A Step Too Far for Gatekeepers?

Statutory Auditor Liability for Financial Misstatements in Japan and Australia

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I. INTRODUCTION

Modern financial markets are characterised by complexity. As investors prepare to meet the challenge presented by cross-border transactions and bespoke financial products, there is an increased importance that the information they rely upon be up-to-date and accurate. Possessing neither the technical expertise nor the knowledge necessary to determine the accuracy of a company's disclosures, however, investors have come to substantially depend on intermediaries shielding them from imprudent involvement with companies whose information is of an unknown quality.

In this regard, the auditing profession is the archetypal gatekeeper, granting companies access to investors only after certifying these companies' disclosures for accuracy. Ideally, auditors would be expected to discharge this role without the need for external supervision. However, as incidents of auditors being compromised by the very companies they are meant to oversee continue to arise in a range of jurisdictions, it is necessary to consider the extent to which auditors should, as a matter of deterrence and fairness, be made liable for their failure as gatekeepers. In short, auditor liability should form part of the response to the question, 'who watches the watchers?'

Toshiba's accounting scandal, as brought to light in 2015, suggests significant shortcomings in the way Japan ensures auditors perform as gatekeepers. Following an order from the Financial Services Agency (*Kinyū-chō,* 金融庁) (FSA), an independent investigative committee discovered that Toshiba's management had for a lengthy period of time perpetrated accounting fraud under the supposed watch of its auditor, Ernst and Young (*Shin Nihon Yūgen Kansa Hōjin,* 新日本有限監査法人) (EY).[1] The Toshiba accounting scandal is only the latest in a string of accounting scandals that has afflicted Japan's corporate landscape since the onset of the 21st century, and it is all the more shocking because of Toshiba's prior reputation as an exemplar of corporate governance.[2]

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1 T. ASO, press conference by Deputy Prime Minister, Minister of Finance, and Minister of State for Financial Services (21 July 2015), *http://www.fsa.go.jp/en/conference/minister/2015/20150721.html.*

2 B. ARONSON, The Toshiba Corporate Governance Scandal: How Can Japanese Corporate Governance be Fixed?, JURIST (in Collaboration with the University of Pittsburg) (10 August 2015).

Yet the regularity with which Japan has faced accounting scandals is at odds with the apparent strength of its regulatory framework. Even as the auditing profession has been successful in many English-speaking jurisdictions (in particular, America, the UK, Canada and Australia) in reducing the liability its members are exposed to, equivalent movements to reduce auditor liability have yet to appear in Japan. Amongst these, the most prominent might be the adoption of a proportionate liability approach to calculating an auditor's liability for investor loss caused by financial misstatement. Despite several jurisdictions switching over to a proportionate liability approach, Japan continues to steadfastly calculate auditor liability for financial misstatements on the basis of joint and several liability, holding auditors liable for the full measure of an investor's loss along with other defendants.

This paper focuses on the way Japan makes auditors liable to investors for losses caused by financial misstatement under the *Financial Instruments Exchange Act* (*Kinyū shōhin torihiki-hō,* 金融商品引法)[3] (FIEA), and in particular how its application of joint and several liability affects that liability. To provide a clearer picture on what these effects look like, this paper will compare Japan to the situation for auditors in Australia under its provisions on misleading and deceptive conduct and the proportionate liability scheme as found in the *Corporations Act 2001* (CA). Through this process, this paper hopes to make some observations as to how auditor liability should be used to encourage auditor performance as gatekeepers in Japan.

Before continuing any further, this paper will review the following preliminary questions in order to better understand the importance of equipping investors with an action against auditors for financial misstatements:

1. Why are auditors important to investors?
2. Why should auditors be liable to investors?
3. Why is apportionment (of liability) important?
4. Why Japan? Why Australia?

1. Why Are Auditors Important to Investors?

Describing auditors as gatekeepers firmly fixes attention upon the profession's function as a safeguard for financial markets, achieved by performing their namesake responsibility to audit information disclosed by companies so as to ensure that this financial information is in compliance with applicable legal and accounting standards. Investors, reassured that companies whose disclosures fail a rigorous examination by a reputable third party are barred from accessing the market, can be confident that the audited information disclosed by companies is reliable. Where an investor is not confident that

3 Law No. 25/1948, as revised by Law No. 65/2006.

the auditor is an effective sentry guarding access to the financial markets, however, there is little reason for the investor to regard the financial markets themselves as representing a safe environment for investment.

2. Why Should Auditors Be Liable to Investors?

One of the facts that incensed the public following the release of the initial report on the Toshiba accounting scandal was the committees' exoneration of EY of any illegal (but not unethical) misconduct.[4] In response to the publics' dissatisfaction, the FSA followed up with formal sanctions against both Toshiba and its auditor.[5] At a high level, the FSA has demonstrated its resolve to improve the performance of auditors by proposing a "Governance Code" specifically applicable to 'auditing companies' (*kansa hōjin,* 監査法人).[6]

Since its initial consultations with the profession about the Auditor Governance Code, the FSA has been consistent in its belief that Japan's existing regulatory framework has simply not kept pace with the changes associated with rise of the behemoth 'Big 4' auditor companies (*yondai kansa hōjin,* 四大監査法人), which have come to dominate the provision of auditing services to listed companies[7] (here in Japan and elsewhere). In proposing the Auditor Governance Code, the FSA appears to be responding to a perceived lack of transparency in contemporary audit practices that has paralleled the rise of the Big 4 auditors.[8]

It is uncertain, however, whether the Auditor Governance Code will translate into an improvement of the status quo for investors. As a profession that has traditionally enjoyed the luxury of self-regulation, it is unclear

4 Independent Investigation Committee for Toshiba Corporation, Investigation Report (20 July 2015).

5 T. ASO, Press conference by Deputy Prime Minister, Minister of Finance, and Minister of State for Financial Services (8 December 2015), *http://www.fsa.go.jp/en/conference/minister/2015/20151208.html.* Financial Services Agency, Disciplinary action against an Audit firm and Certified Public Accountants (22 December 2015), *http://www.fsa.go.jp/en/news/2015/20151222-2.html.*

6 Financial Services Agency, *Kansa hōjin no gabanansu kōdo ni kansuru yūshoku-sha kentō-kai (dai 1-kai),* 監査法人のガバナンス・コードに関する有識者検討会（第１回) (15 July 2016), *http://www.fsa.go.jp/singi/governance_code/gijiroku/20160715.html.*

7 Financial Services Agency, *Kansa hōjin no gabanansu kōdo no sakutei ni tsuite ("kansa hōjin no gabanansu kōdo ni kansuru yūshoku-sha kentō-kai" (dai 1-kai) giji shidai no haifu shiryō 1),* 監査法人のガバナンス・コードの策定について（「監査法人のガバナンス・コードに関する有識者検討会」（第１回）議事次第の配付資料１）(15 July 2016) slide 2, *http://www.fsa.go.jp/singi/governance_code/siryou/20160715.html.*

8 Financial Services Agency, *supra* note 6.

what a non-binding corporate governance code will do other than affirm the latitude auditors already enjoy in regulating their own activities.

Similarly, an approach of relying solely on government regulators to pursue auditors who have breached their duties presents its own problems. While Japan has traditionally relied on a model of public enforcement to regulate its financial markets,[9] the dissatisfaction on display following the Toshiba accounting scandal suggests that a difference of opinion, or 'expectation gap', very much exists between the duties investors assume auditors will undertake and those expected by the FSA and the law.[10] Investors frustrated with the way regulators have treated auditors may choose to voice that frustration by exiting the market altogether if an alternative means of obtaining relief is not forthcoming.

The very fact that investors have typically shied away from personally enforcing their rights in Japan[11] presents an opportunity whereby improvements in the delivery and availability of private enforcement can have a marked effect on the regulation of auditors in Japan. Further, the willingness of foreign investors to resort to litigation to enforce their rights in the cases of the Toshiba and Olympus scandals[12] suggests that an improvement in Japan's private enforcement mechanisms in respect of deficient auditing will increase the attractiveness of the Japanese economy to a segment of investors that can only be expected to grow in importance as local demand diminishes over time.

3. Why is Apportionment of Liability Important?

However, in any attempt to amend its rules to increase the attractiveness of its markets to investors, Japan must also avoid inadvertently creating an environment that is excessively hostile to the auditing profession.

A consistent theme in the auditing profession's argument against joint and several liability has been an auditor's susceptibility to liability for a claimant's entire loss, irrespective of the scope of the auditor's responsibility during the audit. The auditor's role (as advocated by the auditing profession) is that of "watchdog, not bloodhound",[13] and the potential that an auditor will be jointly and severally liable where a company has submitted

9 M. WEST, Why Shareholders Sue: The Evidence From Japan, Michigan Law and Economics Research Paper 0–10 (2000) 44–47, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=251012*.

10 M. ANDENAS/I. CHIU, The Foundations and Future of Financial Regulation: Governance for Responsibility (Abington 2014) 111–133.

11 WEST, *supra* note 9, 2–3.

12 J. FUJITA/O. TSUKIMORI, Foreign Investors Sue Toshiba over Accounting Scandal, *Reuters* (13 October 2016), *http://www.reuters.com/article/us-toshiba-accounts-lawsuit-idUSKCN12D01W*.

inaccurate or fraudulent information for the audit is a hard pill for the profession to swallow. In a nutshell, the profession argues that joint and several liability magnifies the scope of its liability in excess of what its responsibilities as an auditor should be.

Under a joint and several approach to apportioning liability, the auditing profession argues that it is exposed to investors who are encouraged to file suit against auditors based on their capacity to pay, rather than on whether the auditor bore any substantial responsibility for the investor's loss.[14] A rational investor primarily interested in recovering a loss is incentivised under joint and several liability to join anyone with capacity to satisfy the claim that has been brought against the now likely financially depleted company, no matter how tenuous this party's connection to the corporate misstatement. This concern was a common refrain particularly in jurisdictions where liability insurance is a professional requirement for auditors, with advocates for the profession warning that opportunistic claims brought by investors against auditors jepoardised the latter's long-term capacity to operate by driving up insurance premiums to unaffordable levels.[15]

A holistic approach to reforming Japan's regulations over auditor activities will thus need to balance an investor's recourse against auditors while at the same time ensuring that an auditor's liability risk does not compromise the profession's longevity. For while investors are unlikely to enter a market that prevents them from holding liable those auditors who fail as gatekeepers, they are equally unlikely to enter a market whose conditions expose auditors to such a level of liability risk that the profession exits the market altogether. From an investor's standpoint, the only thing arguably worse than an ineffective auditor may be the absence of any auditor at all to test the reliability of corporate financial statements.

4. Why Japan? Why Australia?

A comparison between Japan and Australia may at first blush seem unusual. A natural assumption might be to compare Japan with the standard bastions of commerce found in the US or the UK. In fact, the most recent cases involving cases of auditor liability have not occurred in the US or the UK, but rather in Canada and Australia.[16] As the proportionate liability scheme

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13 R. MEDNICK / J. PECK, Proportionality: A Much-Needed Solution to the Accountants' Legal Liability Crisis, Valparaiso University Law Review 28 (1994) 882.

14 D. MCNAIR, Proportionate Liability, PriceWaterhouseCoopers Australia (2016) 2.

15 MEDNICK / PECK, *supra* note 13, 888–900.

16 D. AUBIN, Analysis: Knives out for Auditors as Class Actions Go Global, Reuters (21 March 2013), *http://www.reuters.com/article/us-usa-accounting-lawsuits-idUSBRE92K0QB20130321.*

under the CA enters into its thirteenth year of operation, Australia lays claim to being home to one of the longest running schemes of proportionate liability, commenced in large part at the behest of the auditing profession. Informed by developments within the auditing profession both at home and abroad, Australia's proportionate liability scheme continues to be the subject of contemporary discussion.[17] Australia's proportionate liability scheme represents a system of apportioning liability that is diametrically opposed to the joint and several approach adopted by Japan. A comparison between Japan and Australia thus promises to yield useful lessons for the improvement of auditor regulations in both countries.

The remainder of this paper will be as follows: Chapter 2 will examine auditor liability, beginning with their role as gatekeepers, and consider how that role may influence the decision on the best way to apportion auditor liability for financial misstatements.

Chapter 3 will then move on to examine the situation in Australia and Japan, concentrating on the developments in each country that have led to their current approaches to apportioning liability for financial misstatements.

Chapter 4 will then look back on the material introduced in Chapters 2 and 3 to consider, first, how Australia and Japan's apportionment approaches interact with their statutory prohibitions against financial misstatements and, second, whether amending the actions for financial misstatement under the FIEA would align auditor liability in Japan more closely with auditors' gatekeeping responsibilities.

This paper will conclude in its final chapter with a brief summary of the principal findings.

II. AUDITORS, GATEKEEPER LIABILITY AND APPORTIONMENT

When deciding how liability should be apportioned, jurisdictions have traditionally been presented with a choice between apportioning on a joint and several basis or on a proportionate basis. What is unclear is which of these options is preferable for jurisdictions that seek to shape auditors' liability towards investors around their responsibilities as gatekeepers.

This chapter examines the considerations that should underpin the scope and extent of auditor liability and how it should be apportioned, by explaining the following concepts:

1. Auditors as 'reputational intermediaries';
2. The necessity of auditor liability as a deterrent; and
3. Gatekeeper liability and apportionment of liability.

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17 MCNAIR, *supra* note 14.

1. *Auditors as 'Reputational Intermediaries'*

While doubtless capable of an endless number of iterations, the eminent scholar John Coffee provides a comprehensive description of the auditor's essential quality as a "reputational intermediary who provides verification or certification services to investors." [18] The material difference between the auditor's say-so that a company's financial statements are trustworthy and the company itself proffering the same opinion is the auditor's public reputation as an independent expert standing apart from the company. In contrast with the inherent suspicion that company management might withhold or manipulate information in the name of self-interest so as to maintain a positive reputation amongst investors, the market accepts the auditor as gatekeeper on the premise that the profession's reputation for independence and impartiality inoculates it from similar allegations.

Financial markets regulators across jurisdictions routinely acknowledge the auditor's superiority as the market's gatekeeper is reliant on the profession's reputation for impartiality. In Japan, the FSA's proposed Auditor Corporate Governance Code was mindful of concerns that the Toshiba accounting scandal had eroded the public's trust in the auditor's impartiality.[19] Likewise, market regulators in Australia and the US have noted at various points that auditors' assumption of gatekeeper responsibilities primarily trades on the strength of their reputation as impartial reviewers of corporate disclosures.[20] Finally, the auditing profession itself has commented recently on the need for its members to police their own actions in an effort to avoid a perception that the profession identifies too closely with the companies it is responsible for monitoring.[21]

However, it is important not to overlook that under Coffee's definition the auditing profession's reputational currency for independence needs to be accepted not by the company, but by the investor. An auditor that investors do not trust as a reliable source of information cannot be relied upon to certify that a company's financial statements are correct. It follows that if the inves-

18 J. COFFEE, Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reform, Columbia Law and Economics Working Paper No. 237 (September 2003) 11.

19 Financial Services Agency, *supra* note 6.

20 J. PRICE, ASIC Compliance: How Internal Audit Can Strengthen the Corporate Governance Framework, Internal Audit Financial Services Forum Institute of Internal Auditors – Australia (15 November 2012). M. WHITE, Remarks at the Securities Enforcement Forum (9 October 2013), *https://www.sec.gov/news/speech/spch100913mjw*.

21 R. KRAVTIZ, Auditors at the Gate: Restoring the Reputational Capital of the Profession, White Paper College for Financial Planning (3 November 2014) 15–16.

tor refuses to accept the auditor's reputation for independence, there is then little reason for companies to rely on the auditor as a gatekeeper.

2. *Auditor Liability as a Contingency when the Reputational Incentive Fails*

In order to understand the purpose of making an auditor liable to the investor for financial misstatements, we must first fully appreciate the auditor's need to maintain an independent reputation amongst investors.

Whilst the auditor is reliant on its reputation amongst investors in order to continue acting as gatekeeper, it is the company which commissions the auditor to review its financial statements in exchange for payment. The company's responsibility for paying the auditor thus creates a competing incentive that may prompt auditors to engage in conduct inconsistent with their reputation.[22] Further, the practice whereby large auditing firms also provide non-audit services to the very same types of companies they audit[23] only serves to enhance the incentive for them to preserve their relationship with companies.

An auditor may abuse its position in service of the company's interests by failing to report a financial misstatement once discovered or by conducting the audit to a standard below what is required under relevant professional standards. In either event, the effect is that the investor is placed at risk of suffering a loss given that they are relying on inaccurate information when making investment decisions.

Certainly, protections around auditor independence that serve to regulate and restrict the relationship between auditors and the companies they are meant to audit (e.g. restricting the sort of non-audit services an auditing firm can provide to a company it audits or requiring auditing firms to 'rotate' auditors to prevent the same individual auditors from servicing the same clients) can reduce the temptation for auditors to betray their reputation for impartiality; however, these measures do not provide an answer for what should be done once an auditor forsakes the gatekeeping obligations it owes towards the investor in favour of serving the company's interests. It is therefore necessary that investors possess a 'stick' they can rely on to hold auditors liable when they abandon their posts as gatekeepers after the 'carrot' of maintaining an independent reputation fails to be sufficient.

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22 KRAVITZ, *supra* note 21, 4.

23 M. FOGARTY/L. ALISON, Sleepers Awake! Future Directions for Auditing in Australia, UNSW Law Journal 25 (2) 2002, 408–433.

3. *Restricting Auditor Liability in Correspondence with their Duties as Gatekeepers*

At the same time, it is important that the scope of auditor liability does not extend so far as to hold auditors responsible for financial misstatements they did not disseminate. As outsiders to the companies they audit, all auditors are reliant to some extent on the company providing accurate information to be audited.[24] The auditor's presence or conduct does not cause a company to misrepresent its true position (either fraudulently or otherwise) in the preparation of its financial statements, and it would be an uncommon situation to hold auditors liable for every failure to discover a misrepresentation in a company's financial statement.

Prevailing standards for auditing and accounting often fall back on the standard of a "reasonable auditor" as the standard an auditor is required to meet, implicitly precluding auditor liability when the discovery of a misstatement would not have been expected by a reasonably competent member of the profession.[25] Alternatively, jurisdictions may seek to make auditors responsible only for financial misstatements that are "material" in nature.[26] Accordingly, returning to the situation described in the paragraph above where the company's financials themselves include the misstatement, the auditor should only be liable for failing to discover the error if that failure represents a contravention of the legal standard that an auditor can be expected to adhere to.

A final aspect to consider in the situation above where the audited company has perpetrated a financial misstatement which the auditor has subsequently failed to detect in breach of the applicable standards, is whether the company and/or the auditor should be held liable for their conduct. If this is answered in the affirmative, the question that follows is how the company's misstatement affects the extent to which the auditor is liable, and vice versa. This is of course the issue dealt with in how liability is apportioned, to which we shall turn to shortly.

The consequences that potentially follow if an auditor's liability operates inadequately within the scenarios described above are not limited to jeopardising the auditing profession's long-term capacity to operate in in a given market (as was discussed in the opening chapter).[27] Courts and equiva-

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24 R. SHINOTO, *Zaimu shohyō kansa ni okeru kansa hōjin no yakuwari to sekinin: kansayaku-tō to no renkei wo daizai toshite,* 財務諸表監査における監査人の役割と責任：監査役等との連携を題材として, Reitaku International Journal of Economic Studies 23 (2015) 27.

25 ANDENAS / CHIU, *supra* note 10, 115.

26 ANDENAS / CHIU, *supra* note 10, 115.

27 Section 1 of this paper, at page 6.

lent decision-makers responsible for determining an auditor's responsibility for financial misstatement may feel bound to an "all-or-nothing" dilemma if forced to apply rules the court believes mandate a minimum level of liability exceeding the auditor's actual misconduct.[28] This may be a prevalent problem particularly for newer statutory-based actions making the auditor liable for financial misstatement in situations where the parent statute in older more established areas of the law has yet to establish some of the mechanisms to respond to the all-or-nothing dilemma.[29] A corollary to this may even be an erosion of the auditing profession's willingness to self-regulate if an auditor believes that admitting to even a minor indiscretion as a gatekeeper exposes it to a disproportionate penalty.

4. Gatekeeper Liability and Apportionment

What is needed then is a concept of liability that encourages an auditor to stay the course as a gatekeeper when the reputational incentive is weakened, but one that at the same time ensures the auditor's liability risk does not exceed its remit as a gatekeeper. The problem for jurisdictions presented with a binary choice between joint and several or proportionate liability, however, is that neither approach alone appears capable of meeting this objective.

On the one hand, proportionate liability responds to the varying degrees of responsibility an auditor may assume for a financial misstatement. As outlined immediately above, an auditor may be completely free of responsibility (where the financial misstatement is within the company's financial statement itself), completely responsible (where the financial misstatement results from the auditor's failure to meet applicable standards of audit) or share responsibility for the financial misstatement (where the company's financial statements are inaccurate *and* the auditor failed to discover the inaccuracy in conformity with applicable standards). Proportionate liability enables an auditor's share of the liability to reflect the extent to which it bears responsibility for the financial misstatement, a characteristic that joint and several liability lacks.

On the other hand, it is impossible to ignore the additional burden proportionate liability places upon investors to pursue all parties responsible for the financial misstatement in order to recover their loss in full. Impos-

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28 S. YANAGA, *Kaikei kansa hōjin no sekinin no gentei,* 会計監査人の責任の限定 (Tōkyō 2000) 11.

29 I.e. the doctrines of contributory and comparative negligence applicable in tort law: see P. D. T. APPLEGARTH, Bar Association of Queensland: CPD 20 Causation, Contributory Negligence and Contribution under the Trade Practices Act, Supreme Court of Queensland Library (2004).

ing that burden on investors is difficult to reconcile with the original aim of exposing auditors to liability so as to ensure that auditors honour their primary responsibility, i.e. acting as gatekeepers working to the benefit of investors. Further, it seems paradoxical to implement an approach to liability where the difficulty that investors face in recovering their losses increases with the number of parties responsible,[30] as is the case under proportionate liability.

Accordingly, apportionment of liability is but one factor jurisdictions must consider so as to ensure that auditor liability is consistent with auditors' gatekeeper duties. The question should not be one of joint and several versus proportionate liability, but whether lawmakers have fashioned statutory claims for financial misstatements that operate in conjunction with the applicable mode of apportionment. For example, the higher exposure to litigation for auditors under joint and several liability might be moderated by requiring claimants to prove a fault element that the auditor's failure to detect the misstatement was accompanied with gross negligence or intention on the auditor's part.[31] Conversely, jurisdictions might consider ameliorating some of the claimant's disadvantages under proportionate liability by facilitating the proof of other elements required to substantiate a statutory claim based on financial misstatements or by restricting proportionate liability to particular classes of investors. When determining an auditor's share of the liability for financial misstatements, what is important is that jurisdictions not focus exclusively on the approach to apportionment but rather how the statutory claim as a whole functions.

III. AUDITOR LIABILITY FOR FINANCIAL MISSTATEMENTS IN AUSTRALIA AND JAPAN

The law both in Japan and Australia demands that businesses disclose their financial details to auditors for certification in order to access financial markets. However, as this chapter will demonstrate, both countries grant to the investor resort against an auditor according to different limits and ranges where an auditor fails in its duty as gatekeeper.

The first half of this section will discuss the introduction of proportionate liability and its operation in conjunction with the statutory prohibitions against making misleading and deceptive statements in relation to a financial product under the CA in Australia before then proceeding to examine how investors might hold auditors accountable for misrepresentations in financial statements under the FIEA in Japan.

30 Australian Government, Review of the Law of Negligence Final Report (2002) 12.

31 ANDENAS / CHIU, *supra* note 10, 116.

1. Australia – The Role of Auditors in the Development of Proportionate Liability

The auditing profession in Australia has played an active role in the adoption of proportionate liability for financial misstatements. Towards the end of the 1980s, a downturn in the Australian economy triggered a string of corporate collapses and reactive legal actions against companies that, in the meantime, had become defunct.[32] While investors were thus left with little hope that their losses would be recoverable against the company itself, joint and several liability served to facilitate their pursuit of compensation by making available for suit a broad array of parties having tangential connections to the failed business. The auditing profession perceived their own presence in these actions as often being a consequence of auditors being required to hold professional liability insurance coverage, thereby marking auditors as "deep-pocket" defendants for investors primarily interested in recovering their loss,[33] regardless from whom.

In part spurred on by the auditing profession's claims that this exposure to liability had pushed their insurance premiums to unaffordable levels, the Australian government commissioned a report on the effects of joint and several liability in 1994.[34] The "Davis Report" (as it became known) included in its findings recommendations that a proportionate liability scheme should be adopted that would apply not only to claims founded in tort for professional negligence but also for statutory claims alleging misleading and deceptive conduct, noting that in practice the two claims were often brought simultaneously.

Notwithstanding the Davis Report's findings, legislative reform of the rules establishing joint and several liability languished for several years until 2004. In 2002, Australia witnessed the bankruptcy of its biggest carrier of professional negligence insurance, HIH,[35] heightening concerns that the auditing professions' fears of rising insurance costs might become a reality if its warnings continued to go unheeded. This worry, along with the concern surrounding the lack of auditor independence following the collapse of the auditing firm Arthur Anderson in the wake of the Enron scandal in the US, prompted the Australian Government in 2004 to finally enact sweeping reforms to improve auditor accountability and independence

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32 C. MACAULAY, Proportionate Liability – Is it achieving its aims? (Australian Insurance Law Association Seminar, 2 December 2010) 5.

33 MACAULAY, *supra* note 32.

34 J. DAVIS, Inquiry Into The Law Of Joint and Several Liability: Report of Stage Two, ACLN (1995).

35 MACAULAY, *supra* note 32.

under the *"Corporate Law and Economic Reform Package 9"* (CLERP 9), including the introduction of a proportionate liability scheme into the CA.

This is not to say, however, that proportionate liability passed into law free of criticism as to the potential adverse side-effects for claimants. As part of the review process that informed CLERP 9, the *Final Report of the Review of the Law of Negligence* that was led by David Ipp (Ipp Report) published in 2002 its findings on the potential effects of applying proportionate liability to claims for recompense for personal injury or death.[36] In recommending against introducing the application of proportionate liability to such claims, the Ipp Report based its concern on the burden that proportionate liability places upon injured claimants to pursue all defendants in order to recover their loss in full. Such an obligation would arbitrarily leave a claimant who had suffered at the hands of multiple defendants worse off than one whose loss was restricted to the actions of a single party.[37] Equally dissatisfying to the authors of the Ipp Report was the converse effect under proportionate liability whereby culpable defendants are subjected to a lesser amount of liability simply because a greater number of wrongdoers had contributed to the claimant's loss.

The Ipp Report's warnings have been implicitly heeded by Australia's states and territories in their implementation of proportionate liability, which uniformly preclude personal injury or death claims from the application of proportionate liability, namely cases where the public policy to protect an injured claimant is perhaps most prominent.[38] By contrast, Australia has readily applied proportionate liability to actions where the loss claimed is often solely economic in nature and the public policy imperative to protect the claimant from further loss is diminished.[39] It is in this space in which the proportionate liability scheme has been erected in the CA.

2. *Australia – Liability for Financial Misstatements under the Corporations Act 2001*

The CA establishes a comprehensive set of obligations for companies and auditors to ensure that their audit of financial statements is an effective and rigorous exercise. Companies are required to have their annual and half-year financial reports audited (ss301, 302). Auditors are required to provide an opinion on a number of aspects when conducting an audit of a companies' financials, including whether the financial reports have been prepared in accordance with the CA's requirements and applicable accounting stand-

36 Australian Government, *supra* note 30.
37 Australian Government, *supra* note 30, 177.
38 MCNAIR, *supra* note 14, 4.
39 DAVIS, *supra* note 34, 19.

ards (s307(a)). Auditors are also required to provide an opinion as to whether they believe the company provided all information, explanation and assistance necessary for the completion of the audit (s307(a)).

Next, the CA identifies types of actions that are prohibited in relation to financial services or products in Part 7.10, Division 2, entitled "prohibited conduct". Financial misstatements are likely to be caught under s1041E ('false or misleading statements') or s1041H ('misleading and deceptive conduct (civil liability only)'). As a matter of theory and history, both provisions have been relied upon by investors seeking recovery for losses flowing from their reliance on financial misstatements.[40] What distinguishes the two provisions, however, is s1041E's additional requirement that the false or misleading statement has been made either intentionally or negligently (s1041E(1)(c) CA), a feature to which this paper will return to at a later stage in this section.

Finally, a claimant is entitled under s1041I of the CA to claim relief for loss suffered as a result of a number of the types of prohibited conduct described in Part 7.10 Division 2, including sections 1041E and 1041H.

While the tendency for auditors in Australia to resolve disputes by way of confidential settlement has resulted in a dearth of decisions that could illuminate how the courts might handle auditor liable for financial misstatements,[41] the Federal Court of Australia's decision in *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65 ('AMRO decision') nevertheless provides some useful guidance by way of analogy. At the time it was issued, the court's judgment in the AMRO decision – ruling that Standard & Poor's (S&P) was liable for the loss suffered by the claimants in reliance on the 'AAA' credit-worthiness rating[42] S&P had attached to financial products the claimants had purchased – marked the first time a credit-rating agency had been held liable for incorrectly rating financial products.[43] The responsibility that credit-rating agencies assume in provid-

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40 R. FORBES/J. EMMERIG, High Court Limits Scope of Proportionate Liability Regime under Part 7.10 of the Corporations Act, King & Wood Mallesons (13 May 2015).

41 For example, N. LENEGHAN, Centro, PwC Take Record $200m Legal Hit, Australian Financial Review (9 May 2012), *http://www.afr.com/real-estate/commercial/centro-pwc-take-record-200m-legal-hit-20120508-j2v7s.*

42 "An obligor rated 'AAA' has EXTREMELY STRONG capacity to meet its financial commitments. 'AAA' is the highest Issuer Credit Rating assigned by Standard & Poor's": "S&P Global Ratings Definitions" (S&P Global Ratings, 26 June 2017), *https://www.standardandpoors.com/en_US/web/guest/article/-/view/sourceId/504352.*

43 B. MCDERMID, Australia's Federal Court Issues Landmark Judgment against S&P, ABN Amro, *Reuters* (5 November 2012), *http://uk.reuters.com/article/uk-australia-sp-lawsuit-idUKBRE8A405420121105.*

ing impartial opinions on the credit-worthiness of companies and the financial products they issue is comparable to the auditor's role as gatekeeper.[44] As such, the AMRO decision represents an approach Australian courts are likely to adopt when determining an auditor's liability for financial misstatements under the CA.

The AMRO decision was initiated by an action brought by a grouping of local government councils ('the Councils') against ABN AMRO bank (AMRO), S&P and the business 'Local Government Financial Services' (LGFS) (collectively, the Respondents) for their individual and collective efforts to sell to the Councils a considerable sum of credit derivatives known as a 'CPDO'. The Respondents promoted the sale of the CPDOs to the Councils to a great extent on the basis that they had received a AAA rating from S&P, notwithstanding that the Respondents knew or should have known to varying degrees that the AAA rating was inaccurate. As the Councils lost a significant amount of money when the CPDOs plummeted in value following the GFC in 2008, they alleged that S&P's AAA rating of the CPDOs constituted under the circumstances a financial misrepresentation in contravention of sections 1041E and 1041H of the CA.

As part of its consideration of whether S&P was in breach of sections 1041E and 1041H, the court reviewed the principles governing proof of misleading and deceptive conduct as well as causation of the claimant's loss. In regards to the former point, the court determined the existence of misleading and deceptive conduct under s1041H of the CA on the basis of strict liability, thus making redundant inquiries into whether the misleading and deceptive conduct was deliberate or intentional.[45] The real question was whether the conduct (in this case, the AAA rating) was misleading and deceptive, or likely to be misleading and deceptive, to a class of people (normal investors) that the claimants belonged to (the Councils).[46] On this point, the court found that the AAA rating was misleading and deceptive conduct under s1041H of the CA.[47]

As to causation, the court decided that S&P's liability for the Councils' loss would depend on the following:

1. Whether the Councils' loss was a result of their 'reliance' on S&P's AAA rating (what the court called 'factual causation'); and

44 A. SAHORE, Case Note ABN Amro Bank NV v Bathurst Regional Council: Credit Rating Agencies and Liability to Investors, Sydney Law Review 37 (2015) 453.

45 Federal Court of Australia, *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65, 772.

46 Federal Court of Australia, *supra* note 45.

47 Federal Court of Australia, *supra* note 45.

2. Whether S&P's scope of liability should extend to covering all or part of the Councils' loss.[48]

The Councils were successful on both points. In relation to the first point, the court concluded that the Councils had proved they had purchased the CPDOs in reliance on S&P's AAA rating denoting the CPDOs as an investment with a minimum level of risk.[49] In relation to the second, the court found that S&P's scope of liability should extend to encompass the main of the Councils' losses, this due to the fact that the AAA rating was granted in the absence of any reasonable basis and under circumstances where the Councils were entitled to rely on that rating accurately describing the risk inherent to CPDO's (particularly as S&P was the only source of independent information available on the creditworthiness of the CPDOs).[50]

While damages were ultimately awarded under a separate claim, the appellate court left untouched the decision of the court at first instance to hold each of the Respondents one-third liable for the Council's total loss.[51]

Since the AMRO decision, investors do not need to prove their reliance on the misstatement to prove causation; instead, they may rely on the theory that the misrepresentation constitutes 'indirect causation' or 'fraud on the market'[52] as a whole, obviating the need to prove specific reliance on the misrepresentation. Of course, claimants will still need to prove the extent to which the respondent should be liable for their losses based on the degree to which the misrepresentation distorted the purchase price of the financial products. Australia's acceptance of a 'fraud on the market' approach to causation represents to at least some lawyers a further step in making Australia more 'claimant-friendly' in the context of securities litigation.[53]

3. *Australia – Proportionate Liability under the Corporations Act 2001*

Part 7.10, Division 2A of the CA makes proportionate liability available under the CA. Proportionate liability is dependent on two threshold elements being fulfilled:

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48 Federal Court of Australia, *supra* note 45, 775.

49 Federal Court of Australia, *supra* note 45, 780.

50 Federal Court of Australia, *supra* note 45, 784.

51 Federal Court of Australia, *supra* note 45, 1506.

52 NSW Supreme Court, *HIH Insurance (In Liquidation) and Ors* [2016] NSWSC 48.2.

53 K. LACROIX, Is Australia About to Become the Global Forum of Choice for Securities Class Action Litigation? The D&O Diary (28 June 2016), *http://www.dandodiary.com/2016/06/articles/international-d-o/is-australia-about-to-become-the-global-forum-of-choice-for-securities-class-action-litigation/.*

1. The action which the claimant suffered loss under falls within the definition of an "apportionable claim" (s1041L(1) CA); and
2. The defendant falls within the definition of a "concurrent wrongdoer" (ss1041N, 1041L(3) CA).

Notwithstanding s1041L of the CA defining an "apportionable claim" to be a claim for "economic loss or damage to property, caused by conduct that was done in contravention of section s1041H", it had until recently been unclear whether the term had been intended to encompass all situations whose facts gave rise to the claimant potentially pleading a breach of s1041H of the CA, or whether it was limited to instances where s1041H had actually been pleaded.

This uncertainty was eliminated in 2015, when the High Court of Australia (the highest court in Australia) decided in *Selig v Wealthsure Pty Ltd* [2015] HCA 18 (the Selig decision) that only an action pleaded under s1041H would meet the definition of an apportionable claim.[54] The Selig decision confirms the (Federal) court's reasoning in the AMRO decision that the defendant's negligence is a relevant consideration in determining the applicability of proportionate liability. In the AMRO decision, after arriving at its findings that the Respondents were liable under both s1041E and s1041H of the CA, the court considered it inappropriate that a defendant be able to diminish its portion of the liability in circumstances where its fault (intentional or otherwise) can be proven.[55]

The second threshold element before proportionate liability can apply is whether the defendant responsible for committing the apportionable claim is a "concurrent wrongdoer". A defendant will be a concurrent wrongdoer if it is "one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the [apportionable] claim" (s1041L(3)).

In terms of the definition of a concurrent wrongdoer, the primary controversy initially related to whether completely independent actions could cause the same damage. This uncertainty was resolved by the High Court of Australia in 2013, when it considered the definition of a concurrent wrongdoer under legislation enacted in the Australian state of New South Wales[56] in *Hunt and Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10. In that case, the High Court adopted a broad interpretation of a concurrent wrongdoer, to the effect that the respondent's loss from having been defrauded by a third party through a fraudulent loan agreement, and

54 High Court of Australia, *Selig v Wealthsure Pty Ltd* [2015] HCA 18, 37.

55 Federal Court of Australia, *supra* note 45, 1574.

56 The definition of a concurrent wrongdoer is, however, identical as between the NSW law and the CA.

from their lawyers failing to notice the fraud when drafting the loan agreement, were considered to have caused the same damage, in satisfaction of the definition.

4. *Australia – Auditors' Liability Risk for Financial Misstatements under the Corporations Act 2001*

From the above analysis, it is possible to make the following observations in regards to an auditor's liability risk for financial misstatements in Australia, either as an effect of the prohibitions against misleading and deceptive conduct under s1041E and s1041H of the CA or as an effect of the proportionate liability scheme in Part 7.10 Division 2A of the CA:

Firstly, an auditor will not escape liability for a financial misstatement simply because an investor is unable to prove the misrepresentation was deliberately or negligently made. As the AMRO decision demonstrates, a standard of 'strict liability' applies, and it will be sufficient if the misrepresentation was misleading and deceptive, or likely to be misleading or deceptive, to a class of people the claimant belongs to. The defendant's negligence will of course be relevant in determining the scope of its liability: again, in the AMRO decision S&P's failure to demonstrate a reasonable basis for having granted the CPDOs a AAA rating in circumstances where the Councils were entitled to rely on the accuracy of that the rating meant S&P was liable for the entirety of the Councils' losses. However, whether the auditor intentionally or negligently made the misstatement will be irrelevant in proving if misleading and deceptive conduct occurred.

At the same time, negligence will be a relevant consideration as to whether an auditor may rely on proportionate liability under the CA. Following the court's judgment in the Selig decision, it is clear that an apportionable claim means a claim under s1041H, and not s1041E.

The prevailing interpretation of an apportionable claim in effect creates two classes of misleading and deceptive conduct, in which the effects of proportionate liability are limited to the class of misleading and deceptive conduct where the defendant's negligence is unproven. Cautious investors may plead actions under both s1041H and s1041E CA, and as long as negligence can be proven the auditor will not be able to benefit from proportionate liability. This situation echoes the observation made in the Davis Report that the effect of proportionate liability can be limited by making it available to misleading and deceptive conduct claims generally but not making it available to claims founded in negligence.

Secondly, by not requiring proof of reliance on the misrepresentation in the test of causation, it should be easier for investors to bring claims against auditors.

Lastly, the definition of a concurrent wrongdoer is likely broad enough to enable an auditor to allege that the audited company is a concurrent wrongdoer, notwithstanding that both the auditor and the audited company have separately contributed to the misrepresentation (i.e. where the company has provided fraudulent/inaccurate financial statement and the auditor has failed to detect the misrepresentations). Given the broad interpretation the courts have adopted following Hunt & Hunt as regards the question of who a concurrent wrongdoer is, it is unlikely that the damage caused by the company, and the damage caused by the auditor to the investor will be discerned as separate types of damage.

5. Japan – Auditors and Auditor Regulation

The existence of audits as an internal function of Japanese businesses considerably predates the introduction of external auditors, with the "statutory auditor" having been established in 1890 under Japan's old Commercial Code (*kyū Shōhō,* 旧商法).[57] The statutory auditor was created as a mandatory position within companies to discourage abuses of power perpetrated by management. While the powers and duties entrusted to the statutory auditor have waxed and waned over the passage of time, a regular feature of the position has been the statutory auditor's responsibility for performing the company's audits, both for the purposes of reviewing its financial position (*kaikei kansa,* 会計監査, or accounting audit) and to ensure compliance with relevant rules and regulations (*gyōmu-kansa,* 業務監査, or operating audit).[58] It was only in 1948 that the modern independent auditor finally emerged in Japan under the enactment of the "Certified Public Accountants Act" (*Kōnin kaikeishi-hō,* 公認会計士法[59]),[60] this occurring alongside the birth of the country's modern financial markets regime with the passing of the "Securities Exchange Act" (*Shōken torihiki-hō,* 証券取引法).[61]

Since then, reform of Japan's financial services and disclosure regime has been significantly driven by incidents of corporate scandal in Japan's major businesses. This dynamic was on display in the legal reforms following the uncovering of Kanebo's accounting scandal in 2006, whereupon

57 F. SUGAWARA, *Kore kara no kaikei kansa: kigyō no naibu tōsei dōnyū to kansa hōjin kaikaku no hataraki,* これからの会計監査： 企業の内部統制導入と監査法人改革の動き, Refarensu (2007) 124.

58 C. LEE/J. ALLEN, The Roles and Functions of Kansayaku Boards Compared to Audit Committees, Asian Corporate Governance Association (ACGA) (Hong Kong 2013) 9.

59 Law No. 103/1948.

60 SUGAWARA, *supra* note 57, 124.

61 Law No. 25/1948.

auditors from ChuoAoyama audit firm were charged with criminal liability for colluding with their client Kanebo to cover up an elaborate and illegitimate accounting scheme.[62] The suggested amendments to the existing law in the wake of the Kanebo accounting scandal were heavily influenced by the implementation of the Sarbanes-Oxley Act in the US, to the extent that the successor to the Securities Exchange Act, the FIEA, acquired the colloquial moniker of the 'Japan SOX'.[63]

In addition to the FIEA's introduction in 2004, legal reform has reflected a clear agenda of increasing protections in relation to auditor transparency and independence, with the following amendments being made to the Certified Public Accountants Act, also in 2008:

1. Prohibiting auditors/audit firms from providing audit services for companies in which they maintain a designated interest in (Art. 24, Certified Public Accountants Act);
2. For large companies, prohibiting an auditor/audit firm from auditing a company to which it provides non-audit services to (Art. 24-2, Certified Public Accountants Act);
3. For large companies, establishing a maximum of seven years that the same individual auditor can audit the same company before 'rotating' with another auditor (Art. 24-3, Certified Public Accountants Act).

Nevertheless, further scandals involving some of Japan's biggest companies and the Big 4 auditing firms call into question whether these reforms have been effective in safeguarding auditor independence. Since 2008, large-scale accounting scandals have been surfaced at Livedoor, Olympus and of course Toshiba, with the audits in question for the last two companies involving KPMG and EY.[64] While these scandals in and of themselves cannot suggest that Japan's track record in securing auditor independence is worse than any other country, it certainly presents a basis to call into question the success of the reforms to increase the independence of auditors overall.

The inability of external auditors to have prevented these scandals also suggests a degree of truth to a theory historically held by some (mostly foreign) academics that Japan's corporate structure renders it susceptible to

62 SUGAWARA, *supra* note 57, 130.
63 SUGAWARA, *supra* note 57, 143.
64 N. GOHARA, *Kansa hōjin ni daiama na tōshiba "futekisetsu kaikei" daisansha i'inkai hōkokusho,* 監査法人に大甘な東芝「不適切会計」第三者委員会報告書, Huffington Post (in Association with the Asahi Shinbun) (22 July 2015), *http://www.huffingtonpost.jp/nobuo-gohara/toshiba-inappropriate-accounting_b_7844824.html.*

interests of company insiders.[65] In this regard, the Olympus accounting scandal is something of a cautionary tale, with the three Japanese company presidents that presided over the accounting fraud all coming from the company's finance department.[66] The fact that audit began as an internal function may also suggest that audits in Japanese companies are unduly exposed to insider influence. Against this setting, it is understandable why current voices might continue to push for external auditors being given greater scope to police fraud amongst the clients they audit.[67]

By contrast, Japan's establishment has left untouched the application of joint and several liability for claims of financial misstatement under the FIEA. A constant reason given for why the auditing profession in Japan has refrained from advocating for a move to proportionate liability, as the profession has done in other jurisdictions, has been that Japan does not have the compulsory liability insurance requirement that marks auditors as deep-pocket defendants in other jurisdictions.[68] This explanation is only partially satisfactory given that the Big 4 auditing firms already expend resources on liability insurance in any event.[69] Another reason why Japanese auditors are not enthusiastically advocating for proportionate liability may be a reduced appetite for securities litigation overall in Japan as compared to other jurisdictions.[70]

6. *Japan – Financial Misstatements and Auditor Liability under the FIEA*

A foremost concern under the FIEA is "the sound development of the national economy and protection of investors" (Art. 1 FIEA). The auditor contributes to this purpose chiefly through Article 193-2 of the FIEA, which requires issuing companies and other corresponding parties intending on par-

65 C. OSI, Board Reforms with a Japanese Twist: Viewing the Japanese Board of Directors with a Delaware Lens, Brooklyn Journal of Corporate, Financial & Commercial Law 3, no. 2 (2009), quoting Milhaupt & Gibson at 350.

66 B. ARONSON, The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground between the Board Monitoring Model and Management Model?, ZJapanR / J.Japan.L 35 (2013) 91.

67 SHINOTO, *supra* note 24, 35.

68 YANAGA, *supra* note 28, 49.

69 *Yūgen sekinin kansa hōjin tōmatsu,* 有限責任監査法人トーマツ, *Gyōmu oyobi zaimu jōkyō ni kansuru setsumei shorui,* 業務及び財産状況に関する説明書類 (2011–2016); *Shin nihon yūgen sekinin kansa hōjin,* 新日本有限責任監査法人, *Gyōmu oyobi zaimu jōkyō ni kansuru setsumei shorui,* 業務及び財産の状況に関する説明書類 (2011–2016), *Yūgen sekinin azusa kansa hōji,* 有限責任あずさ監査法人, *Gyōmu oyobi zaimu jōkyō ni kansuru setsumei shorui,* 業務及び財産状況説明書 (2011–2016).

70 G. GOTO, Growing Securities Litigation against Issuers in Japan. Its Background and Reality (13 January 2016), *https://ssrn.com/abstract=2714252,* p. 31.

ticipating in the provision and sale of securities to obtain audit certification from an auditor or auditing firm as regards their financial statements.[71]

Under the FIEA, there is no single 'catch-all' provision investors can uniformly invoke in order to pursue claims for losses flowing from financial misstatements. Rather, the FIEA establishes a complex framework to determine the evidentiary presumptions and elements that are applicable for the investor's claim. Accordingly, an investor's argument will be influenced by the time when it acquired the securities, whether the securities were purchased on the primary or secondary market and who made the financial misstatement.

Assuming an investor is in a position to fully benefit from the evidentiary presumptions on offer under the FIEA, it is helpful to differentiate between claims against an auditor according to misstatements made in the context of securities acquired on the primary market (primary market securities) and, alternatively, misstatements made in the context of securities acquired on the secondary market (secondary market securities).

7. *Japan – Auditor Liability for Financial Misstatements Made in Connection with the Sale of Securities on the Primary Market*

Auditors may be made liable to investors for misstatements made in relation to financial statements attached to the issuer's Securities Registration Statement (*yūka shōken tōroku todoke shussho,* 有価証券登録届出書) (Art. 21(1)(iii) FIEA) or in relation to the financial statements attached to a Securities Annual Statement (*yūka shōken tōroku hōkokusho,* 有価証券報告書) (Art. 24-4 FIEA). Regardless as to which Article is relied upon, the following principles will determine whether an investor can hold the auditor liable for its loss.

Firstly, the investor must be able to point to a 'false statement' (either by way of an affirmative misstatement or the omission of a 'material fact') that contradicts the auditor's certification that the financial statements in question are free of any false statements. On the other hand, auditors may avoid liability if they can provide evidence that the certification was not deliberately or negligently provided (Art. 21(2)(ii) FIEA). The auditor's situation in this regard may be contrasted with that of the issuer, whose fault for making a false statement is determined on the basis of strict liability (*mukashitsu sekinin,* 無過失責任), preventing the issuer from avoiding liability even if it can provide proof that the false statement was not intentionally or negligently made (Art. 18 FIEA).

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71 These include at a minimum the balance sheets and profit and loss statements: Art. 193 FEIA.

Secondly, consistent with the standard rules for establishing civil liability in Japan, an investor is required to prove causation and show that its loss resulted from its reliance on the false statement.[72] Again, this to be distinguished from the rules on causation applicable to the issuer, who is by contrast presumed to have caused an amount of loss equivalent to the difference between the price the investor acquired the securities at and the market price of the shares at the time the investor makes the claim – or if the investor has already disposed of the shares ahead of the misstatement commencing the claim, the disposal price (Art. 19 FIEA). In practice, Article 19 of the FIEA adopts a version of the 'fraud on the market' approach similar to Australia, assuming the investor's loss was caused by the false statement.[73] If the investor intends on claiming in excess of the amount presumed by Article 19 of the FIEA, it must prove that proportion of the loss in accordance with the normal rules on causation.

Notwithstanding that as a matter of law the issuer has been presumed to have caused damage in accordance with Article 19, in practice the courts will tend to work out the amount of loss caused by an auditor's false statement consistent with Article 19 of the FIEA.[74] Nonetheless, the investor will still be put to the task of proving that its loss actually resulted from its reliance on the auditor's false statement.[75]

8. *Japan – Auditor Liability for Financial Misstatements Made in Connection with the Sale of Financial Products on the Secondary Market*

Investors are entitled to pursue an action against auditors for a false statement made in connection to a Securities Registration Statement or an Annual Securities Statement for secondary market securities under the collective effect of Articles 24-4, 22 and 21(1) of the FIEA. The investor's claim against an auditor for a false statement in connection to secondary market securities is practically identical to the elements the investor is required to prove in relation to false statements made in relation to primary market securities: Investors initially must prove only the false statement and need not show that it was certified deliberately or negligently (though the auditor can defeat the claim by proving that certification of the false statements was neither deliberate nor negligent), but they are required to prove their loss and the extent to which it was caused by the false statement.

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72 E. KURONOMA, *Kinyū shōhin torihikihō,* 金融商品取引法 [Financial Instruments and Exchange Law] (Tōkyō 2016) 243.

73 GOTO, *supra* note 70, 6.

74 KURONOMA, *supra* note 72, 218.

75 *Ibid*.

By contrast, an investor's claim against an issuer for false statements in relation to secondary market securities deviates in meaningful ways from the situation as existing in relation to primary market securities. The first of these is a defence available to the issuer if it can prove it did not intentionally or negligently issue the false statement, negating the old strict liability standard that existed on this point since an amendment to the FIEA in 2014 (Art. 21-2(2) FIEA).[76]

The other way claims alleging false statements in relation to secondary market securities differ from claims alleging false statements in relation to primary market securities made by the issuer is in respect of the element of causation. Investors are only able to rely on a presumption that their loss was caused by the false statement if they acquired the securities one year prior to when the false statement was "publically announced" (Art. 21-2(3) FIEA). An issuer may also reduce its liability if it can persuade the court that the investor's loss was caused separate from the false statement (Art. 21-2(4), (5) FIEA).

The decision to introduce a defence where the false statement can be proven to have been made neither intentionally nor negligently, and amend the presumptions that apply to issuers for false statements in respect of secondary market securities, was based on concerns that the balance of litigation had been overly weighted in favour of investors, which had contributed to an increase in litigation against issuers since the introduction of the FIEA in 2004.[77] In particular, a rebalancing of the elements for false statement claims brought against issuers was also thought necessary in light of reforms enhancing corporate governance requirements and the administrative penalties available to securities regulators, these being seen as moderating the need for a strict standard being applicable to issuers.[78] However, it is unclear as to why this logic has not led to a corresponding change to the presumptions as they apply to false statements in respect of primary market securities.

9. Japan – Liability of Issuers and Auditors under Joint and Several Liability

Joint and several liability enables an investor to hold the auditor and the issuer responsible for the total amount of damage either party caused to the investor. However, joint and several liability cannot be used to make the auditor liable for the issuer's liability in excess of what the auditor was proven to cause, and vice versa.

76 GOTO, *supra* note 70, 29–30.
77 KURONOMA, *supra* note 74, 222.
78 KURONOMA, *supra* note 74, 222.

10. Japan – Auditor Liability for Financial Misstatements under the FIEA

Clearly, the issuer being subject to a strict liability standard and evidentiary presumptions that the investor's loss (at a fixed amount) was caused by the false statement makes it easier for an investor to pursue the issuer rather than the auditor in a situation where claims based on financial misstatements can be made against either party. As a consequence, these elements make the damages that an investor will be able to claim against an issuer more likely and larger than those they could claim against the auditor.

While at this time there is insufficient information for a definite conclusion to be drawn from this point, it is reasonable to speculate that an investor will be less likely to file a claim against the auditor and will instead proceed against the issuer even under circumstances where the claimant is unable to prove whether the issuer or the auditor is responsible for its loss, and if so in what proportions.

Such an outcome has the potential of shifting the balance of claims made for financial misstatements from the auditor to the issuer, particularly where proof of causation is uncertain. Further, the relative difficulty for an investor claiming against an auditor as opposed to pursuing the issuer also diminishes the desirability of pursuing both issuer and auditor for a misstatement, thus reducing the applicability of joint and several liability.

IV. Comparing Australia and Japan

From the last section, it is clear that the differences in how Australia and Japan have chosen to make auditors subject to investor actions pursuing damages for financial misstatements extend beyond their respective approaches to apportioning liability. While the two countries require audit as a legal pre-condition for companies intending to access financial markets, the sheer variation in how auditors may be held liable for financial misstatements can make a comparison difficult.

The difficulty in comparing auditor liability in Australia and Japan extends to the availability of information (or rather, the lack thereof) on the litigation outcomes of disputes involving in auditors. The auditing profession's reluctance against leaving the outcome of a dispute in the hands of a court has manifested itself in a tendency to resolve disputes by way of settlement.[79] The condition of confidentiality that such settlements are commonly premised on obscures an otherwise commonly used metric to evalu-

79 For a recent example, D. FISHER, PwC Settles With MF Global, Leaving Question Of Auditor Liability For Another Case, *Forbes* (23 March 2017), *https://www.forbes.com/sites/danielfisher/2017/03/23/pwc-settles-with-mf-global-leaving-question-of-auditor-liability-for-another-case/#422641c41900.*

ate the effectiveness of laws, namely the number of claims brought against auditors for financial misstatements.

In the case of Japan, it must be noted that the usefulness of comparing Japan in respect of the litigation rates of other countries has been questioned. Japan's generally low level of securities-related litigation[80] will often mean that evaluations gauging success on the number of claims made will often produce a foregone conclusion and in any event yield little in the way of insight into how effective Japanese law is in encouraging a particular behaviour. Indeed, even as there appears to be an increase in the number of claims made under the FIEA for securities-based misconduct, the number still falls far below other jurisdictions,[81] and it is likely to remain that way – if the 2014 reforms to the FIEA doing away with the strict liability standard previously applicable to issuers for financial misstatements relating to secondary market securities (mentioned in section III) are anything to go by.

In spite of these challenges, this paper identifies two areas where the Australian and Japanese experience can be compared against each other:

1. the effect apportionment approaches have had on liability insurance; and
2. the need for a dedicated apportionment mechanism in conjunction with financial misstatement provisions in Australia and Japan.

1. Effect on Liability Insurance

A common theme that traverses jurisdictions where auditors have raised joint and several liability as a threat to their profession has been its deleterious effects upon liability insurance. In this regard, the logic commonly adopted by the auditing profession has been that where joint and several liability threatens to exacerbate the cost of liability insurance by pushing its premiums to unsustainable levels, proportionate liability reduces the likelihood of the cost of insurance rising by limiting an investor's ability to claim damages to the extent the auditor was responsible for causing the loss.

Considering the frequency with which auditors have depended on the cost of insurance to justify a move to proportionate liability, it is perhaps surprising just how little proof is publically available in support of this claim by auditors. The lack of information on any link existing between

80 M. IKEYA/S. KISHITANI, Japan: Trends In Securities Litigation In Japan: 1998–2008 – Damages Litigation Over Misstatements On The Rise, NERA Economic Consulting (21 July 2009), *http://www.mondaq.com/x/83300/Commodities+Securities/Trends+In+Securities+Litigtion+In+Japan+19982008+Damages+Litigation+Over+Misstatements+On+The+Rise*.

81 IKEYA/KISHITANI, *supra* note 80.

proportionate liability and a stabilisation or decrease in liability insurance premiums has been noticed in Australia, with little evidence available suggesting a change in the price of liability insurance since the introduction of proportionate liability in 2004. Indeed, the main factor influencing price trends in liability insurance is generally agreed to be the broader market forces that lie far beyond the disputes auditors find themselves in with investors.[82]

Insofar as proportionate liability has had a real impact on liability insurance in Australia, it is more likely that it has reduced the amount an insurer must 'reserve' to cover the potential loss at litigation from the full extent of the investor's loss to that which can be estimated as having been caused by the auditor only.[83] Theoretically, this can be presumed as having a downward effect on the price of liability insurance, though how widespread this phenomenon is uncertain.

One of the areas where proportionate liability has been thought to be reflected is at the level of pre-trial negotiation, where investors must now contemplate the prospect of recovering less than the complete amount of their loss,[84] something now presumably more likely than when Australia still imposed joint and several liability. However, given the resources at the disposal of the Big 4 auditors operating in Australia, and their advantages as a 'repeat player' in litigation (magnified by their global networks), it is uncertain as to whether it is a positive outcome to have increased their advantage at the bargaining table vis-à-vis investors. It also bears repeating that the constraints upon what will be considered an "apportionable claim" under the CA may make any benefit the auditor profession is perceived to enjoy in this regard more apparent than real.

In contrast to Australia, the Big 4 auditors in Japan include relevant details about the amount they spend on liability insurance. Specifically, figures for total sales, the proportion of sales from audit and non-audit services and the amount spent on liability insurance are readily available in the annual financial statements of EY, KPMG and Deloitte for the years 2010 to 2016. From those figures, it is possible to work out the cost of liability insurance for these auditors as a percentage of the total amount of sales made in a given period. Those figures have been collated and collected in the table below:

82 MACAULAY, *supra* note 32, 22.
83 MACAULAY, *supra* note 32, 23.
84 MACAULAY, *supra* note 32, 18.

Insurance cost for three of the "Big 4" Japan auditing firms 2010–2016[*85]

ShinNihon (EY)	2010	2011	2012	2013	2014	2015	2016
Insurance costs (in millions of yen)	899	1087	1205	1099	1244	999	925
Percentage of sales derived from audit services	84.24%	82.45%	83.01%	82.54%	79.89%	78.24%	79.85%
Total sales (in millions of yen)	98484	95941	92975	92508	96409	99175	106482
Insurance costs as percentage of total sales	0.91%	1.13%	1.30%	1.19%	1.29%	1.01%	0.87%

Azusa (KPMG)	2010	2011	2012	2013	2014	2015	2016
Professional liability insurance costs (in millions of yen)	724	824	848	701	813	690	728
Percentage of sales derived from audit services	83.73%	82.89%	82.82%	84.61%	83.52%	81.89%	77.73%
Total sales (in millions of yen)	85329	88007	82872	80082	80735	83157	89895
Insurance costs as percentage of total sales	0.85%	0.94%	1.02%	0.88%	1.01%	0.83%	0.81%

Tomatsu (Deloitte)	2010	2011	2012	2013	2014	2015	2016
Insurance costs (in millions of yen)	663	649	641	676	708	736	695
Percentage of sales derived from audit services	84.72%	82.46%	78.12%	77.00%	76.60%	74.75%	73.03%
Total sales (in millions of yen)	80102	81624	82443	83872	86546	89177	96478
Insurance costs as percentage of total sales	0.83%	0.80%	0.78%	0.81%	0.82%	0.83%	0.72%

The information provided by these figures is potentially interesting in a number of respects. The first is that the amount of revenue brought in by audit services is stable during the entire period and that it makes up the overwhelming amount of revenue generated by Japanese auditors. The second is that the amount spent by Japanese auditors on liability insurance

* Unable to locate relevant equivalent information from PwC

85 *Supra* note 66.

has also remained stable over the last seven years. The stability presented by these figures should be interpreted in the context of a period that saw a number of these auditing firms implicated in major accounting scandals (including suits brought by investors against EY in relation to the IHI accounting scandal in 2011, against EY and KPMG in relation to the Olympus scandal in 2013 and against EY in relation to the Toshiba accounting scandal in 2015).

Finally, the amount spent by auditors on liability insurance failed to exceed 1% for most years, and never exceeded 1.3% of an auditor's total sales. While the lack of comparable data from Australia prevents a direct comparison, this paper can offer the litigation costs quoted by US auditors in the context of their advocating for proportionate liability in the US, with the auditor profession's litigation costs in 1992 allegedly amounting to 14% of its revenue.[86] Clearly, the amount Japan's auditors have spent on liability insurance falls far below this figure.

These figures in of themselves by no means establish a definitive direction for the development of auditor liability in Japan. However, they present a basis for cautiously concluding that an urgent need to switch from apportioning liability on a joint and several basis to a proportionate liability approach for the purposes of reducing auditor's insurance costs has not yet arrived in Japan.

2. *Need for a Dedicated Apportionment Mechanism in Conjunction with Financial Misstatement Provisions in Australian and Japan*

At this point, it has been repeated throughout this article that, unlike joint and several liability, proportionate liability is able to take account of multiple defendants bearing liability for a claimant's loss in varying amounts. However, the introduction of proportionate liability can be assumed to be less important in regulating an auditor's share of the liability in jurisdictions where claims for financial misstatement against auditors are de facto apportioned by some alternative means.

In Australia, proportionate liability plays a substantial role in determining the amount an auditor must compensate an investor for under the CA. Regardless of who they intend to pursue, investors seeking relief for the loss caused by a financial misstatement can rely only on the provisions for misleading and deceptive conduct under the CA, sections 1041E and 1041H. The proportionate liability scheme that applies to claims made under s1041H of the CA is applied in a consistent manner without regard to who made the financial misstatement. Finally, while there remains some scope at the causa-

86 BUSH / FEARNLEY / SUNDER, *supra* note 26, 17.

tion stage for distinguishing between the defendants' respective shares of liability owed by considering the extent to which a defendant should be liable for the investor's loss (aka the second causation question), the broad view Australian courts have adopted regarding the definition of a 'concurrent wrongdoer' results in proportionate liability being the primary method for apportioning liability in a wide range of situations.

In Japan however, claims of financial misstatements under the FIEA differ substantially depending on who is alleged to have made the misstatement. From the very outset, the FIEA establishes two different processes depending on whether an investor intends on pursuing the issuer or the auditor for financial misstatement.

The different treatment of issuers and auditors under the FIEA is generally achieved through the sorts of defences and evidentiary presumptions which are made available to the defendant and the investor, respectively. Investors pursuing the issuer for a false statement in relation to primary market securities are granted the greatest number of presumptions and do not have to contend with defences that exculpate the issuer because of an absence of fault; in terms of benefitting from such advantages, this category of claimants is followed by investors suing for a false statement in connection with secondary market securities; finally, investors pursuing auditors for false statements in relation to primary and secondary market securities are offered the least assistance under the FIEA in respect of evidentiary presumptions and excluded defences.

Of course, these features are not exclusive to the FIEA. The application of 'strict liability' under the CA works in a similar manner to that under the FIEA so as to assist investors by making intention or negligence on the issuer's part irrelevant to what an investor is required to prove to a court for misstatements made in respect of primary market securities. Similarly, 'fraud on the market' presumptions about causation facilitate an investor's having recourse against an auditor for financial misstatements, both in Australia and Japan. However, whereas the elements that make up claims for financial misstatements under the CA are identical and equally applicable regardless of whether it is the auditor or that issuer that is pursued as a defendant, the identity of the defendant (amongst other things) is crucial for determining what presumptions and defences are applicable under the FIEA for claims of financial misstatement.

This is particularly evident when considering the evidentiary presumptions that standardise the amount of losses an auditor or issuer is presumed to have caused, echoing the approach taken by Japan in mass tort cases for environmental damage. In the landmark decisions issued in the 'Minamata Disease' cases in the 1980s and 90s, featuring actions brought by claimants for personal injury caused by trace amounts of mercury in the drainage

from the defendant's factory, claimants were sorted into various classes depending on their probability of developing symptoms in the future as a result of the defendant's misconduct, with claimants at a higher risk of developing symptoms presumed to have suffered a higher level of damages as compared to claimants at a lower risk.[87] While the analogy should not be unduly extended, it is nevertheless possible to see a similar situation established between the investors pursuing issuers on the primary market, investors pursuing issuers on the secondary market, and finally investors pursuing auditors for undetected financial misstatements.

Taken as a whole, by making it easier for investors to file claims against issuers, and in larger amounts as compared to claims against auditors, the FIEA generally serves to reduce the likelihood of an auditor being found liable as a result of a financial misstatement in Japan, with the potential amounts being decreased as well. This assertion is consistent with the assessment made by other commentators that the threat of litigation experienced by auditors is even lower than that enjoyed by defendants generally in Japan.[88] Of course, the application of proportionate liability allows for apportionment to be done on a case-by-case basis, whereas the FIEA facilitates investor claims against the issuer, in the process reducing the likelihood and corresponding amounts for which auditors might be found liable as a result of the Act's selective application of evidentiary presumptions and defences. While the nature of the FIEA is such that issuers may not be satisfied with their higher exposure to liability for financial misstatements as compared to auditors, it is at the same time understandable why the auditing profession has not advocated for a change in how the FEIA currently apportions liability between issuers and auditors in practice.

3. *Should Japan Amend Claims for Financial Misstatements under the FIEA?*

So does Japan hold the auditing profession to a standard of liability consistent with its gatekeeping responsibilities? In Australia, the auditing profession successfully argued for the introduction of proportionate liability because of a concern that the joint and several liability to which auditors were exposed auditors risked pushing liability insurance premiums to unaffordable prices in the long run. Yet there is in fact little evidence to suggest

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87 Y. NOMI, Proportionality in Tort and Contract Law, Dutch-Japanese Law Symposium, Utrecht University (1996) 4.

88 B. ARONSON, *Kaigai kara mita nihon kigyō no gabanansu ni okeru mondai: jikō no aru gabanansu kaikaku no hōsaku,* 海外絡みた日本企業のガバナンスにおける問題：実行性のあるガバナンス改革の方策，Shōji Hōmu 1991 (February 2013) 28.

that Australia's introduction of proportionate liability has reduced liability insurance for auditors.

Similarly in Japan, available figures from its largest auditors suggest that the auditing profession has access to liability insurance at a stable and affordable price, even as the FIEA continues to apportion liability on a joint and several basis. In short, the effect of joint and several liability on insurance prices would not appear to be forcing auditors to abdicate their position as gatekeepers in Japan any time soon.

In actuality, joint and several liability appears to play a minimal role in apportioning an auditor's liability for financial misstatements in Japan. The existence of selective evidentiary presumptions and strict liability standards – thereby increasing the relative attractiveness of pursuing an issuer instead of an auditor for a financial misstatement – is likely a much bigger factor in determining the frequency with which investors pursue auditors for financial misstatements under the FIEA.

Indeed, the FIEA's selective application of defences and evidentiary presumptions should be seen as serving the dual function of limiting an auditor's liability for performing its gatekeeper function while preserving the investor's means of recovering losses. In the context of primary market securities, auditors may protect themselves from liability for financial misstatements in excess of applicable legal and professional standards if they can prove their certification of a "false statement" was not intentionally or negligently made under the FIEA. At the same time, investors are still left with a means of recourse as a result of the FIEA refraining from providing an equivalent defence for issuers that would allow them to avoid liability on the basis of their not having intentionally or negligently made the false statement.

Assigning to issuers the residual responsibility for financial misstatements in cases where auditors can prove an absence of intention or negligence on their own part obviously raises questions as to whether the interests of issuers are adequately protected under the FIEA. At least in Japan, the issuer's position as the primary beneficiary of a financial misstatement, i.e. in their receipt of moneys wrongly paid by investors because of the misstatement, provides part of the motivation for depriving the issuer of the opportunity to evade liability on the basis of exculpatory evidence proving a lack of fault.[89] This justification certainly meshes with the notion sometimes promoted that gatekeeper liability should be conceived of as a contingency that is engaged when the issuer is unable to meet an investor's needs for compensation, as opposed to the other way round.[90]

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89 KURONOMA, *supra* note 74, 209.

90 ANDENAS/CHIU, *supra* note 10, 115.

One of the issues yet to be discussed at any length is the potential downsides for investors following the 2014 reforms to the FIEA in respect of secondary market securities. In that context, investors have been left at risk of being without a defendant they can file against for financial misstatements where both the issuer and the auditor are able to provide evidence that they acted neither intentionally nor negligently in relation to the misstatement. Accordingly, this chapter concludes with the cautious recommendation that the 2014 reforms be reviewed for any adverse effects suffered by investors as a result of both issuer and auditor being able to avoid liability by proving a lack of fault, and whether an alternative exists that improves the issuer's situation under the FIEA without increasing the chances that an innocent investor be left at a loss because of the absence of any defendants to file a claim against.

V. CONCLUSION

Much like other markets, Japan is reliant on auditors to reassure investors that the information they receive from companies in relation to their financial and business activities is accurate. The recent and well-publicised accounting scandals, however, make clear the importance of ensuring that auditors operate in a regulatory environment featuring deterrents as well as incentives that encourage their continual performance as gatekeepers.

Specifically, when the incentive of maintaining a good reputation fails to be a sufficient motivation for auditors, investors must have recourse against them for financial misstatements they have contributed towards. At the same time, an auditor's liability cannot be set at a level which risks forcing the auditor to abandon its position as gatekeeper altogether because the associated litigation exposure is too high. The decision whether to apportion liability on a joint and several basis or on a proportionate basis has been a particularly contentious issue in this context for a number of jurisdictions. At the same time, it bears mention that apportionment of liability must be considered in the overall context of the claims investors can make against auditors for financial misstatements in order to obtain a true picture of the level of liability risk auditors are exposed to.

In Australia, the auditing profession campaigned for the introduction of proportionate liability on the grounds that the then current application of joint and several liability exposed its members to liability for financial misstatements that were beyond its capacity as a gatekeeper to prevent. By the same token, Australian auditors have yet to produce any recent figures that support a connection between the introduction of proportionate liability in 2004 and a downward movement in the price of liability insurance.

In Japan, the application of joint and several liability does not appear to have contributed to an increase in liability insurance costs. Rather, a selective availability of defences and evidentiary presumptions under the FIEA appear to restrict an auditor's liability to a degree consistent with its role as a gatekeeper while at the same time ensuring that investors have some recourse for pursuing compensation for financial misstatement. In Japan, a dedicated mechanism for apportioning liability does not appear to have had much impact on the level of liability an auditor faces.

SUMMARY

The seal of approval that an auditor stamps upon corporate financial disclosures relies on the auditor's own reputation for impartiality, thereby serving to reassure investors that the audit has been conducted at arm's length. Yet in 2015, the emergence of an accounting scandal perpetrated by the Japanese corporate stalwart Toshiba for lengthy period of time rocked the impartiality the auditing profession rests upon. Incidents such as the Toshiba accounting scandal demonstrate that in order for the auditing profession to function as intended for investors, a regulatory framework equipped with robust penalties is required when the incentive to maintain an impartial reputation is no longer sufficient to motivate the auditor to rigorously perform its duties.

This paper compares the statutory claims that can be made against auditors for financial misstatements in Japan and Australia. A key feature that distinguishes the two countries is the chosen approach to apportioning liability. Whilst Japan apportions liability on a joint and several basis so as to attribute the whole of an investor's losses to each party that has been proven to have contributed to the investor's loss, Australia allows liability to be apportioned on a proportionate basis between wrongdoers. Australia's adoption of proportionate liability is in part a result of the auditing profession having persuaded lawmakers that imposing liability on a joint and several basis exposed its members to an unsustainable level of liability.

Despite this, the experiences between the two countries do not show a clear correlation between proportionate liability and a net reduction in the level of liability that auditors are exposed to. Rather, Japan provides a basis for suggesting that a stable level of liability risk for auditors can be maintained under a system that continues to impose joint and several liability. At least in Japan, the facet of statutory financial misstatement claims that is most relevant to the liability share of an auditor is the selective application of evidentiary presumptions, as these encourage claims to be made against the issuer rather than the auditor.

ZUSAMMENFASSUNG

Das Siegel der Bestätigung von Finanzinformation eines Unternehmens, das der Wirtschaftsprüfer erteilt, baut auf seinem eigenen Ruf der Unparteilichkeit auf, um den Investoren zu versichern, dass seine Prüfung mit hinreichender Unabhängigkeit durchgeführt wird. Im Jahre 2015 aber erschütterte ein Bilanzskandal beim japanischen Vorzeigeunternehmen Toshiba, der von der Langzeit-Wirtschaftsprüfergesellschaft des Unternehmens unentdeckt blieb, den Ruf der Unparteilichkeit der Zunft der Wirtschaftsprüfer. Wer hat denn diesen Satz bei uns verfasst? Vorfälle wie bei Toshiba zeigen, dass der rechtliche Rahmen ermöglichen muss, auch empfindliche Sanktionen zu verhängen. Nur so können Wirtschaftsprüfer dort, wo die Sorge um die eigene Reputation nicht ausreichend Anreize setzt, dazu angehalten werden, ihren Pflichten gewissenhaft nachzukommen, und kann der Berufsstand der Wirtschaftsprüfer die ihm zugedachte Funktion für Investoren tatsächlich erfüllen.

Dieser Aufsatz vergleicht die gesetzlichen Ansprüche, die gegen Wirtschaftsprüfer in Japan und Australien wegen einer Falschdarstellung in Finanzberichten geltend gemacht werden können. Ein wesentlicher Punkt, in dem sich die beiden Länder unterscheiden, ist der Einsatz einer Teilung der Haftung in Fällen von Falschdarstellungen in Finanzberichten. Während Japan eine gesamtschuldnerische Haftung aller Beteiligten vorsieht, wonach jeder Beteiligte gegenüber dem Investor für den Schaden vollumfänglich haftet, den der Investor nachweislich erlitten hat, sieht Australien die Möglichkeit der Teilhaftung nach dem jeweiligen Anteil der Verantwortlichkeit unter den Schädigern vor. Die Einführung der Teilhaftung in Australien beruht teils darauf, dass es die Wirtschaftsprüferzunft vermocht hat, gegenüber dem Gesetzgeber wirkungsvoll das Argument in Szene zu setzen, dass die gesamtschuldnerische Haftung für Wirtschaftsprüfer unzumutbar sei.

Gleichwohl zeigen die gemachten Erfahrungen in beiden Ländern keine klare Korrelation zwischen der Teilhaftung und einer Verringerung des Ausmaßes der Haftung von Wirtschaftsprüfern. Im Gegenteil gibt Japan Grund zur Annahme, dass ein stabiler Grad des Haftungsrisikos für Prüfer aufrecht erhalten werden kann in einem System, das weiterhin eine gesamtschuldnerische Haftung vorsieht. Zumindest besteht in Japan eine Förderung der Geltendmachung von Ansprüchen gegen den Emittenten von Wertpapieren (das Unternehmen, dessen Finanzinformationen in Frage stehen) gegenüber Ansprüchen gegen Wirtschaftsprüfer in Form unterschiedlicher Voraussetzungen der Ansprüche wegen Falschdarstellung in Finanzberichten, die relevant sind für die Bestimmung des Haftungsanteils von Prüfern und die die Anwendung anderer Beweisregeln je nach Anspruchsgegner betreffen.

(Die Redaktion)