THE ABCS OF PRODUCT SAFETY RE-REGULATION IN JAPAN: Asbestos, Buildings, Consumer Electrical Goods, and Schindler's Lifts

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Australia is considering a full-scale Free Trade Agreement with Japan. This gives added importance to the trajectory of Japanese product safety regulations, and consumer law more generally. Generally, Japan has been dismantling ex ante regulation while strengthening private liability regimes, especially information disclosure obligations, over its 'lost decade' of economic stagnation since the early 1990s. Yet it has also re-regulated more broadly in response to safety concerns, as evidenced by four recent case studies involving asbestos (for the third time), buildings, electrical goods, and elevators manufactured by a market leader worldwide. This makes Japan converge on a broader pattern identified within 'global business regulation', and makes it likely that the nation (like Australia) will revamp general consumer product regulation along recently revised European Union lines. Yet Japan's regulatory mix still diverges from that in several other industrialised democracies, particularly in the prominent roles played by criminal prosecutions and the spectre of state liability.

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Re-regulating for Safety in Japan and Beyond

In 2005, Australia and Japan initiated a Feasibility Study aimed towards negotiating a full-blown bilateral Free Trade Agreement (FTA), building on the path-breaking 1976 Basic Treaty of Friendship and Cooperation (Nara Treaty) and the 2003 Trade and Economic Framework underpinning the close relations between the two nations.[1] An important issue, as under the World Trade Organisation (WTO) multilateral system, will be the measures that each might retain or deploy to address serious health risks from imported goods.[2] More broadly, an FTA raises the possibility of adding other means of harmonising the legal systems of the two countries, particularly in commercial and consumer law. Such potential is evidenced by the 'softer' harmonisation agenda pursued in the context of Australia's long-standing FTA with New Zealand, as well as the 'harder' agenda developed particularly in the European Union (EU).[3] Policy-makers and jurists in Australia, in particular, therefore need a sound understanding of the current trajectory of Japanese law, including many aspects of consumer law. Japan's experience also holds broader lessons for legal theorists and consumer law experts interested in the evolution of contemporary consumer law in an increasingly globalised context.[4]

Since the collapse of Japan's 'bubble economy' at the end of the 1980s, including a banking crisis peaking in 1998, the country has been undergoing a 'regime shift' involving a raft of economic, political and legal reforms.[5] Some have even proclaimed the 'Americanisation of Japanese law', pointing to political fragmentation highlighted by the Liberal Democratic Party (LDP) losing a general election in 1993 after almost four decades in power, economic liberalisation, and consequent growth in legal services markets.[6] Others find more 'Europeanisation' or more complex globalisation, amounting to the more 'gradual transformation' apparent also in other industrialised democracies, particularly over the last decade; however, they agree that Japan is being extensively 'remodelled'.[7] Japanese law and society continue to draw on a variety of foreign models, as well as retaining some idiosyncratic indigenous features; but it is no longer true — if it ever was — that the Japanese simply

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1 See www.dfat.gov.au/geo/japan/japan_brief_bilateral.html; Spigelman (2006a); and, particularly on the tension with China, Terada (2006).

2 See generally Bermann and Mavroidis (2006); Pekannen (2001).

3 See, for example, Farrar (1989); Nottage (2007a). See also Spigelman (2006b), urging policy-makers also already to consider adding enforcement of judgments and other cross-border legal cooperation agreements to FTAs.

4 For example, see generally Ramsay (2006).

5 Pempel (1998).

6 Kelemen and Sibbitt (2002).

7 Nottage (2005d). See also generally Drysdale and Amyx (2003); Streeck and Thelen (2005); Vogel (2006).

'don't like law'.[8] Although the LDP regained major political momentum after the inauguration of the Koizumi government in 2001, the party has itself been forced to change many of its ways.[9] In parallel with various deregulatory initiatives, a blue-ribbon advisory Judicial Reform Council called for a fundamentally new role for civil and criminal justice systems in Japan, recommending a raft of law reforms largely enacted by 2004.[10] The Council urged a shift away from direct *ex ante* regulation by public authorities towards more indirect control over socio-economic activity through *ex post* remedies (such as compensation claims) activated primarily by private initiative (civil suits). Although the consequent law reform program has focused mainly on procedural law, it also involves a strengthening of substantive private law rules in favour of plaintiffs.

Such private law reform continues a longer-standing trend since the mid-1990s, evident in Japanese consumer law more generally. For example, the Product Liability Law (No 85 of 1994) added a strict-liability compensation regime for defective products, modelled on the 1985 Directive in the EU (as in Part VA of Australia's *Trade Practices Act 1974* (Cth), 'TPA', added in 1992).[11] The Consumer Contracts Law (No 61 of 2000) developed case law and commentary striking down certain exclusion clauses, as well as allowing consumers to cancel contracts entered into under certain types of pressure during the contract negotiation phase. On the other hand, Japan has not (yet) gone as far as Australian and EU legislation in directly regulating other types of exclusion clauses, minimum warranty standards, or misleading conduct generally.[12] A major way to offer more scope for consumer redress has been to impose stricter information disclosure obligations on suppliers, through reforms to both private and public law, as well as 'soft law' initiatives.[13] This

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8 Compare Roehl (2005) (historical overview, reviewed by Nottage in 22 *Journal of Japanese Law*) and Nottage (2006b) (locating Tanase's neo-communitarian perspective within various paradigms developed to explain the Japanese legal system).

9 Compare Mulgan (2002) with Amyx (2005) (drawing on her forthcoming book).

10 See www.kantei.go.jp/foreign/judiciary/2001/0612report.html and, for example, Nottage (2005a), Anderson and Ambler (2006).

11. Directive 85/374/EEC (extended to all primary agricultural produce by Directive 99/34/EC). For a detailed comparative, historical, doctrinal and socio-legal analysis of Japan's PL Law, see Nottage (2004).

12 Cf respectively Directive 93/13/EEC on Unfair Terms in Consumer Contracts, Directive 1999/44/EC on Consumer Sales and Guarantees, Directive 2005/29/EC on Unfair Commercial Practices; and TPA Parts IVA, Part V Div 2, and Part V Div 1 (particularly section 52 prohibiting misleading and defective conduct by corporations in trade).

13 See also Taylor (1997). In financial services recently, for example, see the Financial Products Sales Law (No 101 of 2000), compared in Nottage and Wolff

model of the well-informed, active consumer is also symbolised by the amendments to the Basic Law for Consumer Protection [*Shohisha Hogo Kihon-ho*] (Law No 78 of 1968), including its renaming as the Basic Law for Consumers [*Shohisha Kihon-ho*] (as amended by Law No 70 of 2004).[14]

With some further time lags, therefore, Japan reveals clear parallels with developments in the ideology and practice of consumer law, and related political economy in countries like the United States and the United Kingdom from the 1980s, and subsequently in Australia.[15] Generally, consumer law has tended to shift from a more laissez-faire ('pre-interventionist') model in the 1950s and 1960s to a welfare economics ('interventionist') model over the 1970s — extending into the 1980s, thanks for example to the 1985 United Nations Guidelines on Consumer Protection.[16] This has left a 'post-interventionist' model comprising widespread agreement for the need for certain minimum standards in contracting, strict-liability product liability and so on.[17] However, more emphasis has been placed, especially since the 1990s — by commentators and policy-makers both on the political left as well as the right — on less intrusive forms of regulation (notably information disclosure rules) and case-specific or hybrid forms of public intervention. This has been underpinned by the benchmarks for deregulation — and, more recently, 'better regulation' — promoted by other international organisations such as the OECD.[18] Overall, such developments track a more universal progression from law and society based on more extreme 'deregulation', through 'regulation' to lighter 're-regulation'.[19]

Nonetheless, because this re-regulatory paradigm is inherently more complex than the other two, an important challenge remains in singling out the inevitable variations that emerge within it among different industrialised democracies. Within the field of consumer law, product safety provides a rich area to uncover how this paradigm is unfolding. This is happening in broadly similar ways due to similar pressures from global economic liberalisation and greater sharing of ideas about appropriate political and regulatory structures. Yet significant idiosyncrasies remain due to different historical starting points, institutions and concomitant broader social norms.[20] At least in product safety, certain aspects of a postwar regime centred on *ex ante* regulation are being

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(2005); and the Financial Instruments and Exchange Law (outlined at www.fsa.go.jp/en/refer/others/20060621.pdf). Cf in Australia, Pearson (2006).

14 See Nakata (2005); and more generally, Naikakufu (2005).

15 See, for example, Howells and Weatherill (2005), Ch 1; and Morgan (2003).

16 Harland (1997).

17 Reich (1991–92).

18 See, for example, Trebilcock (2003).

19 See generally Nottage (2005b).

20 Cf generally also Braithwaite and Drahos (2000); Kagan and Vogel (2004); and, regarding consumer and food safety issues, Vogel (1995) and Ansell and Vogel (2006).

remodelled, but not completely abandoned.[21] This essay begins teasing out such tensions by focusing on four case studies that surfaced in Japan in quick succession from mid-2005 through to mid-2006, summarised in the timeline in Appendix 1. A major aim is to bring together a range of print media resources to offer the first detailed account in English of these important recent events, raising concerns often shared both specifically and more broadly worldwide. This platform should allow more sustained and explicitly comparative studies to be undertaken by those with either practical or theoretical interests in safety regulation (in its broadest sense), consumer law, and overall legal system design in our 'world risk society'.[22]

The second part of the article examines asbestos, which continues to generate the most pervasive problems and responses around the world — even quite recently, for example, in Australia, New Zealand and France.[23] Japan imported hundreds of thousands of tons over the 1980s, and some estimate that asbestos is found in around 70 per cent of homes as well as thousands of factories and public facilities built after World War II.[24] Demolition of these older buildings is accelerating, potentially releasing large quantities of cancer-inducing asbestos fibres. Deaths from mesotheliomia and other fatal diseases may burgeon to 100 000 over the next four decades.[25] As well as strengthening regulations on the use and disposal of asbestos, the Japanese government was forced to promptly enact a state-led compensation scheme as part of a third and most comprehensive response to this controversial material.

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21 Cf, also generally, Cohen and Martin (1985).

22 For other work in this tradition, including extensive data-mining of media sources in the overlapping field of environmental pollution, see Reich (1984). On increasingly broad conceptions of regulation nowadays, see Cane (2002) and Braithwaite (2004). On how our postmodern globalising world increasingly spirals into risks, see Beck (1999) and below.

23 See Nottage (2007b); Spender (2003); Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation (via www.cabinet.nsw.gov.au/publications.html) and *Amaca v Frost* [2006] NSWCA 173 (4 July 2006).

24 'Millions of Homes have Asbestos Roofing', *Japan Times*, 28 August 2005; 'Editorial: Asbestos Compensation', *Asahi Shimbun*, 30 August 2005. Even in 2004, some 8000 tonnes were imported into Japan: Nihon Keizai Shinbunsha Gakugijutsubu (2005), p 9. Imports peaked in 1974 and did not begin to drop off until the early 1990s, related to some regulatory initiatives described below but also to the collapse of Japan's property and construction market. Conversely, exports to China then soared. See Awano (2006), pp 36–39. For another useful recent introduction to asbestos problems more generally in Japan, see also Miyamoto et al (2006). Several other works were published when asbestos regulation or litigation had attracted attention in Japan, albeit less visibly or as extensively as in this latest round: see eg Asubesuto Konzatsu Nettowaku (1996).

25 'Editorial: Asbestos Compensation', *Asahi Shimbun*, 30 August 2005. See also Awano (2006), pp 43–46. Health problems are compounded by comparatively high levels of smoking in Japan, and a similarly multi-layered and slow response to tobacco regulation: see generally Feldman (2006).

'Re-regulation' with some quite distinctive Japanese features is also evident in three other problem areas that also quickly attracted widespread media and political attention: defectively designed buildings, electrical goods, and elevators manufactured by one of the world's major suppliers, headquartered in Switzerland (see below for discussion of these). Liability of builders and local authorities has also been a longer-standing issue in Australia, and the government is presently reviewing its general framework for consumer product safety and related standard-setting processes.[26] This article concludes with the tentative conclusion that both countries should address quite similar and likely future problems by converging on the emerging benchmark set by the EU for general consumer product safety regulation. In addition, this latest *anno horribilis* in terms of product safety issues for Japan confirms a new rebalancing of business, government and consumer interests in a country now recovering from its 'lost decade' of economic stagnation, combined with considerable soul-searching and institutional upheaval. Japan, like many other countries in a re-regulatory world, needs now to stand back and undertake a more holistic review of how a legal system can best be repositioned to deal with increasingly complex safety risks.

Asbestos

Japan's asbestos saga resurfaced as a huge social and legal issue from June 2005, when the media reported that 79 employees of Kubota (a major machinery and materials company) at its Amagasaki factory (located between Kobe and Osaka) had died from asbestos-related diseases.[27] From July, more deaths were reported in other sectors, including construction, shipbuilding, auto parts manufacturing, steelmaking, railways, power generation and military bases.[28] The government initially estimated that almost 400 employees from 27 companies had died, with 849 claiming workers' compensation (including 121 in 2004 and 186 in 2005).[29] It encouraged peak industry associations to stop using asbestos altogether before a nationwide ban scheduled to be implemented from 2008. A ban in principle implemented belatedly in 2004 had allowed exceptions for facilities that might have difficulty finding substitutes (eg in power plants), and even the most toxic 'blue' asbestos (crocidolite) was only banned in 1995.[30]

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26 Nottage (2006a).

27 'Hundreds of Deaths Spur Ministry Plan to Ban All Asbestos Use by 2008', *Japan Times*, 9 July 2005; '51 More Deaths Tied to Asbestos', *Daily Yomiuri*, 14 July 2005; 'Asbestos Linked to 80 Shipbuilders' Deaths', *Asashi Shimbun*, 15 July 2005.

28 'Asbestos Remains in Bodies of 650 Train Cars Used Daily', *Asahi Shimbun*, 21 July 2005; 'Ministries to Seek Complete Asbestos Halt', *Japan Times*, 21 July 2005.

29 'Ministries to Seek Complete Asbestos Halt', *Japan Times*, 21 July 2005.

30 'Industry Groups Pressed to Abolish Asbestos Use', *Asahi Shimbun*, 21 July 2005.

Earlier Responses: Creeping Regulation

These actions came well after several other advanced industrialised democracies had imposed restrictions on asbestos use, although these countries have also only started to completely ban the substance in recent years.[31] Yet the Japanese government had long been aware of the health risks posed by asbestos and slowly phased in measures, particularly those directed at occupational health and safety. From 1956 it exercised administrative guidance (*gyosei shido*),[32] encouraging employers to have employees undertake chest x-rays and other tests when working with asbestos. Following a survey of how 46 dangerous substances were being disposed of, carried out in 1970 during the height of Japan's responses to large-scale environmental pollution,[33] asbestos was formally listed in 1971 as a dangerous substance requiring special handling. An official statement that year also acknowledged links between asbestos and cancer,[34] officially confirmed in 1972 by the World Health Organisation (WHO) and the International Labor Organisation (ILO).[35]

However, formal restrictions were only imposed in 1975, when spraying on of asbestos (eg in roof areas and on steel girders, especially in factories and public facilities like railway stations) was prohibited 'in principle'. That meant where the asbestos content was 5 per cent or more, so 'rock wool' insulation with lower proportions could still be applied until 1995, although such a construction method was delisted as an acceptable fire-retardant in late 1987 and was reportedly no longer used by 1990.[36] Japan's Labour Ministry (now the Ministry of Health Welfare and Labour, or MHWL) also added rules in 1975 extending from three to 30 years the period for preserving records of asbestos concentrations in workplaces; compelling certain health checks; and requiring, in principle, wetting down of asbestos products when removing or breaking them up. In 1976, it also issued more administrative guidance (in the form of an order, or *tsutatsu*) to local Labour Offices to encourage firms dealing in asbestos to substitute for asbestos products, to take care regarding work clothes, and to improve measures to prevent emissions.[37] Perhaps the central authorities also hoped that local governments would begin to take over

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31 'Editorial: Asbestos Compensation', *Asahi Shimbun*, 30 August 2005; Koyama and Kitayama (2005).

32 Administrative guidance was held to be non-binding, allowing regulatees ('regulators') the freedom in principle not to follow the guidance, by a judgment of Japan's highest court in 1985; however, it continued to exert significant influence through the 1990s, particularly when sourced from central government authorities. See generally Nakagawa (2000).

33 See generally Gresser (1981); and for subsequent developments, Upham (1987); Kidder and Miyazawa (1993); Kawashima (1995); Sumikura (1998); Broadbent (1998); Lam (1999).

34 Ozawa (2006), pp 25–26.

35 'Socialists Ditched Bill to Ban Asbestos', *Asahi Shimbun*, 6 August 2005.

36 Further administrative guidance was issued in 1986. See, for example, Ozawa (2006), pp 26–27.

37 Ozawa (2006), pp 26–27.

the lead, as they had done for environmental pollution and consumer law more generally from the late 1960s, but developments in the latter areas had been underpinned by national legislation specifically delegating some broader authority.[38]

Subsequently, moreover, the Japanese government continued to respond with at least three- to four-year lags even to clear consensus reached at the international level, mostly again relying on softer measures. Japan did not accede until 2005 to the ILO's Asbestos Convention (No C162 of 1986), prohibiting the use of blue asbestos — and indeed was recently accused of leading to a watering down of that Convention.[39] Instead, in 1989 the government published a survey indicating that workplaces no longer used blue asbestos; it only prohibited blue asbestos in 1995. In 1989, the WHO recommended prohibiting the use of 'brown asbestos' (amosite), but the government again released a report in 1993 after discussions with the industry, claiming that this was no longer being used either. In 2001, the WHO changed its opinion dating from 1987 that there might also be cancer risks from certain possible substitutes for white asbestos (chrysotile), over which the ILO Treaty had also required controls (albeit not full-scale prohibition). The government only prohibited brown and white asbestos in 2003, by a further reform to Occupational Safety and Health Law Enforcement Ordinance [*Rodo Anzen Eiseiho Shikorei*], in force from 2004. The government maintains that these delayed and softer regulatory responses were not significantly slower or more lax than in other major industrialised countries, but many others disagree.[40] There certainly seems to have been a pattern of allowing employers plenty of time and discretion in deploying safety measures and substitutes.

Further, a 1977 report by a local Labour Office had already noted abnormal deaths among those residing in the vicinity of a brakes manufacturer. But little had been done, partly because this problem was seen to go beyond the MHWL's jurisdiction.[41] Yet responses to such problems had also been lax from the Environment Agency, now a Ministry but a weaker government department (even after the legislative and institutional reforms in environmental policy generally in the early 1970s). It ceased measuring asbestos fibre concentrations in the air near such factories after 1977–78,

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38 See generally MacLachlan (2002); and the Basic Law for Consumers referred to above.

39 Awano (2006), pp 151–52. For example, the representative to the ILO from Japan (but also Canada, a major asbestos producer) objected to a draft that had proposed — ultimately in vain — a licensing scheme for asbestos removal.

40 Compare Kokusei Joho Senta (2006), pp 66–71 (noting, for example, use of pre-existing blue asbestos in Germany in 1986 and France in 1987; and prohibition of brown asbestos there only in 1993 and 1994 respectively) with Ozawa (2006), p 27; Miyamoto (2006), pp 54–63 (with a helpful comparative chronology at pp 2–7); and particularly Awano (2006), pp 139–70.

41 'Govt to Check Levels of Airborne Asbestos', *Daily Yomiuri*, 8 September 2005; Mishima and Kanda (2005) '70s Report on Asbestos Deaths Ignored', *Asahi Shimbun*, 18 July; 'Ministry Neglected Asbestos Monitoring', *Daily Yomiuri*, 29 July 2005.

instead focusing research on other industrial and residential areas (and finding little regional variance) until 1987, when the use of asbestos in school buildings attracted broader social concern. High levels were then found around school buildings, causing Japan's first and less pervasive panic about asbestos.[42] The Air Pollution Control Law (No 97 of 1968) was amended in 1989, requiring no more than 10 fibres per litre (the upper limit of the 1–10 fibre range suggested by a WHO report in 1986).[43] However, even this seems to have been breached, and the restriction was not extended to areas around demolition sites of buildings containing asbestos until 2005, when the MHWL also belatedly added a regulation aimed at preventing the dispersal of asbestos from building sites.[44]

To make matters worse, the Waste Management and Public Cleansing Law (No 137 of 1970) had only been revised in 1997, to require anti-scattering measures when asbestos was disposed of by burying. The main impetus was the devastating Hanshin Earthquake in 1995, which killed over 6000 inhabitants in and around Kobe, and caused immense property damage releasing large amounts of asbestos. This led to Japan's second but still quite localised panic over the substance.[45] Recently, both Kubota and Kirin Breweries in Amagasaki have had to remove asbestos-contaminated soil, but there are fears that lax rules and enforcement mean that many other sites remain contaminated.[46] A further problem raised recently has been the paucity of regulations addressing possible dispersion of asbestos within buildings more generally (such as inside schools), either on the part of the MHWL or (other

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42 The concern about asbestos in schools, in turn, was prompted by revelations about disposal of asbestos from the US aircraft carrier *Midway*, decommissioned at the Yokosuka naval base the previous year: Awano (2006), pp 71–87. Japanese citizens and local governments have remained particularly concerned about dangerous substances in and around schools, understandably enough, as evidenced also by the furore in the late 1990s over high dioxin levels produced by waste processing and other facilities.

43 'Govt to Check Levels of Airborne Asbestos', *Daily Yomiuri*, 8 September 2005; Mishima and Kanda (2005) '70s Report on Asbestos Deaths Ignored', *Asahi Shimbun*, 18 July; 'Ministry Neglected Asbestos Monitoring', *Daily Yomiuri*, 29 July 2005. On Japan's air pollution regulation more generally, see also Nishimura (1989); and Mills (1996).

44 '"De facto" Ban on Asbestos Use Eyed', *Daily Yomiuri*, 3 September 2005; Kono (2005); see also 'Asbestos Death Near Plant Reported in '86', *Japan Times*, 1 August 2005. For details on the far-reaching new obligations on those building owners or certain other employers employing personnel in contact with asbestos, see the Asbestos Harm Prevention Regulations in force from 1 July 2005; see also Ozawa (2006), pp 43, 75–87.

45 Awano (2006), pp 105–17.

46 'Asbestos-tainted Soil Found at Plants', *Daily Yomiuri*, 24 August 2005. On air pollution and waste management regulation generally in connection with asbestos, see further Ozawa (2006), pp 30–38. On soil contamination generally, see Ori (1993). Comparing approaches to waste management in the United States, see also Aoki and Cioffi (1997).

than, belatedly, in regard to its own facilities!) the Ministry of Land, Infrastructure and Transport (MLIT).[47]

Third-Round Responses: Re-regulation and State Funding in the Shadow of Lawsuits and Politics

Further pressure had mounted on the Japanese government because during the period 2002–05 it had paid out 716 million yen to 41 claimants in three lawsuits (including two settlements), who had suffered asbestos-related diseases after being hired to work at the US Naval Base at Yokosuka (near Yokohama).[48] Pressure was also extended to the US government, which unusually agreed in August 2005 to shoulder 194 million yen for 26 of those claimants who had worked at the Base from 1966, under Article 16 of the Japan–US Status of Forces Agreement, added in that year.[49] Further, a Nagano District Court judgment of 27 June 1986 had been reluctant to find facts establishing the 'extreme unreasonableness' seen as necessary to impose State Compensation Law liability for omissions on the part of government regulators in the asbestos context. By contrast, a Supreme Court judgment of 27 April 2004 had found the government liable in an arguably analogous situation involving lung disease claims and the Mining Law (No 70 of 1949).[50] Local governments, including the progressive mayor of Amagasaki — sensitive to contamination issues after its painful struggle particularly with air pollution over many decades — added pressure to the central government.[51]

By July 2005, unsurprisingly but still unusually for Japan, the heads of seven government agencies had met quite promptly to investigate more closely the causes and ramifications of the asbestos problem.[52] Further surveys quickly uncovered at least 190 more who had died from asbestos-related diseases, many of whom were thought not to have claimed workers' compensation.[53] The widespread use of asbestos was also confirmed, and cases of excessive fibres per litre were found at schools and other public facilities.[54] An Emeritus

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47 Ozawa (2006), pp 38-43. Table 2.1 (pp 44–46) adds a useful summary of all Japanese regulations (hard and soft) from 1956 until 2005.

48 'Editorial: Asbestos Compensation', *Asahi Shimbun*, 30 August 2005; Koyama and Kitayama (2005).

49 'US to Pay Share in Asbestos Settlements', *Asahi Shimbun*, 22 August 2005.

50 Respectively, Hanta 616: 34 and Minshu 58(4) 1032, discussed in Ishida (2006), pp 46–47.

51 Awano (2006), pp 54–58.

52 'State to Draft Law on Asbestos Redress', *Japan Times*, 27 August 2005.

53 'State to Draft Law on Asbestos Redress', *Japan Times*, 27 August 2005; 'Asbestos Levels Exceeding Limit Found at 2 Schools', *Daily Yomiuri*, 8 September 2005; '190 New Deaths Linked to Asbestos', *Daily Yomiuri*, 27 August 2005; 'Law May Cover Cost of Asbestos Ills', *Daily Yomiuri*, 30 July 2005.

54 'Asbestos Found at 22 Hyogo Facilities', *Daily Yomiuri*, 15 September 2005; 'Shiga Closes Facilities Due to Asbestos Scare', *Daily Yomiuri*, 14 September

Professor appointed by the Environment Ministry to chair a review of its responses to asbestos was forced to resign after it was revealed he had advised the Japan Asbestos Association over the period 1985–97.[55] The Review's report in August 2005 defended the Ministry's research focus, but concluded that the 1989 Air Pollution Control Law revisions had been limited. One explanation given was that a 'precautionary approach' to such uncertain but potentially disastrous risks was not yet prevalent around that time. Another was that there was insufficient coordination with other government agencies — especially the MLHW, dealing mainly with asbestos within industrial facilities, and the powerful Ministry of International Trade and Industry (now METI: Ministry of Economics Trade and Industry) with primary jurisdiction over products incorporating asbestos.[56]

Further pressure then came from local governments, with the Amagasaki municipality taking the unprecedented step of offering free health check-ups for asbestos-related diseases, and from labour union branches.[57] However, the Trade Union Federation (*Rengo*) was itself revealed to have put the brakes on a movement led by the Social Democratic Party (then the main opposition party) in the early 1990s to ban already asbestos. This backflip had followed concerns about job losses, as well as resistance from the Association and other firms favouring voluntary and delayed restrictions.[58]

Already by the end of July 2005, the government was indicating that it was considering special legislation to compensate those — primarily workers — who had died from asbestos. This became almost certain after Prime Minister Koizumi dissolved the House of Representatives on 8 August, calling for a general election on 11 September. As his campaign was focused on gaining the electorate's direct support for reform of Japan's postal savings system, Koizumi could not afford any ongoing distractions by asbestos.[59] His very successful campaign was not even marred by sports centres and other public facilities being unavailable for use as polling stations on election day, due to temporary closures after having been found to contain asbestos.[60] However, the Koizumi government also made it clear that the compensation

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2005; 'Asbestos Used at 3700 Train Stations', *Asahi Shimbun*, 24 August 2005; 'Asbestos Used in Train Stations', *Daily Yomiuri*, 2 August 2005.

55 'Asbestos Probe Chief Exits Over Industry Ties', *Japan Times*, 3 August 2005.

56 Ishi wata (asubesuto) mondai ni kan suru kankyôshô no kako no taiô ni tsuite — kenshô kekka hôkoku [On the Environment Ministry's past response to the asbestos problem — Report on Inquiry Outcomes], (2005).

57 'Asbestos-hit Town Offers Free Health Checks', *Daily Yomiuri*, 20 August 2005; see also 'Kanagawa Pref. Leads Way in Probing Asbestos Cases', *Daily Yomiuri*, 16 August 2005.

58 'Socialists Ditched Bill to Ban Asbestos', *Asahi Shimbun*, 6 August 2005; 'Editorial: Asbestos Compensation', *Asahi Shimbun*, 30 August 2005; Koyama and Kitayama (2005). See also Miyamoto et al (2006), pp 57–60.

59 Nottage and Wolff (2005).

60 'Poll Stations Polluted by Asbestos', *Daily Yomiuri*, 25 August 2005.

scheme would extend beyond workers themselves.[61] Further re-regulation aimed at minimising future harm was on the cards as well.

On 27 December 2005, the (re-elected) government's inter-ministerial committee released its 'Comprehensive Response Plan for Asbestos Problems'. A massive budget was duly provided to remove asbestos from public facilities, and two major laws were enacted on 10 February 2006.[62] The 'Law Partially Amending the Air Pollution Control Law, etc to Prevent Harm to Public Health, etc caused by Asbestos' largely followed the Plan's recommendations by introducing amendments to three other laws, to come into effect within eight months of enactment. To prevent dispersal of asbestos from pre-existing structures, the Building Standards Law — under MLIT jurisdiction — was amended to: (i) require removal of sprayed-on asbestos and rockwool when renovating or adding to certain buildings (unless not at risk of dispersal); (ii) provide for warnings or orders if there is a risk of dispersal; (iii) provide powers to obtain reports or make site inspections if necessary; and (iv) supervise operations via the Law's periodic report system. Second, a further amendment to the Air Pollution Control Law — under Environment Ministry jurisdiction — extended its scope beyond buildings to certain plants and facilities using asbestos. (This followed amendments to its enforcement regulations on 21 December 2005, in force from 1 March, which had also extended the Law (a) to cover asbestos products as well as sprayed-on asbestos, (b) to remove limits to scope based on building size, and (c) to require placement of signage making it clear what asbestos-related work was being carried out.) Third, the Waste Management Law — also under Environment Ministry jurisdiction — was amended to establish a system whereby the minister certifies those who dispose of asbestos waste without causing harm by using high levels of technology.

On the other hand, this amending legislation does not seem to have taken up the Response Plan's recommendation for reform also of the Local Finances Law (No 109 of 1948), under jurisdiction of the General Affairs Ministry. That would have allowed expenses needed by local governments to remove asbestos from their facilities to be covered, exceptionally, by local government bond issuance. Also left hanging are the Plan's suggestions for studies into (a) requiring asbestos test results to be added to the key points to be explained when disposing of real property, pursuant to the Real Property Transactions Business Law (Law No 176 of 1952), and (b) means of having asbestos issues accurately reflected in building valuation practices, in light of Building Standards Law reforms. These suggestions are seen as having the greatest potential for effectively addressing future harms from asbestos.[63]

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61 'Compensation Law Eyed for Victims of Asbestos', *Asahi Shimbun*, 27 August 2005.

62 For further background to the politics behind the legislation, see Awano (2006), pp 203–14.

63 Compare Kokusei Joho Senta (2006), especially pp 85–89 with Ozawa (2006), especially p 136.

In parallel, the Law Providing Relief for Injuries from Asbestos (No 4 of 2006) was also enacted on 10 February 2006 and promptly came into effect from 27 March. It benefits workers (mostly self-employed)[64] not covered by workers' compensation, families of workers who died at least five years ago (losing the right to workers' compensation due to extinctive prescription), family members of workers in turn contaminated (eg by washing asbestos-ridden clothes), and residents living near asbestos-related factories. First, living victims not at work or not covered by workers' compensation will be reimbursed for their out-of-pocket medical expenses not otherwise covered by health insurance, and receive medical treatment support payment of around 100 000 yen per month. Second, surviving spouses or dependants of workers who died before the law came into effect can claim an annuity of 2.4–3.3 million yen (depending on their numbers). If there are no such survivors, their own surviving relatives can claim up to 12 million yen. Such claims must be brought within three years of the law coming into effect. Third, for non-workers or workers not covered by workers' compensation who die afterwards, their families can claim 2.8 million yen in condolence money and 199 000 yen towards funeral expenses. The main aim of the law is stated to be prompt and predictable compensation for extensive injuries that are typically latent for long periods, and for which it is difficult to attribute causality. It must be reviewed before 27 March 2011.

The scheme is operated by the central government as a type of social security scheme, drawing inspiration from Japanese schemes for drug side-effects and for harm from nuclear accidents. It contributed an initial endowment of around 40 billion yen, and will pay half the fund's administrative expenses from the fiscal year 2007 (beginning April). Local governments contribute one-quarter of the fund's outgoings from the fiscal year 2006. However, a large proportion will come from industry, collected through the workers' compensation payment scheme. All employers will contribute an annual levy, but some employers found to have used asbestos extensively in their workplaces or engaged in commercial activities closely linked to asbestos can be required to pay surcharges.[65] It remains to be seen how these payments will be calculated each year. However, the philosophy seems to be that firms, as well as central and local governments, have benefited from use of asbestos, so they should now share in covering the latent costs involved. Similar notions underpin New Zealand's state compensation scheme for all personal injuries by accident, in lieu of allowing tort claims. A major problem that emerged in Australia is also avoided, where the major

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64 Takashi Sei (2005), 'Day Laborers Shut Out from Help for Their Asbestos-Linked Diseases', *Asahi Shimbun*, 4 August.

65 'Asbestos Aid Falls Short', *Japan Times*, 15 March 2006; Kokusei Joho Senta (2006), esp pp 9, 19–20, 44 and 49. The Environment Ministry wishes to have Kubota and other firms contribute 340 million per year, out of 7.4 billion yen it is collecting this year: 'Kubota, Other Firms Get Asbestos Bill', *Japan Times*, 31 August 2006.

asbestos manufacturer's parent company relocated to the Netherlands, leaving insufficient assets in a fund designed to pay out its compensation claims.[66]

Around 2000 people applied for relief in the Japanese scheme's first few weeks of operation.[67] A major incentive is that, after 27 March 2006, victims must apply while still alive for their families to be able to claim upon their death.[68] Also, employers or their families cannot claim: they are expected to self-insure through a special accident compensation scheme, but less than a third of small- or mid-sized firms have done so. Another problem is that victims must suffer from mesothelioma or other asbestos-related lung cancers, but the criteria to prove the latter are difficult to formulate and apply, and other diseases like asbestos pleural effusions are not covered.[69] On 26 April 2006, eight plaintiffs who had worked in or lived near Kubota's Amagasaki plant, but who were not eligible under the law, brought claims totalling 2.2 billion yen (22–33 million yen each) under the State Compensation Law (No. 125 of 1947) for the government's negligent regulation of asbestos.

In addition, the amounts under the Asbestos Relief Law are less than normal workers' compensation, let alone tort damages. (Unlike New Zealand's scheme providing compensation for all personal injuries by accident, tort claims are not precluded.) Indeed, Article 25 states that the government may deduct from payments to those otherwise entitled any compensation amounts received for their losses arising from the same circumstances. Victims' groups and others have objected, arguing that this goes against the social welfare nature of the scheme and encourages compensation claims against firms.

The status was also unclear about payments such as two million yen in 'consolation money' initially paid by Kubota to each of 66 victims or their families, followed by its promise in December 2005 to secure additional funds for them equal to that received by its employees afflicted by asbestos-related diseases (totalling eight billion yen as of the end of March 2006). These were expressly stated to be made out of a sense of moral (not legal) responsibility.[70] In April 2006, Kubota confirmed that it would stop paying two million yen,

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66 See Nottage (2007b); Spender (2003); Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation (via www.cabinet.nsw.gov.au/publications.html) and *Amaca v Frost* [2006] NSWCA 173 (4 July 2006); cf generally eg Campbell (1996).

67 'Asubesuto: rôsai shinsei, zenkoku de 782-ken ni kôrôshô matome [Asbestos: Ministry of Health, Labour and Welfare gathers 782 workers compensation applications]', *Mainichi Shimbun*, 7 April 2006.

68 'New Asbestos Law No Panacea: Rigid Criteria Mean Many Lung-disease Sufferers will be Left Out in the Cold', *Daily Yomiuri*, 17 March 2006; 'Asbestos-affected Apply for Relief: But Window Narrow for Some State Funds Victims', *Japan Times*, 21 March 2006.

69 'New Asbestos Law No Panacea: Rigid Criteria Mean Many Lung-disease Sufferers will be Left Out in the Cold', *Daily Yomiuri*, 17 March 2006; 'Asbestos-affected Apply for Relief: But Window Narrow for Some State Funds Victims', *Japan Times*, 21 March 2006.

70 'Not all Asbestos Victims to be Compensated', *The Daily Yomiuri*, 21 March 2006.

and instead pay amounts similar to those provided under workers' compensation (25–46 million yen each) to afflicted residents who had lived for a year within a kilometre of its Amagasaki factory (and possibly further afield), as well as those who had worked or gone to school within that radius. However, these payments (of at least 3.4 billion yen for 88 certified victims, but with at least another 20 applications pending) would only be available to those certified as asbestos victims under the law.[71] Kubota also still insisted that its payments were made out of moral responsibility; however, because its actions are seen as at least partly designed to pre-empt tort suits, it seems likely that these payments (but perhaps not the two million yen payments already paid) will be fully offset against the (lower) amounts available to victims certified under the law. On 2 May 2006, a building materials manufacturer based in Nara (Nichias Corporation) and its subsidiary, with combined asbestos-related deaths of 183 workers, announced a similar but less generous scheme, offering 30 million yen to victims who had lived for at least one year within 400 metres of its plants before 1971.[72]

Kubota's relatively prompt responses occurred not only in the context of a long history of air pollution around Amagasaki. It also is consistent with a growing concern about corporate governance and broader corporate social reponsibility (CSR) and restoring public trust especially among Japan's larger listed companies. Their attitude initially drew considerable public praise, but some commentators continue to point out that the company was nonetheless free-riding on decades of benefits from work practices and products involving asbestos.[73] Another corporate law dimension to the Japan's latest asbestos saga had been a suit brought by a woman whose parents had worked for the Kansai Slate Company (manufacturing asbestos-based roof tiles and the like) until she was 13. As a child, oblivious to the risks, she had played around in the company's asbestos stockpiles. Because that company had gone under in 2001, however, the woman had sued the Sumitomo Osaka Cement Company, which had provided funding to the original company for many years. On 18 August 2006, the Cement Company agreed to a settlement of two million yen, again disclaiming any legal responsibility.[74]

In sum, further claims against the government under the State Compensation Law remain quite possible, as do tort claims by residents or workers, particularly against those who are not direct employers, and even by consumers or others against manufacturers of asbestos products or parts. After all, a METI survey in August 2005 of 20 000 firms making consumer goods found that only 14 firms produced 19 products still containing asbestos, but that 118 firms had previously produced 502 such consumer goods. Reportedly, no claims of asbestos-related diseases have been brought in relation to these

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71 'Kubota Offers Asbestos Redress to Neighbours', *Japan Times*, 19 April 2006.

72 'Payout Set Up for Asbestos Victims', *Asahi Shimbun*, 3 May 2006.

73 Awano (2006), pp 54–57 and 59–62. For further references to some studies comparing CSR in Japan, see again Nottage (2005d).

74 Awano (2006), p 58.

goods, although that situation might change.[75] However, difficulties will remain with prescription periods and evidential burdens, especially in proving a causal link to any diseases recognised by such consumers (or workers, residents, or those suing the government for lax regulation).[76] This demonstrates the limits to tort law and product liability in many 'toxic torts' situations.[77]

Further refinement or development of this new statutory scheme, as well as the changes to building and environmental regulations culminating in the Response Plan, are therefore quite likely. Nonetheless, they provide insights and experiments for governments to begin addressing other widespread and complex safety issues through state compensation or social welfare and 're-regulation', rather than relying primarily on private tort law and self-regulation — even in Japan's brave new world of law, politics and economics.[78] The contemporary relationship between Japanese citizens and their new state remains complex.[79]

(Defectively Designed) Buildings

Just as some light was beginning to emerge at the end of the asbestos tunnel towards the end of 2005, another major safety issue generated further social and political furore. Revelations emerged of around 100 defectively designed and constructed hotels, condominiums (especially around Yokohama and Tokyo), and other buildings spread around the country. As with asbestos, the reaction has involved funding from the government, partly in the shadow of lawsuits claiming it should have checked and uncovered earthquake resistance data falsified by architectural firms pressured by construction companies and consultants, as well as the bankruptcies of several large firms. Again, state authorities were forced to react quickly, belatedly coordinating investigations and responses within and across many branches of government, with additional pressure coming from a parliamentary committee. Civil litigation among private parties has also emerged, along with pervasive media attention. However, a major difference from asbestos is that criminal prosecutions have already been brought, as occurs in many other areas of tort litigation in Japan (eg traffic accidents and medical malpractice), particularly in large-scale incidents (eg environmental pollution and product liability).[80]

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75 'Asbestos Found in Kids' Bicycle Brakes', *Daily Yomiuri*, 9 September 2005; 'Bill Afoot to Offer Victims of Asbestos-caused Mesothelioma Aid', *Japan Times*, 14 September 2005. Some estimate that there were over 3000 uses for asbestos in Japan: Nihon Keizai Shinbunsha Kagakugijutsubu (2005), p 11.

76 Compare Ozawa (2006), pp 109–16 with Ishida (2006), pp 40–47.

77 See generally Reich (1991); Nottage (2004), esp Ch 2; Gresser (1981).

78 Cf generally Sibbitt (1998); Kelemen and Sibbitt (2002).

79 See also Tanase (2006); Nottage (2007b).

80 Leflar and Iwata (2006); Nottage (2007b).

Criminal Prosecutions and a Limited Parliamentary Inquiry

On 25 October 2005, President Ojima of the now insolvent condominium developer Huser learned from eHomes, a company designated by the government under 1998 revisions to the Building Standards Law (No 201 of 1950) that allowed outsourcing of building inspections, that an architect named Aneha might have fabricated quake-resistance data for some of Huser's buildings. eHomes later alleged that it was pressured not to disclose this disturbing safety risk.[81] Ojima certainly accepted payments from buyers over 25–29 October and on 7 November, for which he was eventually (on 17 May 2006) arrested for fraud as well as failure to comply with disclosure obligations under legislation governing dealings in residential property.[82]

On 9 November, Ojima visited MLIT, and began requesting financial support to repair or buy back its defective buildings. He explained that Huser would otherwise risk bankruptcy, and also raised the possibility of the state bearing some responsibility for the situation.[83] Ojima also got Kozuke Ito — a veteran senior government politician supported by Huser, and a former head of the National Land Agency (now part of the ministry) — to accompany him on 15 November to ask the ministry why it had halted construction of one of Huser's condos.[84] However, an architect named Watanabe from a design office associated with Aneha had blown the whistle, so a few days later the ministry made public the extent of the problem. On 17 November it warned residents of buildings at risk (thought to be only 21 at that stage). Following a cabinet meeting the next day, a senior politician indicated that public funding was unlikely to be forthcoming to resolve the situation, as it involved dealings among private parties. By contrast, on 22 November the MLIT Minister contradicted his colleague regarding funding.[85]

Aneha himself had appeared to come clean, but he blamed companies like Huser and consultancy firms for pressuring him to develop plans using insufficient reinforcement steel in order to reduce construction costs, as well as

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81 Reiji Yoshida and Kaho Shimizu (2005) '8 Billion Yen Outlay Eyed to Repair Shoddy Condo Fiasco; Buyers Would Still Have to Repay Loans', *Japan Times*, 7 December.

82 'Huser's Buyback Pledge Rings Hollow: Aneha, Four Subcontractors Face Charges', *Japan Times*, 22 December 2005; 'Huser Head Held in Building Scam', *Japan Times*, 18 May 2006. See also 'Huser President Facing Criminal Investigation', *Japan Times*, 18 April 2006. On 27 October 2005, the day before the sale of a condo complex in Yokohama, Huser reportedly received fresh (faked) data from Aneha: 'Hyûzâ: Kyôdo Dêta Sai-Nyûshu [Huser: Strength Data Re-Acquired]', *Nihon Keizai Shimbun*, 21 May 2006.

83 '18 Inspection Firms Using Lax Procedures: Residents of Kawasaki Condo are Ordered to Stay Out of Their Homes', *Japan Times*, 29 November 2005; 'Razing of Aneha Buildings Begins: Three Condos in Tokyo, Hotel in Aichi Start Coming Down', *Japan Times*, 11 January 2006.

84 'LDP Vet Ito Denies Arranging Huser Meeting with Ministry', *Japan Times*, 20 January 2006.

85 Sankei Shimbun Shakaibu (2006), esp pp 326–27. Whistle-blowing in Japan has been supported by legislation enacted in 2004: see generally Wolff (2005).

the government-specified inspection firms for not noticing this. In particular, Aneha alleged pressure from Kimura Construction, a client providing 90 per cent of his business which had built around 50 out of his 98 defectively designed buildings, and a firm closely linked to the developer.[86] Police later also arrested the developer's president, Moriyoshi Kimura, for fraud, but his initial arrest (on 26 April 2006) was for window-dressing a financial report in March 2005 showing large profits for the now-bankrupt firm, in contravention of the Construction Business Law (No. 100 of 1949). Aneha was likewise pursued for fraud, after being initially arrested (also on 26 April 2006) for allowing a designer to use his licence in violation of the Architect's Law (No. 202 of 1950).[87] Executives of eHomes were also arrested that day for fraudulently inflating the company's capital base, by borrowing the funds from a judicial scrivener (*shiho shoshi*) who recorded the increase in order to receive accreditation from MLIT to check plans for larger-scale buildings. eHomes was found to have approved 37 of Aneha's 98 defectively designed buildings, and he had described it as a 'soft touch' (*amae*). Indeed, the whole saga had began when (on 7 October 2005) MILT received an anonymous tip-off that eHomes was failing to comply with record-keeping obligations under the Building Standards Law, and inspected their offices on 24 October.[88]

By June 2006, however, it had emerged that Aneha had lied at Parliamentary Transport Committee hearings initiated (quite unusually for Japan) on 29 November 2005, soon after the problems were made public by MLIT. Under cross-examination on 14 December, he had sworn that his data falsifications had commenced in 1998 when he became involved with Kimura. However, after Aneha's initial arrest he indicated that this was false, and that he had also faked data for at least one other unrelated project in 1997.[89] On 24 June 2006, he was re-arrested for perjury, prompting debates about the proper role and powers of parliamentary inquiries in such situations.[90] Within a

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86 Kaho Shimizu (2005) 'It Was Cut Corners or Kimura Axed Contract: Aneha to Diet', *Japan Times*, 15 December. Kimura appears particularly lax in having checks conducted during construction as well, but this has probably been a more pervasive problem under regulations and practices until recently: 'Sekô Furyô 'Kakuseba Ii': Hyûzâ, Zusan Na Hinshitsu-Kanri [Faulty Construction 'Should Be Hidden': Huser's Shoddy Quality Control]', *Nihon Keizai Shimbun*, 20 May 2006; Nagajima (2005).

87 'Huser Head Held in Building Scam', *Japan Times*, 18 May 2006; see also 'Huser President Facing Criminal Investigation', *Japan Times*, 18 April 2006.

88 Sankei Shimbun Shakaibu (2006), especially pp 2–5 and (a detailed timeline) pp 326–31. eHomes was deregistered in May 2006, when three out of five others later investigated for improper procedures also had their accreditation suspended: '4 Kensa Kikan O Shobun E: Iihômuzu Shitei Torikeshi [4 Organisations under Investigation to Be Dealt With: ehomes to Lose Designated Status]', Nihon Keizai Shimbun, 24 May 2006.

89 'Aneha Lied to Diet About Start of Fraud', *Japan Times*, 30 May 2006; 'Aneha Faces More Claims of Misdeeds', *Japan Times*, 7 June 2006.

90 'Lawmakers Perplexed over Aneha Perjury', *Asahi Shimbun*, 24 June 2006. Aneha reportedly has pleaded guilty to perjury, as well as falsifying fake-resistance

week, a taskforce of prosecutors had released the results of their seven-month investigation, concluding that only Aneha had acted fraudulently in this case and dropping some additional fraud charges against Kimura and Ojima.[91] More recently, however, Kimura has been charged with separate counts of fraud for selling certain defective buildings despite knowing that earthquake-resistance data had been forged.[92]

Nonetheless, it had become clear to the public and the government that problems were more pervasive. A considerable weakness in the present system is the susceptibility to pressure on the part of architects like Aneha. Although they must pass difficult examinations and undergo practical training, there are still around 100 000 including 30 000 'first class' architects like him. Even within his category, there is a clear hierarchy between those who concentrate on design work, and those (like Aneha himself) who concentrated more on the drafting and related paperwork. Those like Aneha, for reasons of economics and status, are more likely to come under pressure to cut corners. This problem became potentially more serious when plan inspection work was deregulated, opened up to outsourcing through an amendment to the Building Standards Law in June 1998 (in force from May 1999), without significantly increasing penalties or enforcement mechanisms for the various professionals involved in the planning and construction process.[93]

Litigation, State Funding, and Re-regulation

It came as little surprise then when, in March 2006, a 'second-class' architect named Asanuma confessed that he too had faked quake resistance data for 33 buildings in Sapporo. The Sapporo municipal government stated that residents did not need to evacuate the five worst condo complexes since resistance was not in immediate danger — below 50 per cent of the required level — and refused to divulge their locations.[94] By contrast, from November 2005 other

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calculations and lending his name to a designer, but maintains that he merely made a mistake in the Diet because the media frenzy kept him from accessing his files: 'Aneha Enters Guilty Plea Over Buildings', *Japan Times*, 7 September 2006.

91 'Aneha Blamed as Defective-Building Probe Ends', *Asahi Shimbun*, 30 June 2006.

92 'Kimura Admits Window-dressing but Denies Fraud in Building Safety Scandal', *Japan Times*, 8 September 2006; 'Ex-Kimura Kensetsu Boss Pleads Not Guilty over Falsified Quake-resistance Data Scandal', *Mainichi Shimbun*, 7 September 2006. It appears that particularly damning evidence against Kimura emerged after he had faxed a prayer to his local shrine that Kimura Construction would not be investigated.

93 Sankei Shimbun Shakaibu (2006), especially pp 322–24. See also Nagajima (2005), and more generally Hosono (2006). Some of the inspection firms licensed for outsourced inspections, moreover, may well have been sites mainly for *amakudari* ('descent from heaven', ie lucrative 'private' firm positions for retiring civil servants): cf generally Grimes (2005).

94 Eriko Arita (2006) 'Another Architect Fakes Design Strength: 33 Sapporo Buildings Target of Investigation', *Japan Times*, 8 March; see also Kaho Shimizu (2006) 'Ministry Denies 'Urgent' Safety Issue; Fukuoka Design Firm Also Faked Structural Data', *Japan Times*, 9 February.

local authorities began ordering demolition or vacating of buildings with even lower quake-resistance, mainly involving Huser and Kimura Construction.[95] Residents who had refused offers from Huser to buy back their condominiums due to concerns about the company's insolvency got the Tokyo District Court to put it into receivership on 16 February 2006.[96] However, this also suspended Huser's suit brought on 30 January claiming 13.9 billion yen from 18 local governments for not properly checking quake-proofing data when allowing developments.[97] More directly, on 2 June, at least one of 46 condo complexes in Tokyo built by a public entity (now known as the Urban Renaissance Agency) was found to have only 58 per cent of the required earthquake resistance, after the entity initially claimed it had misplaced the relevant data.[98]

Anticipating such upheaval, in December 2005 the government announced a package to provide five billion yen towards rebuilding costs for 212 households in seven condo complexes, as well as three billion yen towards inspections for quake resistance. It also said it would examine three more complexes that might obtain public assistance, but the MLIT Minister remarked that 'this is a matter to be settled in court (by private parties) eventually', so it was unclear if and how funds would be forthcoming.[99] Even if this funding is available to rebuild certain complexes, residents cannot generally just re-enter them upon completion; each must pay on average 20 million yen to have the dwellings subdivided again. Since this extra cost is beyond the means of many residents, their associations have found it difficult to obtain the necessary resolutions to undertake reconstruction. Some therefore describe the public funding scheme as like a 'dumpling in a painting (*e ni egaita mochi*)' — you can see it, but you can't eat it![100] The Taskforce's report at the end of June 2006 did not go into the question of what relief might be provided to residents, although (in this area, as well as others in Japan) the

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95 '18 Inspection Firms Using Lax Procedures: Residents of Kawasaki Condo are Ordered to Stay Out of Their Homes', *Japan Times*, 29 November 2005; 'Razing of Aneha Buildings Begins: Three Condos in Tokyo, Hotel in Aichi Start Coming Down', *Japan Times*, 11 January 2006.

96 'Huser's Buyback Pledge Rings Hollow: Aneha, Four Subcontractors Face Charges', *Japan Times*, 22 December 2005; 'Huser Enters Bankruptcy Procedures', *Japan Times*, 17 February 2006; see also 'Huser Appeals Bankruptcy Declaration; Seller of Shoddy Condos Mum as Administrator Says Assets have Dried Up', *Japan Times*, 18 February 2006.

97 'Huser Sues Government for Missing Falsified Data', *Japan Times*, 31 January 2006.

98 'Public-Built Condo at 58% of Quake Standard', *Daily Yomiuri*, 2 June 2006.

99 Reiji Yoshida and Kaho Shimizu (2005) '8 Billion Yen Outlay Eyed to Repair Shoddy Condo Fiasco; Buyers Would Still Have to Repay Loans', *Japan Times*, 7 December.

100 *Sankei Shimbun Shakaibu* (2006), pp 5–6. Japanese law, especially product liability law (arguably unfairly), has been so described by one of Japan's leading legal sociologists in a *Time Magazine* feature in 2000: cf Nottage (2000).

determinations from criminal investigations often cast a sharp light on potential civil or public liability issues.[101]

Anyway, problems afflicting many other complexes may generate compensation claims against the government, either by residents themselves or firms themselves suffering compensation claims or other losses. In May 2006, nine hotels forced to close due to faked structural data brought a civil negligence claim against consultants associated with Aneha for 456 million yen, mainly comprising management fees, with the expectation of further claims for lost business and rectification costs.[102] In June, 33 residents of a Tokyo condo complex found to have only 30 per cent earthquake resistance filed a suit claiming 600 million yen in compensation from Aneha, a design firm (Space One) and two of its former architects, a construction firm (Taihei Kogyo), and the Kawasaki municipal government.[103] On the other hand, as in Japan's asbestos saga outlined above, an advisory panel released a report in April that largely absolved the ministry from failing to detect fabrications and for meeting with Ito, although it urged more disclosure including information about more buildings found to be in breach of the law.[104] Meanwhile, many local governments began offering subsidies and/or technical assistance to owners of houses and buildings for earthquake-resistance tests.[105] In addition, perhaps prompted by the authorities, from February some financial institutions and insurers have allowed deferrals of loan or premium payments owed by residents of the defective buildings.[106]

Changes to 'hard' and 'soft' law have also been initiated. The Law for Promotion of the Earthquake-proof Retrofit of Buildings (No 23 of 1995) was revised with effect from 26 January 2006. The law was enacted in 1995 after over 6000 ended up dying in the Great Hanshin Earthquake, most crushed under older buildings that collapsed. It called for pre-1981 buildings larger than 1000 square metres and higher than three storeys to be checked and strengthened if necessary, but local governments could only recommend such retrofits. The revised law extends its scope to buildings larger than 500 metres and two storeys or more, and allows authorities to disclose names of those buildings with sub-standard quake resistance. It also sets a (still non-binding)

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101 'Aneha Blamed as Defective-Building Probe Ends', *Asahi Shimbun*, 30 June 2006; cf Sankei Shimbun Shakaibu (2006), pp 6–7, and generally Leflar and Iwata (2006); Nottage (2007b).

102 'Huser Head Held in Building Scam', *Japan Times*, 18 May 2006; see also 'Huser President Facing Criminal Investigation', *Japan Times*, 18 April 2006. For a general analysis of potential civil liability for latent defects in buildings and the like, see Kamano (2006).

103 'Kawasaki Condo Residents to Sue Multiple Parties', *Daily Yomiuri*, 25 June 2006.

104 'Report Clears Govt Over Fake Quake-resistance Data', *Daily Yomiuri*, 8 April 2006.

105 '25 Prefectures Aid Quake Checks', *Japan Times*, 6 January 2006.

106 Hiroko Nakata, 'Lenders, Insurers Offer Relief to Aneha Victims', *Japan Times*, 2 February 2006.

target of 90 per cent quake-resistance for buildings by 2015, but this increase from 75 per cent will require about one million dwellings and 30 000 large facilities to be reinforced. Separately, from April 2006, the ministry will release the results of earthquake tests of pre-1981 public primary and middle school buildings. However, 40 per cent have yet to be inspected despite more checks recently, and only 52 per cent of those inspected are deemed earthquake-resistant, although this proportion has grown by seven percentage points since 2002 as some strengthening has been undertaken.[107]

In another 'softer' initiative, from 3 April 2006 the government began accepting registrations from condo management unions for a new free website to be unveiled from July, disclosing information on the architects, original seller, builders and the history of repairs, with the aim of reviving the market for used condos.[108] This strategy is reminiscent of the government's support of quite successful systems to generate information at retail outlets regarding the provenance of local beef after consumers were scared off by 'mad cow disease', discovered in 2001.[109]

On the 'hard law' front, on 31 March 2006 the cabinet approved four Bills that it aimed to have submitted during the legislature's session ending in June. First, the Building Standards Law would increase maximum fines on architects and other individuals who have erected unsafe buildings from 500 000 to three million yen. Deviant companies would receive a maximum fine of 100 million yen, without going through administrative procedures to correct violations. Second, belatedly covering the pre-construction phase, the Architects Law would add a maximum penalty of one million yen or a one-year prison term for architects like Aneha who fabricate structural calculations. (As before, they would also lose their licences.) Third, the Real Property Transactions Business Law would extend a maximum fine of three million yen (100 million yen for companies) or two-year prison terms to those individuals lying to clients or deliberately concealing important facts about buildings from them when concluding contracts. Sellers would also need to disclose whether they or the builder had insurance covering the cost of rebuilding or reinforcement if defects were found, although the Ministry of Finance could not yet be persuaded to make such insurance mandatory. Finally, the Construction Business Law would require construction companies to exchange, in writing, details of their insurance policies with builders when signing contracts.[110] Parliament passed the Architects Law amendment on 14 June, extending the novel maximum prison term to three years.[111]

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107 Kaho Shimizu, 'New Nonbinding Law to Quake-Proof the Old', *Japan Times*, 27 January 2006.

108 'Ministry to Create Condo-data Web Site', *Asahi Shimbun*, 3 April 2006, available at www.mankan.or.jp.

109 See generally Nottage and Trezise (2003). After BSE was first detected in 2001, producers and suppliers sought to develop a traceability system, which was later underpinned by Law No 72 of 2003: Kijima (2006), pp 54–55.

110 'Designers, Sellers of Defective Buildings Face Law with Teeth', *Japan Times*, 1 April 2006.

111 'Diet Toughens Penalties on Architects', *Mainichi Shimbun*, 14 June 2006.

Amendments to the Building Standards Law not only increased maximum penalties, but also required independent organisations to double-check structural calculations after checks by inspection agencies (like the disgraced eHomes) and design offices, and required builders to have construction plans verified by intermediate inspections.[112] Alongside such stricter regulations and enforcement, on 27 June MLIT announced that it would introduce licences for qualified structural designers in response to specialist developments in construction work, and as another way to restore public trust in the construction field.[113]

In May 2006, moreover, the ministry initiated a detailed study into compelling insurance against defects in buildings. The Building Quality Promotion Law (No. 81 of 1999, in force since 2000) makes sellers liable for latent defects in major structural parts for at least 10 years, but that does not help when they go bankrupt — as with Huser and Kimura recently. Although the proportion has been growing since 2000, comparatively few dwellings have voluntary insurance covering such an eventuality (see Table 1).[114]

Table 1: Comparing building insurance in Japan

Country	*Japan*	*USA*	*UK*	*France*	*Canada*
Insured buildings pa. (%)	13	30	98	100	75
Compulsory?	No	No (exc in some states)	No No	Yes Yes	No (except in some provinces)
Insurance term (years)	10	10	10	10	5-7
State support	Some support from publicly funded bodies	Some support from publicly funded bodies	No	No	No

Japanese insurance companies remain concerned about the difficulties in pricing such risks and are calling for direct public funding if compulsory insurance is introduced, but the government has pointed out that countries like France do not provide any support. Another issue is whether insurers should be exempt from claims if sellers create building defects intentionally or with gross negligence. Some sellers also object that the extra costs of compulsory insurance will need to be borne by consumers, depressing a still fragile real

112 'Editorial: Aneha Scandal', *Asahi Shimbun*, 1 July 2006.

113 'More Builder Licences Planned', *Japan Times*, 27 June 2006.

114 Translated and adapted from *Nihon Keizai Shimbun*, 22 May 2006, p 5. Compare, for example, the regime under the *Home Building Act 1989* (NSW), which from 1997 required builders to arrange home warranty insurance for project work over $5000 for seven years (over $12 000 for six years since 2002).

estate market. The MLIT study group did not include any real estate industry representatives, so strong opposition may emerge depending on the premiums and other terms recommended for any such scheme.

Overall, Japan's long-cosseted construction industry is now also being exposed to 'structural reform' — in a rather different sense from that advanced in other areas of the economy by the Koizumi government over the last five years — and the increasingly harsh glare of public scrutiny.[115] The defectively designed buildings saga has highlighted again other long-standing problems, such as 'sick house syndrome'.[116] It has led to more revelations, such as illegal renovations (removing barrier-free access and other spaces required by planning laws) in cut-price hotels developed successfully by the Toyoko Inn group throughout Japan, for which its president has abjectly apologised. The public now expects more from the industry and the government, particularly regarding illegal modifications, as well as initial construction. Calls have been made for a thorough further review of planning laws and enforcement involving a broad range of stakeholders, leading to public disclosure of designs at the approvals stage (or early inspections, if applicants fear privacy violations), surprise on-site inspections (now commonplace in the financial services industry), and ongoing improvements in generating better information about construction projects.[117] Given broader socio-economic and political trends in Japan in recent years, particularly when the safety of citizens is at stake, more shake-ups of this sector are likely. This continues to create both challenges and opportunities for foreign as well as domestic firms and their legal advisers, along with Japanese citizens and policy-makers.

(Consumer) Electrical Products

Just as the furore over defectively designed and constructed buildings was winding down, in mid-February 2006 yet another product safety issue attracted widespread attention in Japan. Unlike asbestos and buildings, the concern was about over-regulation, rather than under-regulation, of electrical goods, still the jewel in crown for the Japanese government, business world and consumers themselves.[118] Again, however, many criticised the government for seeming to serve certain industry interests — mainly manufacturers of new products, as opposed to resellers of secondhand goods, let alone those of consumers — and in a disorganised way. Because many of the goods in question are primarily destined for use by consumers, this fiasco more directly raises broader issues (revisited below) about how to regulate generally for consumer product safety in an era still of considerable deregulatory pressures.

In 1999, the Electrical Appliance and Materials Control Law (No 234 of 1961: abbreviated as the 'Dentori' Law) was revised and renamed the Electrical Appliance and Materials Safety Law ('Den'an' Law). The main aim

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115 On the postwar 'Construction State' in Japan, see McCormack (2001); and on the Koizumi agenda, Mulgan (2002).

116 Akino (2006).

117 Inagaki (2006).

118 See generally, Partner (1999).

of the revision was to allow more scope for safety checks to be conducted by firms themselves, or (for around 100 'specified' products) by state-accredited inspection organisations (now including several abroad), rather than the government itself. This was consistent with outsourcing of public functions long advocated by certain domestic policy-makers, as well as foreign suppliers and governments often critical of the inflexible and opaque Dentori Law.[119] Outsourcing from METI's predecessor in other fields was also introduced more generally in 1999 (Law No 121), impacting also on the Consumer Product Safety Law (No 31 of 1973) with effect from October 2000.

Under the new Den'an Law, the electrical product safety criteria themselves do not seem have to have been changed much.[120] This was despite the wave of recalls of televisions and other consumer electronics goods (as well as foodstuffs and automobiles) in 2000, although concern had been building about their safety levels over the 1990s and some high-profile product liability (PL) litigation had been brought particularly against manufacturers of defective televisions.[121] Nonetheless, the Den'an Law not only required all new electrical products manufactured or imported from April 2001, when the law mostly came into effect, to be checked as meeting the safety criteria and to have compliance evidenced by affixing a new 'PSE' mark before supply; it also envisaged these requirements being extended to other suppliers for older products produced before 2001, when distributed secondhand. However, METI provided various grace periods for implementing this aspect of the Den'an Law, depending the type of electrical products (see Appendix 2).[122]

Unfortunately, METI failed to widely publicise this aspect around 1999–2001. Great consternation erupted after 10 February 2006, when its website announced that the first set of products (televisions, refrigerators, etc) would all need to be checked and marked 'PSE' if compliant by sellers of secondhand goods wishing to keep trading in those goods from April 2006.[123]

Over 300 000 secondhand shops, the numbers and sales of which had proliferated during Japan's 'lost decade' of economic stagnation and 'price destruction', lobbied directly and through a new advocacy group to postpone implementation. They joined forces with performers and others in Japan's vibrant music industry, who protested that costs and potential failures involved in testing older musical instruments and equipment (synthesisers, etc) would drastically undermine the industry's viability.[124] Concerns were also raised by

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119 Cf, for example, the complaints lodged over the 1990s with the Office of the Trade and Investment Ombudsman: searchable at www5.cao.go.jp/otodb/english.

120 Yumi Wijers-Hasegawa and Eriko Arita, 'New Rules to Doom Used Electrical Goods Shops?' *Japan Times*, 25 March 2006.

121 Nottage (2007b).

122 Reproduced from: www.meti.go.jp/english/information/data/denan_grace050217.html

123 Wijers-Hasegawa and Arita, 'New Rules to Doom Used Electrical Goods Shops?' *Japan Times*, 25 March 2006.

124 'Musicians Speak Out Against Ban on Sale of Old Electrical Appliances', *Mainichi Daily News*, 23 March 2006.

those in 'classic' video games markets.[125] Suppliers and others also emphasised that costs of testing (and forced disposal of non-compliant goods) would have to be passed on to consumers generally, dampening or even preventing supplies of older goods that consumers might wish to purchase even at a higher risk of product safety failure. Cynics also suggested that METI's main motivation for this aspect of the Den'an Law was old-fashioned industrial policy to promote those firms manufacturing new goods, sheltering them against the rise of secondhand markets and growing competition from East Asia, rather than genuine concern for consumer safety.[126] An immediate practical problem was a nationwide shortage of devices — quite expensive anyway — for even willing resellers to use to test for PSE mark compliance.

METI's initial response included setting up 500 inspection stations across the country and lending out devices for six months.[127] However, most electrical products are bulky and hence could not easily be transported to the stations, and the demand for the testing devices meant they could not be borrowed for long. After further intense pressure, the ministry decided to turn a blind eye after April 2006 if the shops supplied goods under a 'lease', one exception already in the Den'an Law. This was subject to (non-binding) 'administrative guidance' encouraging them — no doubt over-optimistically — to check later for PSE mark compliance if asked by consumers and when testing devices became more widely available.[128] The ministry justified this on the basis that ownership under a 'lease' would remain with the supplier until it fulfilled its responsibility to test for compliance.[129] Second, METI also suggested an expansive interpretation of the law's exception for sales of goods overseas, allowing business-to-business supplies of goods without PSE marks if they might be exported.[130] Third, widening the scope to apply the law's exception for private sales between individuals, METI has left vague the definition of 'trading', simply stating that anyone 'making a living' selling used appliances (eg at flea markets) will be subject to the law.[131] Some fear that traders will disguise themselves as private individuals to sell quantities of

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125 Ollie Barder, 'Secondhand Gagets Win Reprieve from Japan's "Worst Law Ever"', *Guardian*, 30 March 2006.

126 Wijers-Hasegawa and Arita, 'New Rules to Doom Used Electrical Goods Shops?' *Japan Times*, 25 March 2006.

127 'Ministry to Blame for PSE Mark Confusion', *Daily Yomiuri*, 21 March 2006.

128 'Govt Allows Compromise on Used Electrical Goods Law', *Daily Yomiuri*, 25 March 2006; 'PSE: mâku nashi demo hanbai mitomeru, keizaishô ga 4-gatsu ikô mo [PSE: METI to allow sales without mark, even after April]', *Mainichi Shimbun*, 24 March 2006. On possible 'capture', but here to raise standards (to anti-competitive effect) rather than to lower them (more obviously to anti-consumer effect), see below.

129 'Ministry Postpones PSE Seal Plan', *Asahi Shimbun*, 27 March 2006.

130 'METI Backs Off Banning Sale of Used Electrical Goods', *Japan Times*, 25 March 2006.

131 'Tiny PSE Marks Not Necessary in Flea Markets', *Asahi Shimbun*, 24 March 2006.

non-PSE goods on internet auctions.[132] Finally, mainly to mollify the music industry, on 25 March METI brought in a new exception for instruments, amplifiers, movie projectors and certain other 'vintage' products made before 1989: high-value discontinued products for domestic sales, marked in accordance with the old Dentori Law.[133]

Secondhand goods markets then staged a remarkable recovery, with prices rebounding from bargain-basement levels to around 80 per cent of pre-February levels. Most shops continued selling similar volumes of pre-2001 goods without checking and affixing PSE marks, apparently without explaining or documenting that these were on a 'lease' basis.[134] Few borrowed even the limited numbers of testing units that METI made available.[135] Some claimed that they feared testing would expose them to civil liability under Japan's strict-liability PL Law — presumably under Article 2's definition of 'apparent manufacturers' — if they later prove defective (even in other respects) and harm users. METI insisted (more justifiably) that PSE mark compliance testing will not be enough to attract PL exposure, but some firms still did not want to run the risk and are exporting more non-PSE marked goods.[136]

Generally, METI has continued to face sharp criticism for its definitions of what is 'vintage',[137] for using taxpayers' money to support testing by resellers[138] and for its expansive interpretations and poor enforcement of the original exceptions under the Den'an Law (particularly 'lease' transactions) — making a mockery of legislative provisions[139] and consumer interests.[140]

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132 Wijers-Hasegawa and Arita, 'New Rules to Doom Used Electrical Goods Shops?' *Japan Times*, 25 March 2006.

133 'PSE dotamba rûru henkô, yûyo kikan enchô wa mitomezu [PSE last-minute rule change, without permitting an extension of grace period]', *Yomiuri Shimbun*, 15 March 2006; 'Vintage Electrical Goods Get 2nd Life', *Daily Yomiuri*, 24 March 2006.

134 Takayuki Sakai (2006) 'PSE mâku: seido kaishi, vhûko-hin hanbai wa ima made to kawari naku [PSE mark: the system begins, but used goods sales remain unchanged]', *Mainichi Shimbun*, 1 April; Takayuki Sakai and Makoto Matsuo, 'PSE: 1-Nichi Sutâto "ihôhanbai" ôkô no kenen mo [PSE: Begins 1 April with apprehensions over brazen "illegal sales"]', *Mainichi Shimbun*, 1 April 2006.

135 'Chûko Kaden, 'PSE Nashi' Zôka [used household electronic items without PSE marks increases]', *Nihon Keizai Shimbun*, 23 May 2006.

136 Takayuki Sakai and Makoto Matsuo, 'PSE: 1-nichi sutâto "ihôhanbai" ôkô no kenen mo [PSE: Begins 1 April with apprehensions over brazen "illegal sales"]', *Mainichi Shimbun*, 1 April 2006. For a comparative analysis of PL Law concepts, see Nottage (2004), Ch 3.

137 Ollie Barder, 'Secondhand Gagets Win Reprieve from Japan's "Worst Law Ever"', *Guardian*, 30 March 2006.

138 Wijers-Hasegawa and Arita, 'New Rules to Doom Used Electrical Goods Shops?' *Japan Times*, 25 March 2006.

139 Takayuki Sakai, 'PSE: "Rentaru" yônin mo, chûko kaden no jishu-kensa nashi [PSE: Neither "rental" nor independent testing of used electrical goods]', *Mainichi Shimbun*, 4 May 2006.

However, METI and some others are hoping that the problem will quietly fade away, particularly since older non-PSE products will begin to reach the end of their usable lives over the next few years.[141]

Schindler's Lifts

In the dying days of Japan's latest 'year of living dangerously', intense media attention turned from the PSE mark problem to yet another product safety problem. On Saturday, 3 June 2006, a 16-year-old high school student had been crushed to death on the 12th floor of his apartment complex built in Tokyo in 1998 as he was backing his bicycle out of an elevator, which suddenly rose.[142] The story broke on Monday, and on Wednesday, 8 June the police searched the offices of the elevator manufacturer, a subsidiary of the Swiss firm Schindler (the world's second-largest manufacturer); the public housing corporation that owned the building; the authorities of Minato Ward in which it was located; and two companies currently engaged to maintain its elevators. MLIT also ordered all local governments to inspect Schindler elevators in their buildings, estimated to number more than 7000.[143]

On Friday, 9 June, the *Asahi Shimbun* reported that Schindler had been struggling to enter the Japanese market, claiming only 1 per cent overall, but that it had made inroads into supplying public entities by keeping prices low, importing mostly from its Asia-Pacific manufacturing base established in China in 1980. The newspaper also pointed to other fatalities in China in 1997 and Hong Kong in 2001, and implied that Schindler was more likely than Japanese manufacturers not to keep servicing the elevators itself, leaving owners to contract instead with other companies (as had happened in Tokyo for over a year prior to that fatal accident).[144] Also on that Friday, the ministry ordered broader inspections of all elevators in government buildings, not just those produced by Schindler. A statement released by Schindler the previous day was reported as offering the company's condolences, but pointing to faulty maintenance as the likely cause of the accident. Reports also pointed out the Building Standards Law required owners to regularly inspect elevators and report findings to local governments, but the latter were not obliged to forward reports to central government or industry associations. Schindler's report in 2004 of a malfunction in this particular elevator's brake system had never been

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140 'PSE nashi chûko kaden hanbai, jijitsu-jô yônin ni tenkan [Turn-around to practical acceptance of sales of used electrical goods without PSE marks]', *Yomiuri Shimbun*, 27 March 2006.

141 Takayuki Sakai, 'PSE: "Rentaru" yônin mo, chûko kaden no jishu-kensa nashi [PSE: Neither "rental" nor independent testing of used electrical goods]', *Mainichi Shimbun*, 4 May 2006.

142 'Teen Crushed as Elevator Abruptly Ascends', *Asahi Shimbun*, 5 June 2006.

143 'Elevator Firm Raided Over Deadly Lift Malfunction', *Japan Times*, 8 June 2006.

144 'Company's Lifts Have a Deadly History of Malfunctions', *Asahi Shimbun*, 9 June 2006. Reports soon followed of further fatalities or serious accidents involving Schindler's elevators in Hong Kong (2002) and the United States (2004): 'MPD Seeks Brake from Firm that Made Faulty Elevator', *Daily Yomiuri*, 9 June 2006.

forwarded to the two companies that took over the maintenance contract from 2005, when competitive bids for that contract were first held. Meanwhile, some elevator maintenance companies began offering free inspections of elevators, even those not manufactured by Schindler.[145] Japanese police also requested the Swiss parent company to provide a sample brake unit to try to re-enact the accident in Japan, and began investigating another near-accident in Osaka Prefecture involving the president of a small company carrying out maintenance work on another Schindler elevator in 2002.[146]

By Saturday, 10 June, complaints were becoming more widespread. The Elevator Maintenance Union called a general meeting and wrote to MLIT stressing the risks posed to maintenance workers due to the lack of information disclosure as under the recall system for automobiles, strengthened after the wave of recalls in 2000. A resident of the Tokyo apartment building where the youth was killed objected to Schindler's 'sloppy' handling of this accident, particularly its lack of explanation and apology. Others complained about Schindler's initial refusal, on commercial confidentiality grounds, to disclose even to MLIT how many elevators it had installed nationwide as well as the locations of elevators identical to those in the Tokyo apartment. However, the Elevator Manufacturers' Association began backing away from the union's request for fuller disclosure, claiming elevators involve complex products.[147] The MLIT Minister himself urged Schindler to 'respond sincerely to both the central and local governments', and the authorities to share information more effectively.[148] It emerged that Schindler had not attended a meeting of condo residents organised by Minato Ward, did not speak to the media after lengthy meetings with the ministry, and only belatedly agreed to provide a list of 8834 elevators it had installed in public and private facilities nationwide (including 6096 that it currently maintains). Schindler's headquarters announced that it would promptly dispatch a senior executive to Japan to address its 'problems in communication'.[149]

Schindler continued to attract bad press, as local authorities were forced to assist elderly residents to access their apartments after elevators were disabled for inspections. Some residents blamed cost-cutting for the installation of too few elevators, while others declared that Japanese-made products were superior. At a press conference in Tokyo on Monday, 12 June, the head dispatched from the Schindler headquarters' Elevator Division apologised for not supplying information adequately, explaining that

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145 'Ministry Starts Checks of All Schindler Elevators', *Asahi Shimbun*, 9 June 2006; 'Schindler Points to Maintenance', *Asahi Shimbun*, 9 June 2006.

146 'MPD Seeks Brake from Firm that Made Faulty Elevator', *Daily Yomiuri*, 9 June 2006.

147 'Accident Exposes Murky Side of Elevator Industry', *Japan Times*, 10 June 2006. Particularly on the scandal involving vehicles manufactured by Mitsubishi, which resurfaced around 2005 as well, see Nottage (2005) and Nottage (forthcoming).

148 'Elevator Maker Blames Others for Fatal Accident: Land Ministry Queries Schindler on Maintenance', *Japan Times*, 10 June 2006.

149 'Elevator Exec Coming to Japan over Teen's Death', *Japan Times*, 11 June 2006.

Schindler's priority had been to cooperate with the police to establish the cause of the accident. He also indicated that the reaction in Japan had been stronger than expected compared to other countries due the country's 'very high standards'.[150]

Somewhat ironically, the next day the police concluded that the likely cause of the Tokyo fatality was worn brake pads, evidence of a lack of maintenance, which was more generally evident in that elevator's case.[151] However, at the press conference, one of Schindler's Japanese managers had conceded that dangerous malfunctions in another elevator in a building in Hachioji (in Tokyo Prefecture) had ceased after the company replaced the control panel. On 14 June, Schindler called another press conference at MLIT to confirm that problems with this control panel had also occurred at another complex in Urayasu (in Chiba Prefecture), run by the Urban Renaissance Agency, as well as in Nagoya and Fukuoka.[152] On Friday, 16 June, Schindler announced that a defective control panel — potentially triggering lifts to ascend with the doors opening — had been included in 52 elevators shipped between 1991 and 1993, and that the two in Urayasu as well as another in Sagamihara (in Kanagawa Prefecture) had never been corrected. Of the remaining 49 that technicians attempted to fix in 1993, six elevators were revealed to have developed a similar problem — seemingly due to reinstalling the faulty control system when replacing components in 2003–04. However, the elevator in the 3 June 2006 fatality had been shipped in 1997 and had a different control panel.[153]

The *Asahi Shimbun* nonetheless kept up the pressure. On 15 June it reported that the 33 prefectures that had already reported back to MLIT had found 421 instances of malfunctions involving 218 Schindler elevators in their public facilities, and that Ibaraki Prefecture had already excluded the company from bidding on future elevator projects because it had failed to offer a 'sincere response' after an incident when a family was trapped in a public housing complex for an hour in July 2005.[154] On 21 June 2006, the newspaper argued that 'Schindler's bows don't go deep enough', quoting a reporter at Schindler's first press conference as implying that its apology had been made on the day of the World Cup soccer match between Australia and Japan, in order to reduce press coverage.[155]

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150 'Schindler Executive Apologises Over Fatal Accident', *Japan Times*, 13 June 2006.

151 'Schindler Elevator had Loose Bolts, Worn Pads', *Asahi Shimbun*, 14 June 2006.

152 'Schindler Lists Six Other Elevator Malfunctions', *Japan Times*, 15 June 2006; 'Schindler Elevator Shot Up Several Floors with Door Open', *Mainichi Shimbun*, 14 June 2006. Recall the problems this semi-public 'agency' also had with defectively designed condos (above).

153 'Schindler Blames Control Panel Software for Door Failure', *Asahi Shimbun*, 17 June 2006; cf 'Elevator Woes Blamed on Faulty Programming', *Japan Times*, 17 June 2006.

154 '421 Schindler Elevator Malfunctions Reported', *Asahi Shimbun*, 15 June 2006.

155 'Schindler's Bows Don't Go Deep Enough', *Asahi Shimbun*, 21 June 2006.

From July 2006, this major product safety saga continued to unfold in the media, in MLIT and local government offices, police task forces, and Schindler's premises in and outside Japan, as well as the offices of various legal advisers. There are many parallels and a few contrasts with the other three case studies sketched above. These include the limited scope for applying tort law — at least until causal chains are clarified, often by criminal investigations into professional negligence causing death — and the now characteristically rapid exposure of problems in regulatory systems, including tensions between local and national governments. In this case of 'Schindler's Lifts', a particularly prominent keyword has been 'sincerity' (*sei-i*). The company — and indeed the entire corporate group — is widely seen as having failed to respond with genuine concern and appropriate measures. Those affected clearly still expect a prompt meeting and an apology, at least for the inconvenience and mental trauma caused, even if the company is later partly or even fully exonerated of legal liability. Sincerity also demands listening to those affected and offering detailed disclosure in return, as opposed to generalised statements (like Schindler's initial statement that most accidents are caused by misuse or poor maintenance). It also often means compensation as well, or — less in the direct shadow of the law — some 'consolation money' (*mimaikin*) for injury or inconvenience. For many, the primary objective in obtaining a sincere response remains to prevent more widespread loss, restoring socio-economic relationships to a sounder footing. These are recurrent factors and themes in Japanese law and society, evident in many other countries as well.[156] However, the precise mixture differs over space and time. In Japan, the new context involves generally heightened expectations regarding safety, and as well as more rapid involvement of a range of government actors in the service of broader constituencies.

Towards Comprehensive Product Safety Systems in a Re-regulatory World

It is too early to offer more than tentative conclusions from these four recent case studies, for the following reasons. First, events are still unfolding — particularly regarding Schindler's elevators, as of the time of last writing (early September 2006). Nonetheless, the broad contours of each problem area are fairly evident. Second, especially when product safety risks are involved, those interested in social psychology have also pointed out that social 'norm cascades' tend to snowball, generating over-reactions and over-regulation.[157] On the other hand, the response to asbestos has been muted — many would say too muted — over three phases in Japan: first in the mid-1980s regarding schools, then in the mid-1990s after the Hanshin Earthquake, and more comprehensively only from 2005. Third, it is always risky to over-generalise from such a small sample of cases. Indeed, all four problem areas arguably involve products involving relatively small risks of harm, but potentially very serious consequences — mostly life-threatening, even for many electrical

156 Cf generally Reich (1982) and Nottage (2004) with Wagatsuma and Rosett (1986).

157 Sunstein (2002).

goods. This category of situations is generally more suited to direct safety regulation.[158] Nonetheless, it remains significant for example that Japan has not followed the United States in addressing problems like asbestos primarily instead through the tort law system.[159] Thus several broader lessons for comparative consumer law and legal theory can already be drawn from Japan's latest round of product safety problems.

At the most theoretical level, events confirm that Japan too is 'Living in the World Risk Society'.[160] Ulrich Beck convincingly contends that key actors in modernity's triumph over the last century or more — scientific and other expert communities, rationalistic companies and governments — not only manage risks. They also *create* new risks and expectations, by promising ever-greater security along with more goods and services. This irony challenges established ideas about governance and generates intense political reactions. Further, this contemporary 'risk society' is now driven by worldwide anticipation of global catastrophes. Such perceptions of global risk become characterised by:

(a) 'de-localisation' (causes and consequences not easily limited by geographical space, effect over time, or ascription of causality);
(b) 'incalculability' (with scientific uncertainty over consequences generating normative dissent); and
(c) 'non-compensability' (leading instead to the principle of precaution through prevention).

Globalisation also highlights more potential for a 'clash of risk cultures'. Some parts of the world are particularly concerned about some issues (eg terrorism in the United States), while others fret over different issues (eg the environment and food safety in the European Union). Yet global risks force communication across differences and borders — a new cosmopolitanism — and failures of nation-states, opening up the possibility for more global governance institutions. For Japan, the asbestos saga provides a particularly vivid illustration of the challenges of this 'world risk society'. The country's risk culture also shares much more with the European Union than the United States, yet reactions remain framed by its own social, economic and legal traditions.

More specifically, Japan's recent product safety problems suggest the need to anticipate and respond to safety issues from a holistic perspective. As well as the role of insurance and markets (including a backdrop of corporate governance and broader CSR), and regulation-setting and enforcement (impacting on workers and the environment, as well as product safety in the narrower sense), safety system design and response need to take into account the potential for damages claims against public authorities for mismanagement, parliamentary inquiries and criminal prosecutions, and civil

158 Sarumida (1996).

159 Tanase (2006); Spender (2003).

160 Beck (2006), expanding on Beck (1999).

liability exposure of firms.[161] Recent events highlight that Japan's mix can still engage more public than private initiatives (see Table 2).

Table 2: Japan's 'Re-regulatory' Mix for Recent Safety Problems

Safety-enhancing means/features	*Asbestos*	*Buildings*	*(Consumer) Electrical Products*	*(Schindler's) Lifts*
Public				
Police/prosecutors		XX		XX
Parliamentary inquiry		X		
Safety regulation (products, labour, environment)	XX	XX	XX	
State relief/ compensation	XX	X	[assistance with testing]	
State liability	X	X		
Private				
Private liability (tort, contracts)	X	XX		X
Markets/insurance		[Under review]		[New entrant]
Corporate governance/CSR	[Kubota as leader; insolvencies]	[Huser insolvency]		

Generally, Japan has tended to rely more on criminal law and public liability. Especially over the last decade it has been building up a more functional tort litigation system, but its role in compensating victims still seems to be valued more than its potential to deter wrongdoing.[162] The nation has also left much to the private sector, at least sometimes in cahoots with certain regulators or political factions. Yet how those parts fit in needs readjustment too, as economic reforms and political realignments proceed. Such readjustment will also be affected by the type, extent and timing of product safety problems that will no doubt continue to surface in this industrialised democracy increasingly open to overseas trade, investment and policy-making models. Japan's re-regulation in this field may therefore still

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161 Cf further generally Zandankai (2003, 2006).

162 Cf in Anglo-American law recently, Cane (2002). On the relationship between civil and criminal law in Japan, see Leflar and Iwata (2006); Nottage (2007b). In environmental regulation, however, some American writers tend to perceive less criminal law enforcement than in the United States: see, for example, Kondrat (2000).

end up diverging from the European Union, let alone more extreme 'liberal market economies' with distinctive legal systems as in the United States.[163] Nonetheless, domestic transformations in Japan, heightened safety expectations and broader global trends since the 1990s will probably continue to generate powerful forces for considerable convergence.[164]

In addition, Japan's recent debacles confirm a more universal lesson that product safety cannot be left completely to market forces — reputation effects, insurance and the like — because they often fail to generate optimal safety incentives and outcomes.[165] This is evidenced by the cases of more or less *under-regulated* asbestos, building design and elevator supply. Insurance is either not provided (as when Japanese insurers explicitly excluded cover from the mid-1980s when at least they, and the then closely intertwined Ministry of Finance, became aware of the health and property risks involved), or not taken up (as in the low rates of voluntary building insurance so far in Japan).[166] Hardly any electrical goods are subjected to voluntary certification by an industry association and its insurer for payouts when such products prove defective.[167] Despite not applying for certification, some dominant firms or industry sectors may encourage standard-setting by industry associations to pre-empt government setting of higher safety standards.

At the other extreme, however, heavy-handed interventionism runs the risk of *over-regulation*, or regulation for the wrong reasons (even possibly 'capture' by certain industry groups). The latter is suggested by the PSE debacle, since electrical goods manufacturers were increasingly feeling the economic pinch in Japan by the turn of the twenty-first century, while retaining much greater political clout than the dispersed and nascent industry for secondhand goods.[168] The strong public response in the Schindler's Lifts case also raises the possibility of local manufacturers mobilising the government to come on strong, more to squeeze out a new foreign competitor than raise product safety standards significantly for consumers, although Schindler's inept responses and original (in)actions remain of major concern.

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163 Nottage (2001).

164 Unlike the case of Japanese tobacco regulation described by Feldman (2006), a norm of complying with international standards seems much less important (especially in the case of asbestos) than a broader concern about product safety. The latter has been gathering momentum since the late 1980s, but dates back to the 'still-birth' of PL around the 1970s: Nottage (2004), Ch 2. Safety concerns are also linked to an increasingly pervasive 'world risk society' analysed by Beck (1999, 2006).

165 For example, Howells and Fairgrieve (2005), Ch 1.

166 See the Table in Part III above and Awano (2006) pp 155–58.

167 Cf Ramseyer (1996).

168 By contrast, Japan's comparatively slower and stricter regulation of medical devices risks creating more health risks (by impeding patients' access to more modern devices already often approved in the United States and the European Union). This seems to be due more to insufficient government personnel (in numbers and expertise) than to protectionist impulses to support certain local manufacturers. See Kelly (2006).

Instead, carefully balanced and structured 're-regulation' seems to provide the middle way forward to minimise risks and maximise overall socio-economic gains in increasingly complex industrialised democracies.[169] A final broad lesson therefore concerns the optimal design and enforcement of a re-regulatory regime. In general consumer product safety, the best model seems to be the revised EU Product Safety Directive.[170] It puts the primary onus on businesses to ensure they do not supply unsafe products, rather than relying on government to intervene — often too late, or sometimes too early — to restrict supplies of products it finds to be unsafe. Firms themselves or their industry associations are often in a better position to monitor and address evolving safety risks, and anyway need to take those into account to minimise exposure under product liability or other regimes. However, the 'responsive regulation' model allows and requires the government to intervene if firms are betraying such expectations, deliberately or otherwise.[171] This means more information flows, with manufacturers and suppliers devising systems to monitor safety problems and disclose potentially serious problems to the authorities. The latter need to audit such information, and to have credible powers to intervene (often collaboratively) and sanction (if nonetheless necessary — for example, through compulsory recalls and stiff fines or prison sentences). All this approximates key features of the revised EU Directive. It also operates in the context of more long-standing EU funding for consumer groups in key standard-setting organisations, which might generate more credible 'trilateralism' within a 'responsive regulation' model.[172]

This model should also work much better in Japan than the Consumer Product Safety Law (No 31 of 1973), very similar to the *Trade Practices Act 1974* (Cth) Pt V Div 1A. On paper, that law gives METI the power to recall products, but it did not provide adequate means to obtain good information to credibly threaten intervention. Combined with a weaker consumer voice until recently, this explains why METI has only ever ordered two mandatory recalls, the first in November 2005 involving Matsushita kerosene heaters, and a second in August 2006 for Paloma gas water heaters. These latest events added further pressure for comprehensive reform.[173] On 28 November 2006, the law

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169 Nottage (2005b).

170 2001/95/EEC, in force in most EU member states since 2004.

171 See generally Ayres and Braithwaite (1992), extended in Nottage (2006c) to product safety reform discussions in Australia (and possibly also Japan).

172 See Howells (2000). As an anonymous reviewer of this article pointed out, Ayres and Braithwaite (1992) make little reference to the resource requirements of public interest groups; and Braithwaite (2005), p 74 now seems to envisage a lesser role for such groups. The resource constraints of public interest groups remain a concern in Japan, despite new legislation (Pekkannen, 2000), but this entire issue deserves further theoretical and empirical study.

173 'Paloma Hit with Emergency Recall Order', *Japan Times,* 29 August 2006; Junichi Abe, 'Product Safety Being Neglected', *Daily Yomiuri Online*, 5 September 2006. On Paloma and subsequent legislative reforms, see Nottage(2008) and 'Editorial: Accountability in Product Safety', *Japan Times*, 15 January 2007.

was amended to oblige manufacturers to report to METI any product-related 'serious accident'. However, the amendments did not add an extra requirement to supply only safe goods, as in the EU.

The EU directive, moreover, is a comprehensive 'horizontal' regime, applying to almost all consumer products. Interestingly, Article 2(a) excludes products supplied that are to be repaired or reconditioned, as well as antiques. However, when implementing the directive in national regulations with effect from mid-2005, the United Kingdom extended its scope to antiques. Yet this may be impermissible under EU law, if the European Commission brings proceedings against the United Kingdom and the European Court of Justice agrees that the directive was intended as a 'maximal harmonisation' instrument. Meanwhile, antique dealers in the United Kingdom may be able to limit their liability by appropriate labelling and warnings. Another useful specific lesson for Japan, not yet applied in the Den'an Law, is that the revised directive even prohibits the dumping of unsafe products on overseas markets. Article 2(a) also extends coverage to 'any product — including in the context of providing a service — which is intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers even if not intended for them'. This should capture asbestos used at least within homes as well as most electrical goods, including elevators and even perhaps any faulty control panel parts, either at the time of initial installation or during later supply.[174] However, Recital 9 explains that the directive does not cover services per se, as opposed to 'products that are supplied or made available to consumers in the context of service provision for use by them'. Hence coverage would not extend to companies providing elevator maintenance (or operating elevators independently of the elevator supplier itself), nor would it apply to those providing faulty design services for a building project.[175]

Nonetheless, a horizontal regime like that of the directive helps fill in many gaps within 'vertical' or product/industry-sector product safety regulations. Such gaps often still emerge — particularly in Japan, where rivalry among various government agencies has been pervasive, as its asbestos saga shows. Unfortunately, despite the amendments late last year, Japan still has an inadequate general Consumer Product Safety Law dating back to the early 1970s. This is all the more so in countries like Australia, but the legislation there is still being openly reviewed in light of the new EU model. It may be difficult for Japan to keep following this lead, but the latest wave of product safety issues further undermined trust in many parts of the government, even the still mighty METI. More comprehensive revisions to the Consumer Product Safety Law along EU lines should, in turn, underpin better design and implementation of sector-specific regulatory regimes.

Convergence on the EU's emerging global standard promises significant efficiency and legitimacy gains for both Australia and Japan, as they seek to

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174 Cf, for example, *Theo Holdings Pty Ltd v Hockey* [2000] FCA 665 (under TPA s 65F(1)(a) fire doors bought by builders for installation in homes may be 'likely to be used' by consumers, although not so 'intended').

175 See further Fairgrieve and Howells (2006), esp p 61.

deepen and broaden their relationship through a full-scale FTA.[176] Such bilateral agreements do not demand identical product safety risk assessments in each country, nor even a similar regulatory framework to generate them. However, they are likely to encourage the parallel emergence of such a framework, especially as another broader pattern noted in contemporary global business regulation is that 'regulation of the environment, safety and financial security have ratcheted up more than they have been driven down by globalisation'.[177] The probability of such an outcome becomes even stronger as Japanese firms in or dealing with the 25 EU member states become entangled in the revised EU Directive regime, and generally bolster their corporate compliance programs in an increasingly complex re-regulatory world.[178] New global governance mechanisms, reaching beyond the modern nation-state, are needed for our 'world risk society'.[179]

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176 See Nottage (2005a, 2006a).

177 Braithwaite and Drahos (2000), p 5. They note (at p 541): 'Global modelling [of regulatory ideas and institutions] often proceeds by piggy-backing on a bilateral agreement initially settled on the basis of a significant dose of economic coercion.' The spread of such a common model seems all the more likely when the agreement involves mostly strategic cooperation.

178 Cf Braithwaite and Drahos (2000), noting also frequent instances of 'corporate innovation — corporate modelling — state regulation' (p 543). State regulation from another sphere (eg 'continuous disclosure' of bad news that listed Australian companies must make to market actors and regulators) may improve in-house legal risk management generally, in turn reducing opposition to consumer product safety monitoring and disclosure obligations. On evolving trends in corporate compliance in Japan, see Kitagawa and Nottage (2006). Several commentators have already begun to link up issues highlighted by Japan's fraudulently designed buildings scandal with the collapse of the Livedoor corporate group in early 2006. Compare, for example, Sankei Shimbun Shakaibu (2006) with Koshi (2006). How Japan's firms might transform themselves into what Parker (2002) advocates as 'open corporations', combining efficiency with legitimacy in dialogue with regulators, is another issue common to countries like Australia that deserves more detailed comparative study.

179 Beck (2006), expanding on Beck (1999); see also Beck (2005).

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State Compensation Law (No 125 of 1947)
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Australia
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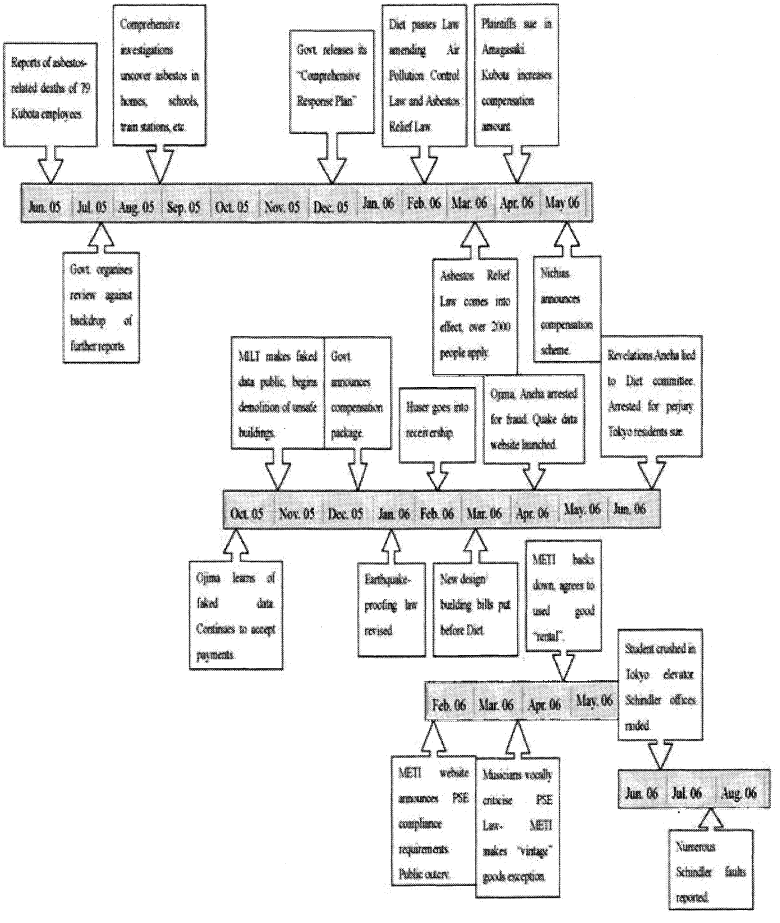
Trade Practices Act 1974 (Cth)

Appendix 1: Timeline for Case Studies



Appendix 2: Implementing Japan's Electrical Appliance and Materials Safety Law

	Old mark	New marks	Applicable items	End of grace period
Specified electric appliances			Electric heated toilet seats, electric storage water heaters, etc. (29 items; subdivided into 32 items)	March 31, 2006
			Electric pumps, electric massagers, DC power systems (AC adapter), etc. (20 items; subdivided into 36 items)	March 31, 2008
			Wiring devices, such as earth leakage breakers and sockets, etc. (16 items; subdivided into 42 items)	March 31, 2011
Non-specified electric appliances	No mark		Electric toasters, electric refrigerators, electric washing machines, radios, televisions, video tape recorders, electric musical instruments, audio equipment, electric game machines, etc. (225 items; subdivided into 227 items)	March 31, 2006
			Electric cooking hot plates, electric air conditioners, electric air cleaners, electric power tools, incandescent lamps, etc. (62 items; subdivided into 65 items)	March 31, 2008
			Wiring devices, conduits, etc. (13 items; subdivided into 45 items)	March 31, 2011