http://sydney.edu.au/law/about/people/profiles/luke.nottage.php
[2] AA de Fina 'Swings and Roundabouts: Developments in Arbitration in Australia' (2012) 28 BCL 169.

THE UNIVERSITY OF SYDNEY

> 'The introduction of amendments to the International Arbitration Act and domestic arbitration acts is widely seen as establishing a new and beneficial environment for arbitration in Australia. The reality is that little has changed. Courts in differing jurisdictions still interpret provisions inconsistently and the suggestion that Australia is an arbitration friendly environment is not supportable on careful analysis. Much more needs to be done from knowledge rather than political expediency.'.

For example, my quantitative analysis of case disposition times for International Arbitration Act cases in the Federal Court (probably nowadays the most consistently pro-arbitration court in Australia) showed that there was little change in the 3 years before and after amendments to the Act enacted on 6 July 2013.[3] My co-authored qualitative analysis of case law since 2010 also confirmed continued diversity among Australian courts.[4]

The broader 'cultural reform' of arbitration envisaged by the then federal Attorney-General in 2009, has not yet occurred.[5] Lawyers still tend to approach it like litigation, and appoint supposed 'safe hands' as arbitrators who in fact reinforce this tendency. I am not comforted, therefore, by the Draft Report's remark (at p 280) that 'commercial arbitration may be undertaken by experienced judges' (or, more likely, ex-judges). Or by Draft Recommendation 8.6, that 'peak bodies covering ADR practitioners should develop, implement and maintain standards that enable professionals to be independently accredited', since such peak bodies tend to charge significantly for such accreditation. The government needs to do more, for example through a more ambitious round of reforms to the *International Arbitration Act* (including provisions encouraging 'Arb-Med', and for indemnity costs against parties who fail to resist enforcement of international arbitration awards).[6] It also needs to

---

[3] Nottage, Luke R., International Commercial Arbitration in Australia: What's New and What's Next? (February 9, 2014). **INTERNATIONAL COMMERCIAL LAW AND ARBITRATION**, N. Perram, ed., Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2014 Forthcoming; Sydney Law School Research Paper No. 14/13. Available at SSRN: http://ssrn.com/abstract=2393232

[4] Monichino, Albert and Nottage, Luke R. and Hu, Diana, International Arbitration in Australia: Selected Case Notes and Trends (August 22, 2012). Australian International Law Journal, Vol. 19, pp. 181-211, 2012; Sydney Law School Research Paper No. 12/53. Available at SSRN: http://ssrn.com/abstract=2133763

[5] Cf 'Addressing International Arbitration's Ambivalence: Hard Lessons from Australia' in Vijay Bhatia, Christopher Candlin & Maurizio Gotti (eds), **Discourse and Practice in International Commercial Arbitration** (Dartmouth: Ashgate, 2012) 11-44.

[6] Above n 2.

THE UNIVERSITY OF SYDNEY

consider ways to address particularly perverse information assymetries in the (generally confidential) world of commercial arbitration, which are exacerbated by the 'billable hours' approach of most lawyers and arbitrators still in this field.[7]

2. Business-consumer disputes

The Productivity Commission's Report on Consumer Policy (2008) recommended various improvements to consumer redress mechanisms. But the federal and state governments have not acted on these, instead focusing on substantive law reform through the Australian Conusmer Law. These and other reforms are long overdue, such as clarifying the juridical nature of industry-based Ombudsman schemes (subject to administrative review, arbitration law or merely contract law?) and the encouragement of 'consumer advocates' who could bring test cases and claim their own costs if successful (so that suppliers take claims more seriously).[8] Raising the profile of Ombudsman schemes (Draft Recommendation 9.1) will not be enough.[9]

3. Disputes involving the government

The way the Australian government presently organises its litigation and legal advice services seems very inefficient, compared for example to the more centralised approach in Japan.[10] Admittedly, the Japanese government has less exposure to liability for administrative review, but it has greater exposure in relation to tort liability.[11] In light of such experiences overseas, Australia should seriously consider winding back the deregulation of government legal services introduced in 1999.

---

[7] "In/formalization and Glocalization of International Commercial Arbitration and Investment Treaty Arbitration in Asia" in Joachim Zekoll, Moritz Baelz and Iwo Amelung (eds) **Dispute Resolution: Alternatives to Formalization – Formalization of Alternatives?** (Leiden: Martinus Nijhoff / Brill, 2014) forthcoming

[8] Nottage, Luke R., Consumer ADR and the Proposed 'Consumer Law' in Australia: Room for Improvement (March 29, 2009). QUT Law and Justice Journal, Vol. 9, No. 2, February 2010; Sydney Law School Research Paper No. 09/10. Available at SSRN: http://ssrn.com/abstract=1370106

[9] See also J Malbon, 'Consumer Complaints' in Malbon and Nottage, **Consumer Law and Policy in Australia and New Zealand** (Sydney: Federation Press, 2013), chapter 13.

[10] Nottage, Luke R. and Green, Stephen, Who Defends Japan?: Government Lawyers and Judicial System Reform in Japan (December 5, 2011). Asian-Pacific Law & Policy Journal, Vol. 13, No. 1, pp. 129-173, 2011; Sydney Law School Research Paper No. 11/96. Available at SSRN: http://ssrn.com/abstract=1968331

[11] Joel Rheuben chapter, as summarized in Nottage, Luke R. and Nasu, Hitoshi and Butt, Simon, Disaster Management: Socio-Legal and Asia-Pacific Perspectives (May 12, 2013). Asia-Pacific Disaster Management: Socio-Legal And Comparative Perspectives, Simon Butt, Hitoshi Nasu and Luke Nottage, eds., Springer, 2014; Sydney Law School Research Paper No. 13/36. Available at SSRN: http://ssrn.com/abstract=2263953.

THE UNIVERSITY OF SYDNEY

The Australian government also should reconsider how it deals complaints from foreign investors about illegal interference with their investments. The Gillard Government Trade Policy Statement, encouraged by the Productivity Commission's *Trade Policy Review* report (2010), departed from past treaty practice by declaring that it would no longer countenance any form of investor-state arbitration in future treaties. This was arguably an over-reaction to the claim brought by Philip Morris Asia against Australia regarding tobacco plain packaging legislation, under the 1993 bilateral investment treaty, and represents a 'false economy'. Foreign investors can still claim against the Australian government in local courts under domestic law, or possibly by mobilising their home state to bring an inter-state arbitation under any applicable investment treaty or free trade agreement, which will incur costs to the Australian government. Indeed, those costs (and delays) may be greater than a carefully tailored treaty-based investor-state arbitration process, including provisions encouraging Arb-Med.[12] The present Australian government seems to have resiled from this aspect of this aspect of the Trade Policy Statement, but the issue needs to be explored further.[13]

I would be pleased to elaborate on the above or related points.

Yours sincerely,

*Luke R Nottage*

---

[12] Nottage, Luke R. and Miles, Kate, 'Back to the Future' for Investor-State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests (June 25, 2008). In L Nottage & R Garnett (eds), 'International Arbiration in Australia', Federation Press: Sydney, 2010; Journal of International Arbitration, Vol. 26, No.1, pp. 25-58, 2009; Sydney Law School Research Paper No. 08/62. Available at SSRN: http://ssrn.com/abstract=1151167; Burch, Micah and Nottage, Luke R. and Williams, Brett G., Appropriate Treaty-Based Dispute Resolution for Asia-Pacific Commerce in the 21st Century (May 24, 2012). University of New South Wales Law Journal, Vol. 35, No. 3, pp. 1013-1040; Sydney Law School Research Paper No. 12/37. Available at SSRN: http://ssrn.com/abstract=2065636.

[13] Armstrong, Shiro Patrick and Kurtz, Jürgen and Nottage, Luke R. and Trakman, Leon, The Fundamental Importance of Foreign Direct Investment to Australia in the 21st Century: Reforming Treaty and Dispute Resolution Practice (December 1, 2013). Sydney Law School Research Paper No. 13/90. Available at SSRN: http://ssrn.com/abstract=2362122.