FOREIGN LAWYERS IN JAPAN — A COMMENTARY ON RECENT DEVELOPMENTS FROM AN AUSTRALIAN PERSPECTIVE

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[*In this paper, which served as a working paper at the Attorney-General's Trade Law Conference, Canberra in November 1986, the author looks at the practice of foreign lawyers in Japan, its past, present and future. In particular, the new legislative scheme which has been imposed is examined and its application to Australians hoping to practise in Japan is considered. The admission to practice of foreign lawyers has been regarded as one aspect of the wider issue of trade protectionism in Japan.*]

1. *INTRODUCTION*

In May of last year, the Japanese government passed legislation which will permit foreign lawyers to practise as recognised foreign law consultants. The law, The Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers,[1] was introduced into the Lower House of the Diet in late March[2] and was approved unanimously by the Upper House on the 16 May 1986.[3] The law will come into effect, it is expected, on the 1 April 1987.[4]

The new law permits persons who have qualified and practised for five years in their country of qualification as lawyers to be admitted, subject to certain requirements, including one of reciprocity, to a limited form of practice in Japan. The details of both the requirements for admission under this regulatory scheme for foreign lawyers, as well as the scope of the practice permitted under the law, will be discussed in Section 3 of this essay.

The new class of lawyer created by the legislation, the foreign-law *jimu-bengoshi*, will be added to a number of classes of foreign lawyers already operating in Japan today.[5] The activities of such foreign lawyers, the subject of Section 2, have been of great importance to Japan. However, in recent years, as there has developed a global trend towards transnational legal practice,[6] there has been increased pressure, mainly from America, upon Japan to allow greater access to the international commercial legal services market. This has led to a dispute between American lawyers and the Japanese *bengoshi*, through their

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1 Law No. 66 of 1986.

2 *Japan Times Weekly*, 5 April 1986.

3 *Japan Times Weekly*, 31 May 1986.

4 *Ibid.*

5 For general reference to foreign lawyers in Japan see Tanaka, (ed.) *The Japanese Legal System* (1976) 589-620, including extracts from Fukuhara, T., 'The Status of Foreign Lawyers in Japan' (1972) 17 *Japanese Annual of International Law* 21-37, and Brown, R., 'A Lawyer By Any Other Name: Legal Advisers in Japan' *Legal Aspects of Doing Business in Japan* (1983) 440-477.

6 See Campbell, D., (ed.) *Transnational Legal Practice* (1982) Vol. 1, 1-28.

national organization, the *Nichibenren*,[7] the terms of which are briefly discussed in Section 2.

The new legislation is intended to settle the dispute by providing some concessions to the demands of the Americans, but it will be argued in Section 4 that in giving these concessions, the Japanese government has in fact acted in a manner which may be seen as restrictive. Even whilst in draft stage, the law received a great deal of criticism from American and European sources,[8] and its impact upon Australians hoping to practise in Japan, or presently practising in Japan, will most likely be negative.[9]

The ordinances necessary for the implementation of the law are still subject to ongoing consultation and any criticism of the law between now and its implementation may be taken into account when these ordinances are drawn up, although as a Foreign Ministry source has stated, 'the basic framework I don't think will change'.[10]

2. *FOREIGN LAWYERS PRESENTLY OPERATING IN JAPAN AND THE SCOPE OF THEIR PRACTICES*

2.1 *Classes*

There are a number of classes of foreign lawyers presently operating in Japan. Perhaps the most firmly established class consists of those lawyers who were admitted to practice on a restricted basis by article 7 of the *Bengoshi* Law of 1949,[11] before its repeal in 1955.[12] Article 7 permitted lawyers who qualified in foreign countries to obtain the recognition of the Supreme Court and conduct the professional activities of a *bengoshi* in regard to aliens or foreign law. Such lawyers were thus permitted to represent foreign clients before courts and to advise Japanese nationals in regard to foreign law matters. They were given associate membership of local and national *bengoshi* associations and were known as '*junkaiin*'.[13] Following the repeal of article 7, the existing '*junkaiin*' were 'grandfathered' into the profession. Of the 68 foreign attorneys who qualified under this provision between 1949 and 1955, only a handful remain in active practice today. A few more were added to their numbers under similar 'grandfathering' provisions when the Ryuku Islands were returned to Japanese authority in 1970.[14] Today this very much closed and rapidly diminishing class still represents an important group in the international legal areas of practice in Japan. It has been said that many Japanese *bengoshi* have felt for some time that the *junkaiin* have abused the privilege[15] of practice granted them through the exten-

[7] The *Nihon Bengoshi Rengokai* — sometimes known as the Japan Bar Federation (JBF) or the Japan Federation of Bar Associations (JFBA).

[8] *Supra* n. 3.

[9] See Hayden, P., 'To Be or not to Bengoshi in Japan' (1985) 59 *Law Institute Journal* 118.

[10] *Supra* n.3.

[11] *Bengoshi* Law of 1949, Law No. 205 of 1949.

[12] *Law Concerning Partial Amendment of the Bengoshi Law*, Law No. 155 of 1955.

[13] '*junkaiin*' means associate member.

[14] Law for Special Measures concerning the Conferral of Qualifications as a *Bengoshi*, *etc.*, in this country upon Persons qualified as an *Okinawa Bengoshi*, Law No. 33 of 1970.

[15] See Fukuhara (1973) 27 *Japanese Annual of International Law* 22, at 28, n. 22.

sion of their practices beyond the permitted scope. This extension has been achieved by partnership with, and employment of, Japanese *bengoshi*. As a result of the virtual monopoly given to the *junkaiin* by the grandfathering provisions of the 1955[16] and 1970[17] laws, there has been some opposition amongst them to the entry by other foreigners[18] into the lucrative field of international commercial legal practice. There are no Australians who have qualified as *junkaiin* either under article 7 or as Okinawan lawyers.

The second class of foreign lawyers who have operated in Japan since 1955 without the recognition of the Supreme Court, but with the approval and encouragement of Japanese *bengoshi*, is that of the 'trainees'.[19] Trainees are typically young foreign practitioners, in most cases Americans, although there have been a number of Australians, who work in an advisory capacity within a Japanese law firm or Japanese company. They are usually posted to such positions for two to three years by arrangement with a firm in their home country of which they are a member. They may be a trainee to either *bengoshi* or *junkaiin* or may work in a mixed firm.[20] The work that they are permitted to perform is circumscribed by the *Bengoshi* Law of 1949 article 72,[21] and is thus limited in many ways. Nevertheless, such work as they do perform, which in many cases, it has been argued by the Japanese *bengoshi*, is beyond their permitted activities, is of very great importance to the transnational commercial legal services that Japan provides. Indeed the *bengoshi* are highly reliant upon the work done by trainees because of their language abilities and a general lack of international expertise among most *bengoshi*, who are trained primarily in Japanese law. The trainees gain the experience of living and working in an overseas country, and whilst many no doubt are satisfied with the nature of the work they are permitted to do, it should be pointed out that some are unhappy with the lack of official recognition and stability that they receive.[22] Their situation has prompted at least to some degree, the recent developments leading to the passage of the new law. However, as will be discussed, they cannot be pleased at all by what the new law provides for them.[23]

A third class of foreign lawyer is that of the in-house corporate lawyer. Here we are concerned with those lawyers who are employed in Japan for some period of time by either a Japanese corporation or, as is more likely, a foreign corporation. In addition, lawyers may visit Japan on corporate business on a transactional basis. Such visits are usually regarded as being acceptable by Japanese *bengoshi* and, for short stays, visas may be granted readily to in-house lawyers for, say, a parent company of a subsidiary based in Japan. Such visitors cannot truly be said to be practising law in Japan because of the limited, transactional

16 *Supra* n. 12.
17 *Supra* n. 14.
18 Shapiro, 'Cultural Barriers to Delivery of Services', Saney, P., & Smit, H., (eds) *Business Transactions with China, Japan, and South Korea* (1983).
19 For an analysis of the types of 'trainees' and types of firms for which they work, see Brown, *supra* n. 5, 460-465.
20 Most are with *junkaiin* or mixed firms, see Brown, *ibid.*
21 See discussion of scope following in Section 2.2
22 See Hayden, *supra* n. 9.
23 See *infra*, Section 4.

basis of such work. The legitimacy of legal business being carried on by corporate lawyers on a long-term or semi-permanent basis is not clearly settled. In many cases, the work of such in-house lawyers would be similar to that of the trainees. Like the trainees, their activities are restricted by the scope of the prohibition of article 72 of the *Bengoshi* Law,[24] but other considerations are important in the case of the corporate lawyer arising out of the difference between the role of the corporate lawyer in Japan and that of western corporate legal tradition.[25] Further, much of the work usually handled by lawyers in a western corporation is handled in a Japanese corporation by legally trained, but non-admitted, employees of the company. As a result of this, the activities of in-house lawyers in foreign corporations trading in Japan have not by and large intruded into the areas reserved as being areas of practice of *bengoshi*. Thus, no real objections to them have been raised by the *Nichibenren*. From an Australian point of view, the activities of in-house lawyers in Australian corporations are more likely to be of the short-term transactional type, given that there are fewer Australian companies permanently operating in Japan than there are American companies. Nevertheless, it should be borne in mind that this avenue to practice, of a form, in Japan exists for Australian lawyers within the corporate structure.

The class of foreign lawyers which has caused the most concern among the *bengoshi*, especially those of the 12 or so large Tokyo firms which control the lucrative international commercial field,[26] is that of the overseas lawyer who wishes to establish an independent office to practice as a foreign law adviser. Over the last 10 to 15 years, there have been some attempts to establish such offices both by individuals and firms. The firm Baker & McKenzie attempted to establish an office in its own name initially, but later changed to an association with the Japanese firm, Tokyo-Aoyama. In 1977 two firms, Millbank Tweed Hadley & McCloy from New York and Johnson Stokes & McMaster from Hong Kong, both opened offices with the approval of the Japanese government on the basis that the practices would be restricted to servicing existing clients on matters of American and Anglo-Hong Kong law respectively. The *Nichibenren* strongly opposed the approval granted in these cases, and, from that time onwards, long-term visas for American lawyers have been held back by the Japanese government pending the settlement of the dispute. The dispute, into which the American Bar Association and *Nichibenren* as main protagonists have managed to draw the reluctant governments of both countries, revolves essentially around some issues of substance, but above all, the wider issue of Japanese protectionism is seen as being at stake.[27] The new legislation[28] is intended to settle the dispute to some extent at least.

[24] *Supra* n. 11.

[25] See Stevens, C., 'Multinational Corporations and the Legal Profession: The Role of the Corporate Lawyer in Japan', in Haley, (ed.) *Current Legal Aspects of Doing Business in Japan and East Asia* (1978).

[26] For a profile of the firms, see Altschul, J., 'Japan's Elite Law Firms' (1984) *International Financial Law Review*.

[27] See Shapiro, *supra* n. 18.

[28] Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers, *supra* n. 1.

The new legislation provides for a new category, or class, to be added to those already mentioned, that of the foreign law *jimu-bengoshi*. Such a lawyer's admission and scope of practice will be considered later,[29] but it is worthwhile to look at the scope of practice of the foreign lawyers presently operating in Japan for several reasons.

First, the new legislation will not prevent the continued conduct of legal business by the classes of lawyer described already as *'junkaiin'*, corporate lawyers, and trainees. The legislation is more likely aimed at the last class described, that of the independent foreign legal consultant. It provides a legitimate means for such practices, and one could infer that other practices than those permitted under the law will not be allowed. However, the law contains no prohibitive provisions aimed at unqualified practice equivalent to article 72 of the *Bengoshi* Law, and there is nothing explicit in the law which would seem to contradict the arguments that have been advanced in favour of there already being legitimate scope for foreign lawyers to practise under treaty rights. In any case, treaty rights would, where present, take priority over any prohibitions of subordinate domestic legislation such as the new law.[30]

Secondly, because of the reciprocity requirement[31] of the law, it may well be that foreign lawyers from Australia will not be able to qualify under this law until changes to the admission requirements are made in Australia. If this proves to be the case, then the present scope of practice of the classes described above will be of continuing relevance to Australian lawyers.

2.2 *The scope of practice of foreign lawyers presently in Japan*

As has been discussed, there are a number of classes of foreign lawyers in Japan, and apart from the *junkaiin*,[32] all practise unofficially in the sense that their presence is not recognized by the Supreme Court. Circumscribing the scope of practice of the 'unofficial' lawyers in Japan (the trainees, the corporate in-house lawyers, and those seeking to act as independent foreign law consultants) is the prohibition against non-*bengoshi* conducting the activities of a *bengoshi* as defined in article 72 of the *Bengoshi* Law.[33] This prohibition, which has never been enforced as a punitive measure[34] against a foreigner, applies to Japanese non-*bengoshi* engaging in, as an occupation, the activities of a *bengoshi*. It is only as a result of the prosecutions of Japanese for breaches of article 72 that we have any judicial authority as to the extent of the prohibition and, hence, the

29 See Section 3.

30 Under art. 98 of the Constitution.

31 Art. 10.2 of the new law.

32 See discussion of *junkaiin* for the scope of their practice, *supra* Section 3.3.

33 Art. 72: 'A person who is not a *bengoshi* shall not engage in the occupation of giving opinions, acting as representative, serving as arbitrator or conciliator, or handling other legal business, or acting as a middleman for any of the above, for the purpose of receiving compensation, in connection with cases in litigation, cases not in litigation, cases of complaints against administrative agencies (such as demands for investigation, statements of objections, and demands for reinvestigation), or any other legal cases.'

34 Art. 73 of the *Bengoshi* Law provides that a person who violates art. 72 is to be punished by imprisonment at hard labour for up to two years or (after the new Law supplt. provision comes into effect) a fine of 1,000,000 yen.

monopoly granted to *bengoshi*. The cases that have been decided[35] at least can be seen as indicating that the monopoly of the *bengoshi* is related to court work. This is apparent when one considers the various related professions which share the handling of legal business.[36] The person who drafted the *Bengoshi* Law of 1949, Professor Fukuhara, supports the view of the Supreme Court that the prohibition of article 72 only extends to matters that have 'crystallized into a Japanese case'.[37] Under this view, that article 72 only prevents unauthorized handling of matters that amount to a Japanese legal case, foreign lawyers, whether authorized or not, would be permitted to handle non-litigious matters governed by foreign law, including such things as the preparation of contracts and the drawing up of other documents that may involve Japanese law.

The *Nichibenren* opposes this limited view of the monopoly granted by article 72. Prior to the early 1970s, it relied on Professor Fukuhara as its counsel in regard to the *Bengoshi* Law, but following his expression of opinion against the *bengoshi's* monopoly, his advice has not been sought. In response to such opinions, and to an increasing awareness among foreigners of the potential areas of practice open to them, the *Nichibenren* has pursued a hard line, claiming that all legal activities by unrecognized foreign lawyers were contrary to article 72. In 1972, the *Nichibenren* issued the 'Standards for the Prevention of Unauthorized Practice by Foreign Attorneys'.[38] The Standards, which possess no legal force, characterize all foreign lawyers who are not recognized to practise as 'unqualified aliens'. They limit the practice of 'unqualified aliens' to the extent that they may not identify themselves as *bengoshi* in any way, they may not meet independently with a client for legal consultation and give legal advice, nor may they draft or reword documents such as contracts other than under the direction and supervision of a *bengoshi* or a *junkaiin*. These restrictions are not confined to matters involving Japanese law, and no reference is made in the Standards to the activities of corporate lawyers. Despite their lack of legal force, the Standards have been seen by the *bengoshi* for the last 12 or 13 years as setting the scope of practice for trainees in particular, although there can be no doubt that much work outside the restrictions has been, and is, going on.[39]

One argument that has been advanced against such restrictive interpretations of the *Bengoshi* Law and the Standards produced by the *Nichibenren* is that American companies have rights under Article VIII of the *Treaty of Friendship, Commerce and Navigation between the United States of America and Japan* (1953)[40] to engage foreign attorneys of their choice, regardless of admission to practice in Japan.[41] Any rights under a treaty are paramount to domestic law,[42]

35 *E.g. Shimizu v. Japan*, decision of the Great Court of Judicature III, Criminal Department, 30 June 1939; *Ishikawa v. Japan* 17 *Kosai Keishu*, No. 6, Tokyo High Court, 29 September 1934; *Okihira v. Japan*, Osaka High Court, 12 June 1965; *Kato v. Japan*, Supreme Court, 14 July 1971, 265 *Hanrei Times* 92.

36 For an analysis of this, see Brown, *supra* n. 5.

37 See *supra* n. 5.

38 Reprinted in *Jiyu to Seigi* (1972) vol. 23, No. 8, 39.

39 See Brown's analysis of work done by foreign lawyers.

40 4 U.S.T. 2063, T.I.A.S. No. 2863.

41 Fukuhara, *op. cit.* 34.

42 *Japanese Constitution*, art. 98.

and thus, it is argued the restrictions of article 72 of the *Bengoshi* Law would not apply.[43] The rights argued to exist under the treaty are comparable to some extent to rights that may enure to the benefit of Australian companies and lawyers under the *Treaty of Friendship and Cooperation Between Australia and Japan of 1976*, article IX(3).[44] Article IX(3) reads as follows:

> Each contracting party shall accord within its territory to the nationals of the other contracting party fair and equitable treatment with respect to matters relating to their business and professional activities provided that in no case shall such treatment be discriminatory between nationals of the other contracting party and nationals of any third country.

Thus, it may be said that Australian companies could claim the right to consult their own lawyers when in Japan, at least with regard to Australian law, on the basis of it being 'fair and equitable treatment with respect to business activities'. Also, the Australian lawyer may claim the right to similar treatment with respect to 'professional activities'.[45] In addition, the treatment under article IX(3) is made subject to a requirement under Paragraph 1 of the Agreed Minutes of the Treaty that it be 'no less favourable than that accorded to nationals of any third country . . .'. Thus, any rights subsisting under the U.S. Japan Treaty, if they are afforded more favourable treatment, would be granted to Australians.

The nature of any rights that Australian lawyers may have to practise in Japan as a result of the treaty has not been fully explored, partially because of the practical problem of asserting treaty rights. In any case, whatever scope there is for practice by foreign lawyers in Japan, the practical realities are that through selective granting of short-term visas, the actual scope of practice can be restricted.

3. *THE NEW LEGISLATION*

3.1 *General*

Article 1 of the new legislation states the purpose of the law as being:

> to open, under guarantees of reciprocity, a path whereby persons qualified as foreign lawyers can handle, in Japan, legal business concerning foreign law, and by providing special measures imposing, inter alia, order similar to that applicable to *bengoshi* on the handling of such legal business, to promote stability in relation to international business law affairs, as well as to contribute to improvement to the handling, in foreign countries, of legal business concerning Japanese law.

The means whereby these aims are to be effected is the creation of a new class of lawyer officially permitted to practise in Japan, the foreign-law *jimu-bengoshi*.[46] The legislation defines the profession only in terms of the scope of practice granted to persons recognized by the law as foreign-law *jimu-bengoshi*.[47] A procedure is set up for admission to practice which involves two basic steps. The first is approval by the Ministry of Justice, and the second is registration by the *Nichibenren*. Thereafter, the responsibility for the maintenance of standards and discipline concerning foreign-law *jimu-bengoshi* is placed in the hands of

[43] See also Shapiro, *supra* n. 18, 813-5.
[44] See Marks, B., *Australian-Japanese Business Transactions, Legal Aspects* (1978) 66-7, 142-50.
[45] Marks, *op. cit.* 67, 144.
[46] *Jimu* means 'office work'. *Jimu-bengoshi* is equivalent to 'legal consultant'.
[47] Art. 2.0.3.

Nichibenren and the local *bengoshi* associations. Admission is made conditional upon there being reciprocity in the country of primary qualification of the foreign lawyer. There is provision made for federal countries such as Australia and the United States. The scope of practice permitted under the law is restricted basically to the giving of advice with regard only to the law of the country of qualification; representation before courts and administrative bodies and the preparation of documents involving other law are excluded.

There is much present within this law which is worthy of comment, and this section will provide an examination of the procedure for admission and the standards required therefore, the scope of permitted practice, the rights and duties of foreign-law *jimu-bengoshi*, and the important issues of reciprocity and federal interpretation.

3.2 *Admission to practice as a foreign-law jimu-bengoshi*

The term, foreign-law *jimu-bengoshi*, is defined in article 2.0.3 as a person who has obtained approval under the provisions of article 7 and who has obtained registration in the registry under the provisions of article 24. Thus, a two-step procedure for becoming admitted to practice is created.

The first step is approval under article 7, which the Minister of Justice may grant to a foreign lawyer who applies under article 9. Note that the term 'foreign lawyer' is defined by article 2.0.2 as being a 'person who, as his profession, engages in legal business in a foreign country [federal provision] and who corresponds to a *bengoshi*.' In order to receive approval, an intending foreign-law *jimu-bengoshi* must submit an application for approval to the Ministry of Justice in accordance with article 9. Approval will be then given if the applicant meets the standards set out in article 10.

Article 10.1 requires that the applicant be 'qualified as a foreign lawyer and after acquiring such qualification, engage in practice as a foreign lawyer in the foreign country in which he acquired such qualification for at least five years'. The legislation does not make it clear what it regards as 'qualification', but from the requirement of five years practice, it probably means 'admission'.[48] The requirement of five years in practice will cause problems. It is not clear whether five continuous years in practice without practising elsewhere is required, or whether it will be possible to practise concurrently in two jurisdictions.[49] The requirement will also be extremely difficult for the trainees, although supplementary provision article 2 provides that persons currently employed by *bengoshi* as trainees may count the time they have spent in Japan towards the five years up to a maximum of two years in total.

The standards of article 10.1.2 are negative, that is, applicants cannot be persons who have committed various criminal and quasi-criminal offences,[50] or incompetents or unrehabilitated bankrupts.[51]

[48] The distinction between admission and qualification is valid and may be of consequence in regard to the five year practice requirement.

[49] This may be possible under a federal interpretation — see Section 3.5 *infra*.

[50] Art. 10.1.2.1-10.1.2.3.

[51] Art. 10.1.2.4.

The third standard required is that of article 10.1.3, that the applicant 'has the intention of engaging in practice honestly, has a plan, a residence, and a financial basis for engaging in practice appropriately and reliably, and has the ability to compensate for damages to his clients'. The most important part of this requirement is probably the last part, that the applicant be able to compensate for damages to clients, but the substantive requirements of having a financial basis for engaging in practice are not spelled out and would, if strictly enforced, perhaps be difficult to establish other than where the applicant is offered employment.[52] The requirement in article 10.2 presents what may be the greatest obstacle to Australian lawyers hoping to obtain approval and qualify as *jimu-bengoshi*. It makes approval subject to there being reciprocity — 'treatment substantially similar to the treatment under this law accorded to *bengoshi*' in the applicant's country of primary qualification. This will be discussed in 3.5 following.

The final requirement before approval can be given is a favourable opinion from the *Nichibenren*. Article 10.3 states, 'The Minister shall, before granting approval, ask the opinion of the Nichibenren'. Although it may appear from article 10.3 that the Minister has discretion to act in accordance with or against the opinion of the *Nichibenren*, this is in fact not so. This is because under article 14.1.3, approval is to be cancelled where registration has been refused under article 26. Article 26, grants to the *Nichibenren* the right to refuse registration based upon the report of the *Jimu-Bengoshi* Registration Board. This Board constituted under article 37 is composed of 13 members, of whom eight are *bengoshi* appointed from within the *Nichibenren*. Thus, if an opinion against approval was given to the Minister, under article 10.3, the practical reality is that he would probably follow it, since it would be highly unlikely that registration would be granted.

If approval is granted, then notice of such approval is to be published according to article 11.1, and the approved person then has six months to request registration in accordance with article 25, otherwise, as provided in article 12, approval lapses.

The second step in the admission procedure is registration under article 24. Registration is done by the *Nichibenren* in the registry of foreign-law *jimu-bengoshi*.[53] Such registration must be requested in writing, according to article 25.1, via the local *bengoshi* association to which the foreign lawyer wishes to be admitted, and the request must contain certain matters prescribed in articles 25.2.1 – 25.2.4. Requests received by local *bengoshi* associations are required to be forwarded immediately to the *Nichibenren*,[54] although the local association may under article 25.4 express its opinion which will be taken into account when the Foreign-Law *Jimu-Bengoshi* Registration Inspection Board comes to consider granting registration.

The Foreign-Law *Jimu-Bengoshi* Registration Inspection Board is established under article 37.1 and is to be composed, under article 38,[55] of 13 members

[52] Therefore, it would be difficult for foreign lawyers to independently establish individual practices.

[53] Art. 24.1

[54] Art. 25.3.

[55] Art. 38.3.

comprising eight *bengoshi*, one judge, one public procurator, two government officials, and one person of learning and experience (probably a legal academic). The Board is obliged to consider requests for registration and is granted power to refuse such requests, under article 26, where there are grounds for fear that the person who is requesting registration will 'disturb the order or injure the reputation of a *bengoshi* association or the Nichibenren'. It is not clear what 'disturb the order' means. It is to be hoped that this will not be interpreted as allowing considerations based on competition or fear of competition to be taken into account. Other grounds for refusing to register a foreign lawyer who has received approval include fears that it would be inappropriate to permit such a person to practise because he or she is 'mentally or physically handicapped'.[56] The discriminatory nature of this, especially in regard to 'physically handicapped', is interesting evidence of a basic difference between the way we in the west and the Japanese treat disabled people — in Australia, such a provision would be regarded as repugnant.

If registration is refused, the board is obliged under article 27 to give notice and reasons to the applicant. The applicant may bring an action challenging refusal only in the Tokyo High Court,[57] and a request that is not answered within five months is deemed, by virtue of article 60.2, to be a refusal.

3.3 *The scope of practice*

The key provisions concerning the scope of practice are: article 3 which deals with the scope of practice, article 4 which prohibits practice beyond the scope allowed in article 3, article 5 which concerns designated law, and article 6 which punishes foreign-law *jimu-bengoshi* who perform certain legal business.

Article 3 contains the basic statement of the scope of practice in article 3.1 — 'the performance of legal business concerning the law of the country of primary qualification, upon the request of a party or other interested person, or upon the charge of a public agency'. Also contained in article 3 are various exclusions to the scope of such practice: articles 3.1.1 – 3.1.6. These exclusions basically extend to all representation before courts or public agencies, and the preparation of documents the chief purpose of which is the acquisition, loss, or change of real or industrial property rights within Japan and the service of procedural documents for a court or administrative agency of a foreign country. Also excluded under article 3.1.3 is 'the expression of an expert opinion or other legal opinion in regard to the interpretation or applicability of law other than the law of the country of primary qualification'. These exclusions thus result in a limited scope of practice, and, in many ways, go further than the pre-existing limits on practice that have been discussed.[58] For example, the exclusion under article 3.1.3 of the expression of an expert opinion or other legal opinion arguably excludes an area which is not prohibited by the *Bengoshi* Law, article 72. What constitutes a legal or expert opinion is open to debate. By excluding expression

[56] Art. 26.2.1.
[57] Art. 60.
[58] *I.e. Bengoshi* Law art. 72; see section 2.2 *supra*.

of opinions in regard to the applicability of law other than that of the country of primary qualification, much of the practice of transnational commercial law will be excluded. The definition of legal business concerning the law of the country of primary qualification in article 2.0.6 refers to 'cases all or the major portion of which are governed or should be governed by the law of the country of primary qualification'. This definition when extended to article 3 runs contrary to the exclusion in article 3.1.3. If the major portion of a case is governed by permitted law, the foreign-law *jimu-bengoshi* would still be unable to advise as to that minor portion which concerns the applicability or interpretation of law of another country. Such a division is highly impractical. In many cases, the question that may be asked of an international commercial lawyer is which law should govern a particular transaction. This question could not be answered completely by a foreign-law *jimu-bengoshi*.

In addition to excluding certain areas of practice, article 3 reserves certain areas which may only be performed by a foreign-law *jimu-bengoshi* and a *bengoshi* jointly or upon the receipt of a written opinion of a *bengoshi*, under article 3.2. This is in keeping with practices developed by *bengoshi* and trainees, but elsewhere in the law, there is evidence[59] that it is intended that some degree of separation is to be maintained by the legislation. The matters[60] which require such co-operation are basically those involving property, real and industrial, situated in Japan, family law involving Japanese nationals, and inheritance and succession matters involving Japanese nationals or property in Japan.

Article 4 prohibits the performance of legal business exceeding the scope of practice defined in article 3. A breach of article 4 being 'a violation of this law' would constitute grounds for discipline, to be administered according to article 5.1. Article 6.2 provides that article 72 of the *Bengoshi Law* does not apply to a foreign-law *jimu-bengoshi*, however, under article 63, there are four categories of business which, if performed by a foreign-law *jimu-bengoshi*, lead to punishment of up to two years imprisonment at hard labour or a fine of up to 1,000,000 yen.[61] These four categories all involve the practise of Japanese law and correspond basically to the exclusions of articles 3.1.1 to 3.1.3. Thus, if a foreign-law *jimu-bengoshi* engages in practice outside the scope granted in article 3.1 (and possibly article 5 — designated law), he will be liable to discipline under article 51, and if the matter involves Japanese law of the kind described in articles 63.0.1 – 63.0.4, he will also be liable for criminal sanctions under article 63.

Article 5 provides that a foreign-law *jimu-bengoshi* may, despite article 4, handle legal business concerning designated law,[62] if he has received designation under article 16.1 and supplementary registration of that designation under article 34.1. However, it is also provided that the exclusions of articles 3.1.1, 3.1.2,

[59] See art. 49.

[60] Art. 3.2.1-3.2.3.

[61] This provision in effect then reimposes those areas under art. 72 that do not apply to foreign law *jimu-bengoshi*. But art. 63.0.4 goes further than some would argue art. 72 extends.

[62] 'Designated law' is defined by art. 2.0.9 as: 'the law of a specified foreign country as to which designation under the provisions of article 16.1 has been received by a person who has obtained approval under the provisions of article 7'. 'Legal business concerning designated law' is defined by art. 2.0.10 as: 'legal business in respect of a legal case, all or the major portion of which is governed or should be governed by the law.'

and 3.1.4 to 3.1.6 apply to a designated law. Designation is not really defined. The granting of designation is governed by article 16, which provides that the Minister of Justice may grant designation to an approved person[63] who satisfies either of two conditions. The first is that he or she is qualified as a foreign lawyer of the specified country.[64] The second is that he or she have knowledge of the law of the specified country of the same level as that of a lawyer of that country and five years or more of practical experience in regard to the handling of legal business concerning such law.[65] Thus, a person who is qualified in two countries, such as Australia and, say, England, would be able to obtain designation of the law of the country other than the one in which he was first admitted and in which he had practised for at least five years. The opinion of the *Nichibenren* is also required for the granting of designation under article 16.2.

A person granted designation may then seek registration of this designation under article 33. The *Nichibenren* is obliged to register under article 34.

3.4 *Rights and duties of foreign-law jimu-bengoshi*

Foreign-law *jimu-bengoshi*, once registered by the *Nichibenren*, are members of that organization, as well as being members of a local *bengoshi* association. As members of these professional organizations, they have certain rights and duties. They are subject to provisions of the *Bengoshi* Law[66] that govern the duties of *bengoshi* in regard to professional conduct, as provided in article 50. According to article 42, they are also subject to a duty to obey the rules of the *bengoshi* association to which they belong and of the *Nichibenren*,[67] which concern foreign-law *jimu-bengoshi*. Foreign-law *jimu-bengoshi* are granted voting rights at general meetings of these associations which are called to consider changes to such rules under article 43.

The foreign-law *jimu-bengoshi* is also granted the right, or perhaps the duty, to use that title[68] when engaging in business and must annex to this the name of the country of primary qualification.[69] The title used by the foreign lawyer in his or her country of primary qualification may be used only as an annex.[70]

The name of the office of a foreign-law *jimu-bengoshi* must include the surname and given name of one or more of the foreign-law *jimu-bengoshi* who compose the office and may not include the name of any other individual or organization,[71] although the name of a corporation, association, or other business entity of the country of primary qualification may be annexed to an individual's

63 Approval under art. 7.
64 Art. 16.1.1.
65 Art. 16.1.2.
66 *Bengoshi* Law art. 31.1; 41; 42.2; 45.2; 48 and 49.
67 Art. 22 provides that special rules be included in the *Bengoshi* association rules with regard to foreign law *jimu-bengoshi*. Art. 23 provides similarly for the rules to be included in the rules of the *Nichibenren*.
68 Foreign law *jimu-bengoshi* — although it is not clear whether such anglicisation is permitted, or the Japanese, *gaikokuho — jimu-bengoshi* will be required, and similarly the question exists whether characters for japanese figures need be used.
69 Art. 44.
70 Art. 47.1.
71 Art. 45.2.

title and the name of his office.[72] Thus, a foreign firm may open an office in the name of its resident foreign-law *jimu-bengoshi* only, but those *jimu-bengoshi* may use the name of the foreign firm in their business as an annex.

Article 45.5 provides that foreign-law *jimu-bengoshi* shall not, under any name, have more than one office in Japan, and so it is likely that most offices will be established in Tokyo, as it is the international commercial centre. This possibly will lead to a competitive market within Tokyo as all the major Japanese international commercial firms[73] are situated there as well.

An important provision is article 49, which prohibits the employment of *bengoshi* by foreign-law *jimu-bengoshi*,[74] and the engaging in a 'joint enterprise based on partnership or any other kind of agreement with a specific *bengoshi* for the purpose of performing legal business or receiving a share in the fees or other profits gained by a specific *bengoshi* in the performance of legal business' (article 49.2). The prevention of employment of *bengoshi* is no doubt an attempt to prevent the abuses which are alleged to have occurred as a result of the employment of *bengoshi* by *junkaiin*. The prevention of 'joint enterprise based on partnership or any other kind of agreement' is no doubt also aimed at preventing such abuse, but it is not clear what 'any other agreement' will extend to. It may well prevent association or liaison between foreign-law *jimu-bengoshi* firms and *bengoshi* firms. On a practical note, there necessarily will develop business relationships between foreign law offices and *bengoshi* firms, and, under article 3.2, joint work will be required in some cases. It should be noted that the law doesn't prevent the employment of foreign-law *jimu-bengoshi* by *bengoshi*.[75]

The last requirement worth noting is the duty of physical presence required by article 48. This requires foreign-law *jimu-bengoshi* to remain present in Japan for at least 180 days of each year.

3.5 *Important issues: reciprocity and a federal interpretation*

The words 'foreign country', wherever they appear in this legislation, are to be given a federal interpretation according to article 2.0.2. Article 2.0.2 states, 'in the case of a federal country stipulated by Ministry of Justice ordinance, the term foreign country shall mean, throughout this law, the states, territories, and constituent units of such federal country as stipulated by Ministry of Justice ordinance'.

In the case of a federal country such as Australia, such ordinances will be of great importance. As has been stated earlier,[76] it has been agreed that consultation will continue on the ordinances until the Law's likely date of implementation in April 1987. The effects of a federal interpretation are particularly important in two areas.

The first area is that of admission to practice. In Australia, admission to practise law is on a state basis. The right to practise in one state does not

72 Art. 47.2.
73 Section 2, *supra*.
74 Art. 49.1.
75 It is in fact recognized by art. 45.3 by necessary implication.
76 See Section 1, *supra*.

automatically give rise to a right to practise in other states or territories, without admission in those other states or territories. Thus, whilst an Australian lawyer may be admitted to practice for a particular state, he cannot in truth say that he is admitted to practice for Australia, for such a practice does not exist. Thus, a federal interpretation of 'foreign country' is needed which permits admission for a particular state to count as admission to practice for Australia. Such an interpretation could be made through article 2.0.2 and appropriate ordinances; however, if a federal interpretation is given, it may lead to difficulties arising out of the reciprocity requirements or questions as to the scope of permitted practice.

The issue of reciprocity under the legislation will be dealt with shortly, but with regard to a federal interpretation, the question which needs to be addressed is whether reciprocity need be granted by all the states and territories, only the state or territory in which the person seeking to become a foreign-law *jimu-bengoshi* is admitted, or by a majority of states. If, for the other purposes of the legislation, admission to practice for a state or territory is regarded as admission to practice for Australia, it may be required that all, or a majority of states and territories, meet the reciprocity requirement. If, on the other hand, admission to one state is regarded as being admission to practice for a country — that state being granted the status of a separate country — then reciprocity requirements may be made more simple, but the scope of practice will be severely limited.

The question of the scope of practice under a federal interpretation of the legislation is thus open. If a lawyer admitted to practice for one state is regarded as admitted to practice for Australia, then the scope of such Australian practice would be regarded as Australian law, and this would be the law of that person's country of primary qualification.[77] If, however, a state is regarded as a separate foreign country, then the scope of practice of that lawyer would be limited to state law, and the lawyer's country of primary qualification would be the lawyer's state.[78] The scope of practice open under the latter view would be extremely restrictive.

The most logical approach would be to have ordinances directing the interpretation of the legislation so that persons admitted to practise in one state would be regarded as being admitted to practice Australian law for Australia. Similarly, practice in any state within Australia should be regarded as practice within Australia for the purpose of the five-year requirement of article 10.1, and the scope of practice under article 3.1 should be for Australian law comprising Commonwealth law and the law of the states. This may require comprehensive reciprocity for the Australian states, but the alternative of allowing admission to practice as a foreign-law *jimu-bengoshi* on a state basis would result in such a narrow scope of practice, divorced from the realities of modern Australian international commercial legal practice,[79] that it may prevent any Australian qualifying, even where reciprocity exists.

[77] For the purposes of art. 3.1.

[78] Hence the scope of practice in art. 3.1 would be limited to state law.

[79] The trend towards large national firms, or agency arrangements between firms in different states, indicates that in a modern commercial context a purely one-state basis for practice is too restrictive.

The requirements of reciprocity in the new legislation appear in several places.[80] Its substantive requirements are set out in article 10.2, which provides that the Minister of Justice may not grant approval unless 'treatment substantially similar to the treatment under this law is accorded to *bengoshi*'. The requirement of reciprocity raises some important questions for Australian lawyers, including the question already discussed as to how many or which states are required to grant such treatment. Another important question relates to the actual requirements of reciprocity: that is, what constitutes substantially similar treatment under the legislation? Would it be necessary to have a legislative scheme? Or would an agreement or undertaking by the relevant professional associations to allow limited practice by Japanese *bengoshi* suffice? Several countries[81] could probably meet the requirements of the new legislation with existing schemes regulating the conduct of foreign lawyers in their jurisdictions. Australia, however, has no such schemes in any of the states or territories at present.

Presently, practice by non-admitted persons is prohibited. In New South Wales and Victoria, the prohibition against acting or practising as a solicitor[82] extends to where a person holds himself or herself to be qualified to act as such.[83] This may make even a limited unofficial practice illegal. The questions that arise out of the intended practice of foreign lawyers in Australia in respect of foreign law have yet to be considered by a court.[84]

An early development which may have indicated that practice by *bengoshi* in Australia could be possible on a restricted basis was the granting of approval in 1984 by the Law Society of New South Wales of an application by an American firm, Coudert Brothers, to open an office in Sydney.[85] The approval was made subject to guarantees that work to be undertaken by the firm would consist of advice with respect to international and foreign law only, and that the firm would observe the ethical rules governing the conduct of solicitors in New South Wales, not hold trust funds and not undertake any work which may in New South Wales only be undertaken by a New South Wales solicitor. The New York firm of Sullivan & Cromwell also received permission to open an office in Victoria on what is understood to be a similarly restricted basis.

The passage of this Japanese legislation has precipitated discussion of the whole issue of practice by foreign lawyers in Australia. Following the Attorney-General's Trade Law Conference in November 1986 a working group was established by that department in order to prepare submissions to the Japanese Ministry of Justice for the drawing up of the ordinances regarding the crucial issues of federal interpretation and reciprocity. As at the time of writing,[86] there

[80] Art. 1; art. 10.2 and art. 14.3.

[81] *E.g.* Hong Kong, Singapore, France, and possibly New York — if accorded national status under the federal provision.

[82] In Victoria, a barrister and solicitor.

[83] *E.g.* Legal Profession Practice Act 1958 (Vic.) s. 90.

[84] Some discussion of this issue appears in the section on Australia by McKay, W. T., and Baker, P. D. B., in Campbell, D., (ed.) *Transnational Legal Practice* (1982) I, 29-37.

[85] See the report of this event in Fisher, R., 'Offshore Banking and the Legal Profession' (1984) 22 *Law Society of N.S.W. Journal* 464.

[86] March 1987. The developments mentioned here are still taking place. It is hoped that by the date of publication agreement will have been reached between the Japanese Government and the Australian groups presently working on the issue and the appropriate ordinances drawn up.

are still certain questions to be resolved to the satisfaction of the Japanese Ministry, but the Law Society of New South Wales has drawn up a set of guidelines for the admission to limited practice by foreign lawyers which it is anticipated may meet the reciprocity requirements.

If the Japanese Ministry of Justice is satisfied with the final submissions of the various bodies presently working on the issue then the major obstacle to practice will be removed. There has already been a successful submission put forward by the Americans and it would be to Australia's detriment if the matter could not be resolved successfully.

One criticism of the reciprocity requirement which is still valid in the case of Australians is that there is no real need for such a guarantee. Japan has very few *bengoshi* and fewer still who specialize in international commercial law, and it is unlikely that many would leave Japan to practise in Australia. Thus, in reality, the need for reciprocity in the case of Australia is illusory.

4. *THE FUTURE OF FOREIGN LAWYERS IN JAPAN?*

Having looked separately at the classes of foreign lawyer presently operating in Japan, the scope of their practices, and the new legislation, some comment on the future activities of foreign lawyers can be made.

With regard to those foreign lawyers who are presently operating in Japan, the legislation will only really affect directly those who are practising unofficially, independently of Japanese *bengoshi*. The position of the *junkaiin* under the legislation does not change, and the future of this class is that it will meet a natural end as its members retire over the next decade.

The legislation does not make provision for corporate in-house lawyers other than in article 50 which makes article 30 of the *Bengoshi* Law applicable to foreign-law *jimu-bengoshi*. Article 30.3 of the *Bengoshi* Law prevents the employment of *bengoshi* by a corporation without the permission of the *bengoshi* association to which such *bengoshi* belongs.[87] This, however, does not mean that a foreign corporate lawyer could not qualify as a foreign-law *jimu-bengoshi* if he met the requirements provided in the legislation.

Similarly, the legislation does not seek to prevent the activities of trainees. It makes it difficult for trainees to qualify as foreign-law *jimu-bengoshi*, with the five-year requirements,[88] despite a provision intended to ease this requirement.[89] The fair degree of reliance upon the trainees that the *bengoshi* have will probably continue, and in regard to countries which cannot meet the reciprocity requirements,[90] which may not include Australia if present consultations are successfully concluded, trainees will have to be relied upon in the absence of foreign-law *jimu-bengoshi*.

[87] *Bengoshi* Law art. 30.3, 'A bengoshi shall not, without receiving the permission of the bengoshi association to which he belongs, engage in any business for the purpose of profit or become the employee of a natural person so engaged or become an executive officer, director, or employee of a juridical person so engaged.'

[88] Art. 10.1.1.

[89] Supplementary provisions, art. 2.

[90] Art. 10.2

The issues concerning the scope of article 72 of the *Bengoshi Law* and rights subsisting under treaties will continue to be of relevance to foreign lawyers. This is because the new legislation does not impose any prohibitions against the unauthorized handling of the legal business of a foreign-law *jimu-bengoshi*. Thus, an unauthorized person who conducts the activities of a foreign-law *jimu-bengoshi* without contravening article 61, which prevents posting of a sign indicating the presence of a foreign-law *jimu-bengoshi* office by an unauthorized person, would only be prosecuted for a breach of article 72 of the *Bengoshi* Law. The disputed scope of article 72 has already been discussed,[91] but the new legislation may be taken as an indication that the prohibition therein extends to the activities authorized by the new legislation because of the need to exempt foreign-law *jimu-bengoshi* from article 72. This is provided for in article 6.2. The arguments that have been raised to the effect that article 72 doesn't extend to foreign law could be rejected.

In any case, the limited scope of practice, the difficulty of obtaining reciprocity, and the effective abdication of control by the Ministry of Justice in deference to the *Nichibenren* in the new legislation, certainly has caused some friction between the Americans and the Japanese.[92]

As far as Australians are concerned, the major problem has been reciprocity, but in line with the growing awareness of Australia's role in the Asia–Pacific Basin the need to come into line with our major trading partners is evident.

This has no doubt prompted the quite considerable activity in regard to the admission of foreign lawyers in Australia that has taken place since the author first considered this issue in July 1986. Certainly one can be more positive now than one could have been then, but it is still the case that in order for the door to practice to be opened fully[93] co-operation must be reached between governments and professional organisations, and the common good of national development would have to be preferred to professional self-interest. It would appear that this is happening.

91 See Section 2.2.

92 Indeed a group of American lawyers who wished to remain anonymous have already petitioned the U.S. government calling for relief under s. 301 of the Trade Act 1974 (U.S.) against Japanese visiting and operating in the U.S., and for a visa freeze to be imposed. This was probably in fact an attempt to put pressure on the Japanese government to make the new legislation less restrictive: reported in *Japan Times Weekly*, 10 May 1986, 9.

93 To use the metaphor favoured by Fukuhara.