Re-regulating Japan: Asbestos, Defectively Designed Buildings, and Secondhand Electrical Products

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I. INTRODUCTION

From mid-2005, Japan experienced an *annus horribilis* in terms of product safety issues. Part II of this article first examines asbestos, which has caused serious problems and various responses around the world – even quite recently, for example in Australia and France.[1] Japan imported hundreds of thousands of tons even over the 1980s, and some estimate that asbestos is found in around 70 per cent of homes as well as thousands of factories and public facilities built after World War II.[2] Demolition of

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1 See L. NOTTAGE, Product Liability and Safety Regulation, in: G. McAlinn (ed.) Japanese Business Law (The Hague, forthcoming).

2 "Millions of homes have asbestos roofing", The Japan Times, 28 August 2005; "Editorial: Asbestos compensation", Asahi Shimbun, 30 August 2005. Even in 2004, 8000 tonnes were imported into Japan: NIHON KEIZAI SHINBUN KAGAKU GIJUTSU-BU, *Q&A Kore dake wa shitte okitai – asubesuto mondai* [Asbestos Issues: Q&A This Much You Must Know] (Tokyo 2005), 9. For other useful recent introductions to asbestos problems more generally in Japan, see K. MIYAMOTO ET AL., *Asubesuto Mondai* [Asbestos Issues] (Tokyo 2006) and M. AWANO, *Asubesuto wazawai – kokkateki fu-sakui no tsuke* [Asbestos Woes: The High Price of a Nation's Failure to Act] (Tokyo 2006). Several other works have been published around the periods when asbestos regulation or litigation had attracted attention in Japan, albeit less visibly or extensively as in this latest round: see e.g. ASUBESUTO KONZETSU NETTOWÂKU, *Koko ga abunai! Asubesuto* [Asbestos: This is Dangerous!] (Tokyo 1996).

these older buildings is accelerating, potentially releasing large quantities of cancer-inducing asbestos fibres, and deaths from mesotheliomia and other fatal diseases may burgeon to 100,000 over the next four decades.[3] As well as strengthening regulations on the use and disposal of asbestos, the Japanese government was forced to promptly enact a state-led compensation scheme. "Re-regulation" is also evident in two other controversial areas that followed in quick succession: defectively designed buildings (Part III), and second-hand electrical goods (Part IV).

Overall, these developments confirm a new rebalancing of business, government and consumer interests in a country now recovering from its "lost decade" of economic stagnation, combined with considerable soul-searching and institutional upheaval. Japan, like other industrialized democracies, needs now to stand back and undertake a more holistic review of how a legal system can best be repositioned to deal with increasingly complex safety risks (Part V).

II. ASBESTOS

Japan's asbestos saga escalated into a huge social and legal issue from June 2005, when the media reported that 79 employees of Kubota (a major machinery and construction firm) at its Amagasaki factory (between Kobe and Osaka) had died from asbestos-related diseases.[4] From July, more deaths were reported in other sectors including construction, shipbuilding, auto parts manufacturing, steelmaking, railways, power generation, and military bases.[5] The government initially estimated that almost 400 employees at 27 companies had died, with 849 claiming workers' compensation (including 121 in 2004, and 186 in 2005).[6] It encouraged peak industry associations to stop using asbestos completely before a nation-wide ban scheduled to be implemented from 2008. A ban in principle implemented belatedly in 2004 had allowed exceptions for facilities that might have difficulty finding substitutes (e.g. in power plants), and even the most toxic "blue" asbestos had only been banned in 1995.[7]

These actions came well after several other advanced industrialized democracies had imposed restrictions, although countries have also only started to completely ban asbes-

3 "Editorial: Asbestos compensation", *supra* note 2.
4 "Hundreds of deaths spur ministry plan to ban all asbestos use by 2008", The Japan Times, 9 July 2005; "51 more deaths tied to asbestos", The Daily Yomiuri, 14 July 2005; "Asbestos linked to 80 shipbuilders' deaths", Asahi Shimbun, 15 July 2005.
5 "Asbestos remains in bodies of 650 train cars used daily", Asahi Shimbun, 21 July 2005; "Ministries to seek complete asbestos halt", The Japan Times, 21 July 2005.
6 "Ministries to seek complete asbestos halt", *supra* note 5.
7 "Industry groups pressed to abolish asbestos use", Asahi Shimbun, 21 July 2005.

tos in recent years.[8] Yet the Japanese government had long been aware of the health risks posed by asbestos, and slowly phased in measures particularly directed at occupational health and safety. From 1956 it exercised administrative guidance (*gyôsei shidô*) encouraging employers to have employees undertake chest X-rays and other tests when working with asbestos. Following a survey of how 46 dangerous substances were being disposed of, carried out in 1970 during the height of Japan's responses to large-scale environmental pollution, asbestos was formally listed in 1971 as a dangerous substance requiring special handling. An official statement that year also acknowledged links between asbestos and cancer,[9] officially confirmed in 1972 by the World Health Organisation (WHO) and the International Labor Organisation (ILO).[10]

However, formal restrictions were only imposed in 1975, when spraying or pumping on of asbestos (e.g. in roof areas and on steel girders, especially in factories and public facilities like railways stations) was prohibited "in principle". That meant where the asbestos content was 5 percent or more, so "rock wool" insulation with lower proportions could still be applied until 1995, although such a construction method was delisted as an acceptable fire-retardant in late 1987 and was reportedly no longer used by 1990.[11] Japan's Labour Ministry (now: MHWL) also added rules in 1975 extending from 3 to 30 years the period for preserving records of asbestos concentrations in workplaces; compelling certain health checks; and requiring, in principle, wetting down of asbestos products when removing or breaking them up. In 1976, it also issued more administrative guidance (in the form of an order or *tsûtatsu*) to local Labour Offices to encourage firms dealing in asbestos to substitute for asbestos products, to take care regarding work clothes, and to improve measures to prevent emissions.[12] Perhaps the central authorities also hoped that local governments would begin to take over the lead, as they had done for environmental pollution and consumer law more generally from the late 1960s; but developments in the latter areas had been underpinned by national legislation specifically delegating some broader authority.[13]

Subsequently, moreover, the Japanese government continued to respond with at least 3-4 year lags even to clear consensus reached at the international level, mostly again relying on softer measures. Japan did not accede until 2005 to the ILO's Asbestos Convention (No. C162 of 1986), prohibiting the use of blue asbestos, until 2005.

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8 "Editorial: Asbestos compensation", *supra* note 2; M. KOYAMA / F. KITAYAMA, Asbestos litigation seen crippling economy, in: The Daily Yomiuri, 19 July 2005.

9 H. OZAWA, *Tatemono no asubesuto to hô* [Asbestos in Buildings and the Law] (Tokyo 2006), 25-6; and generally J. GRESSER / K. FUJIKURA / A. MORISHIMA, Environmental Law in Japan (Cambridge, Mass. 1981).

10 "Socialists ditched bill to ban asbestos", Asahi Shimbun, 6 August 2005.

11 Further administrative guidance was issued in 1986. See e.g. OZAWA, *supra* note 9, 26-7.

12 Ibid, 26-7.

13 See generally P.L. MACLACHLAN, Consumer Politics in Postwar Japan: The Institutional Boundaries of Citizen Activism (New York; Chichester 2002).

Instead, in 1989 the government published a survey indicating that workplaces no longer used blue asbestos (crocidolite); it only prohibited blue asbestos in 1995. In 1989 the WHO recommended prohibiting the use of "brown asbestos" (amosite); but the government again released a report in 1993 after discussions with the industry, claiming that this was no longer then being used either. In 2001, the WHO changed its opinion dating from 1987 that there might also be cancer risks from certain possible substitutes for white asbestos (chrysotile), over which the ILO Treaty had also required controls (albeit not full-scale prohibition). The government only prohibited brown and white asbestos in 2003, by a further reform to Occupational Safety and Health Law Enforcement Ordinance,[14] in force from 2004. The government maintains that these delayed and softer regulatory responses were not significantly slower or laxer than in other major industrialised countries, but many others disagree.[15] There certainly seems to have been a pattern of allowing employers plenty of time and discretion in deploying safety measures and substitutes.

Further, a 1977 report by a local Labour Office had already noted abnormal deaths extending to those residing in the vicinity of a brakes manufacturer; but little had been done, partly because this problem was seen to go beyond the MHWL's jurisdiction.[16] Yet responses to such problems had also been lax from the Environment Agency, now a Ministry but a weaker government department even after the legislative and institutional reforms in environmental policy generally in the early 1970s. It ceased measuring asbestos fibre concentrations in the air near such factories after 1977-8, instead focussing research on other industrial and residential areas (and finding little regional variance), until 1987 when the use of asbestos in school buildings attracted broader social concern. High levels were then found around school buildings, and the Air Pollution Control Law[17] was amended in 1989, requiring no more than 10 fibres per litre (the upper limit of the 1-10 fibre range suggested by a WHO report in 1986).[18] However, even this seems to have been breached, and the restriction was not extended to areas around demolition sites of buildings containing asbestos until 2005, when the MHWL

14 *Rôdô anzen eisei-hô shikô-rei*, Ordinance No. 31/1972.

15 Compare KOKUSEI JÔHÔ SENTÂ (ed.) *Asubesuto shinpô – Q&A-hen* [the New Asbestos Law: Q&A Volume], (Tokyo 2006) 66-71 (noting e.g. use of pre-existing blue asbestos in Germany in 1986 and France in 1987; and prohibition of brown asbestos there only in 1993 and 1994 respectively); with e.g. OZAWA, *supra* note 9, 27, and generally AWANO, *supra* note 2.

16 "Govt to check levels of airborne asbestos", The Daily Yomiuri, 8 September 2005; T. MISHIMA / T. KANDA, '70s report on asbestos deaths ignored, in: Asahi Shimbun, 18 July 2005; "Ministry neglected asbestos monitoring", The Daily Yomiuri, 29 July 2005.

17 *Taiki osen bôshi-hô*, Law No. 97/1968.

18 "Govt to check levels of airborne asbestos", *supra* note 16; MISHIMA / KANDA, *supra* note 16; "Ministry neglected asbestos monitoring", *supra* note 16.

also belatedly added a regulation aimed at preventing the dispersal of asbestos from building sites.[19]

To make matters worse, the Waste Management and Public Cleansing Law[20] had only been revised in 1997, to require anti-scattering measures when asbestos was disposed of by burying. Both Kubota and Kirin Breweries in Amagasaki have recently had to remove asbestos-contaminated soil, but there are fears that lax rules and enforcement mean that many other sites remain contaminated.[21] A further problem raised recently has been the paucity of regulations addressing possible dispersion of asbestos within buildings more generally (such as inside schools), either on the part of the MHWL or (other than, belatedly, in regard to its own facilities!) the Ministry of Land, Infrastructure and Transport (MILT).[22]

Further pressure had mounted on the Japanese government because over 2002-5 it had paid out 716 million yen to 41 claimants in three lawsuits (including two settlements), who had suffered asbestos-related diseases after being hired to work at the US Naval Base at Yokosuka (near Yokohama).[23] Pressure was also extended to the US government, which unusually agreed in August 2005 to shoulder 194 million yen for 26 of those claimants who had worked at the Base from 1966, under Article 16 of the Japan-US Status of Forces Agreement, added in that year.[24] Further, a Nagano District Court judgment of 27 June 1986 had been reluctant to find facts establishing the "extreme unreasonableness" seen as necessary to impose State Compensation Law liability for omissions on the part of government regulators in the asbestos context. By contrast, a Supreme Court judgment of 27 April 2004 had found the government liable in an arguably analogous situation involving lung disease claims and the Mining Law.[25]

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19 " 'De facto' ban on asbestos use eyed", The Daily Yomiuri, 3 September 2005; H. KONO, Tougher standards required on asbestos, in: The Daily Yomiuri, 15 September 2005; see also "Asbestos death near plant reported in '86", The Japan Times, 1 August 2005. For details on the far-reaching new obligations on those building owners or certain other employers employing personnel in contact with asbestos, the Asbestos Harm Prevention Regulations in force from 1 July 2005, see OZAWA, *supra* note 9, 43 and 75-87.

20 *Haiki-butsu no shori oyobi seisô ni kan suru hôritsu*, Law No. 137/1970.

21 "Asbestos-tainted soil found at plants", The Daily Yomiuri, 24 August 2005. On air pollution and waste management regulation generally in connection with asbestos, see further OZAWA, *supra* note 9, 30-8.

22 OZAWA, *supra* note 9, 38-43. Table 2-1 (pp 44-6) adds a useful summary of all Japanese regulations (hard and soft) from 1956 until 2005.

23 "Editorial: Asbestos compensation", *supra* note 2; KOYAMA / KITAYAMA, *supra* note 8.

24 "U.S. to pay share in asbestos settlements", Asahi Shimbun, 22 August 2005.

25 *Kôzan hoan-hô*, Law No. 70/48. The judgments can be found in Hanta 616, 34 and Minshû 58, 1032, respectively, and are discussed in N. ISHIDA, *Nihon ni okeru asubesuto soshô – genjô to kongo no kadai* [Asbestos Litigation in Japan: Present Situation and Future Issues], in: N.B.L. 827 (2006) 46-7.

By July 2005, unsurprisingly but unusually still for Japan, the heads of seven government agencies had met quite promptly to investigate more closely the causes and ramifications of the asbestos problem.[26] Further surveys quickly uncovered at least 190 more who had died from asbestos-related diseases, many of whom were thought not to have claimed workers' compensation.[27] The widespread use of asbestos was also confirmed, and cases of excessive fibres per litre were found at schools and other public facilities.[28] An Emeritus Professor appointed by the Environment Ministry to chair a Review of its responses to asbestos was forced to resign after it was revealed he had advised the Japan Asbestos Association over 1985-97.[29] The Review's report in August 2005 defended the Ministry's research focus, but concluded that the 1989 Air Pollution Control Law revisions had been limited. One explanation given was that a "precautionary approach" to such uncertain but potentially disastrous risks was not yet prevalent around that time. Another was that there was insufficient coordination with other government agencies – especially the MLHW, dealing mainly with asbestos within industrial facilities, and the powerful Ministry of International Trade and Industry (now METI: Ministry of Economics Trade and Industry) with primary jurisdiction over products incorporating asbestos.[30]

Further pressure then came from local governments, with the Amagasaki municipality taking the unprecedented step of offering free health check-ups for asbestos-related diseases, and from labour union branches.[31] However, the Trade Union Federation (*Rengô*) was itself revealed to have put the brakes on a movement led by the Social Democratic Party (then the main opposition party) in the early 1990s to ban already asbestos. This backflip had followed concerns about job losses, as well as resistance from the Association and other firms favouring voluntary and delayed restrictions.[32]

Already by end-July 2005, the government was indicating that it was considering special legislation to compensate primarily the surviving dependants of workers who had died from asbestos. This became almost certain after Prime Minister Koizumi

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26 "State to draft law on asbestos redress", The Japan Times, 27 August 2005.

27 *Ibid.*; "Asbestos levels exceeding limit found at 2 schools", The Daily Yomiuri, 8 September 2005; "190 new deaths linked to asbestos", The Daily Yomiuri, 27 August 2005; "Law may cover cost of asbestos ills", The Daily Yomiuri, 30 July 2005.

28 "Asbestos found at 22 Hyogo facilities", The Daily Yomiuri, 15 September 2005; "Shiga closes facilities due to asbestos scare", The Daily Yomiuri, 14 September 2005; "Asbestos used at 3,700 train stations", Asahi Shimbun, 24 August 2005; "Asbestos used in train stations", The Daily Yomiuri, 2 August 2005.

29 "Asbestos probe chief exits over industry ties", The Japan Times, 3 August 2005.

30 *Ishiwata (asubesuto) mondai ni kan suru kankyô-shô no kako no taiô ni tsuite – kenshô kekka hôkoku* [On the Environment Ministry's past response to the asbestos problem – Report on Inquiry Outcomes], (2005).

31 "Asbestos-hit town offers free health checks", The Daily Yomiuri, 20 August 2005; see also "Kanagawa Pref. leads way in probing asbestos cases", The Daily Yomiuri, 16 August 2005.

32 "Socialists ditched bill to ban asbestos", *supra* note 10; "Editorial: Asbestos compensation", *supra* note 2; KOYAMA / KITAYAMA, *supra* note 8.

dissolved the House of Representatives on 8 August, calling for a general election on 11 September. As his campaign was focussed on gaining the electorate's direct support for reform of Japan's postal savings system, Koizumi could not afford any ongoing distractions by asbestos.[33] His very successful campaign was not even marred by sports centres and other public facilities being unavailable for use as polling stations on election day, due to temporary closures after having been found to contain asbestos.[34] However, the Koizumi government also made it clear that the compensation scheme would extend beyond workers themselves.[35] Further re-regulation aimed at minimising future harm was on the cards as well.

On 27 December 2005, the (re-elected) government's inter-ministerial committee released its "Comprehensive Response Plan for Asbestos Problems." A massive budget was duly provided to remove asbestos from public facilities, and two major laws were enacted on 10 February 2006. The Law Partially Amending the Air Pollution Control Law etc to Prevent Harm to Public Health etc caused by Asbestos[36] largely followed the Plan's recommendations by introducing amendments to three other laws, to come into effect within eight months of enactment. To prevent dispersal of asbestos from pre-existing structures, the Building Standards Law – under MILT jurisdiction – was amended to (i) require removal of sprayed-on asbestos and rockwool (unless not at risk of dispersal) when renovating or adding to certain buildings, (ii) provide for warnings or orders if there is a risk of dispersal, (iii) provide powers to obtain reports or make site inspections if necessary, and (iv) supervise operations via the Law's periodic report system. Secondly, a further amendment to the Air Pollution Control Law – under Environment Ministry jurisdiction – extended its scope beyond buildings to certain plants and facilities using asbestos. (This followed amendments to its enforcement regulations on 21 December 2005, in force from 1 March, which had also extended the Law (a) to cover asbestos products as well as sprayed-on asbestos, (b) to remove limits to scope based on building size, and (c) to require placement of signage making it clear what asbestos-related work was being carried out.) Thirdly, the Waste Management Law – also under Environment Ministry jurisdiction – was amended to establish a system whereby the Minister certifies those who dispose of asbestos waste without causing harm by using high levels of technology.

On the other hand, this amending legislation does not seem to have taken up the Response Plan's recommendation for reform also of the Local Finances Law[37], under jurisdiction of the General Affairs Ministry. That would have allowed expenses needed by local governments to remove asbestos from their facilities to be covered, exception-

33 "Officials' response to asbestos slipshod, critics say", The Japan Times, 4 August 2005.
34 "Poll stations polluted by asbestos", The Daily Yomiuri, 25 August 2005.
35 "Compensation law eyed for victims of asbestos", Asahi Shimbun, 27 August 2005.
36 *Sekimen ni yoru kenkô-tô ni kakaru higai no bôshi no tame no taiki osen bôshihô-tô no ichibu o kaisei suru hôritsu*, Law No. 5/2006.
37 *Chihô zaisei-hô,* Law No. 109/1948.

ally, by local government bond issuance. Also left hanging are the Plan's suggestions for studies into (a) requiring asbestos test results to be added to the key points to be explained when disposing of real property, pursuant to the Real Property Transactions Business Law[38], and (b) means of having asbestos issues accurately reflected in building valuation practices, in light of Building Standards Law reforms. These suggestions are seen as having the greatest potential for effectively addressing future harms from asbestos.[39]

In parallel, the Law Providing Relief for Injuries from Asbestos[40] was also enacted on 10 February 2006 and promptly came into effect from 27 March. It benefits workers (mostly self-employed)[41] not covered by workers' compensation; families of workers who died at least five years ago (losing the right to workers' compensation due to extinctive prescription); family members of workers in turn contaminated (e.g. by washing asbestos-ridden clothes); and residents near asbestos-related factories. First, living victims not at work or not covered by workers' compensation will be reimbursed for their out-of-pocket medical expenses not otherwise covered by health insurance, and receive medical treatment support payment of around 100,000 yen per month. Second, surviving spouses or dependants of workers who died before the Law came into effect can claim an annuity of 2.4-3.3 million yen (depending on their numbers). If there are no such survivors, their own surviving relatives can claim up to 12 million yen. Such claims must be brought within 3 years of the Law coming into effect. Third, for non-workers or workers not covered by workers' compensation who die afterwards, their families can claim 2.8 million yen in condolence money and 199,000 yen towards funeral expenses. The main aim of the Law is stated to be the provision of prompt and predictable compensation for extensive injuries that are typically latent for long periods, and difficult to attribute causality for. It must be reviewed before 27 March 2011.

The scheme is operated by the central government as a type of social security scheme, drawing inspiration from Japanese schemes for drug side-effects and for harm from nuclear accidents. It contributed an initial endowment of around 40 billion yen, and will pay half of the fund's administrative expenses from fiscal year 2007. Local governments contribute one quarter of the fund's outgoings from fiscal year (April) 2006. However, a large proportion will come from industry, collected through the workers' compensation payment scheme. All employers will contribute an annual levy, but some employers found to have used asbestos extensively in their workplaces or engaged in

38 *Takuchi tatemono torihiki-hô*, Law No. 176/1952.

39 Compare KOKUSEI JÔHÔ SENTÂ, *supra* note 15, especially pp 85-9 with OZAWA, *supra* note 9, especially p 136.

40 *Ishiwata ni yoru kenkô higai no kyûsai ni kan suru hôritsu*, Law No. 4/2006.

41 T. SEI, Day laborers shut out from help for their asbestos-linked diseases, in: Asahi Shimbun, 4 August 2005.

commercial activities closely linked to asbestos can be required to pay surcharges.[42] It remains to be seen how these payments will be calculated each year. However, the philosophy seems to be that firms as well as central and local governments have benefited from use of asbestos, so they should now share in covering the latent costs involved. Similar notions underpin New Zealand's state compensation scheme for all personal injuries by accident, in lieu of allowing tort claims. A major problem that emerged in Australia is also avoided, where the major asbestos manufacturer's parent company relocated to the Netherlands, leaving insufficient assets in a fund designed to pay out its compensation claims.[43]

Around 2000 people applied for relief in the Japanese scheme's first few weeks of operation.[44] A major incentive is that after 27 March 2006 victims must apply while still alive for their families to be able to claim upon their death.[45] Also, employers or their families cannot claim; they are expected to self-insure through a special accident compensation scheme, but less than a third of small or mid-sized firms have done so. Another problem is that victims must suffer from mesotheliomia or other asbestos-related lung cancers, but the criteria to prove the latter are difficult to formulate and apply, and other diseases like asbestos pleural effusions are not covered.[46] On 26 April 2006, eight plaintiffs who had worked in or lived near Kubota's Amagasaki plant, but who are not eligible under the Law, brought claims totalling 2.2 billion yen (22-33 million yen each) under the State Compensation Law[47] for the government's negligent regulation of asbestos.

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

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42 "Asbestos aid falls short", The Japan Times, 15 March 2006; KOKUSEI JÔHÔ SENTÂ, *supra* note 15, especially pp 9, 19-20, 44 and 49.

43 NOTTAGE, *supra* note 1 (and Report of the Special Commission of Inquiry Into the Medical Research and Compensation Foundation, available via <*http://www.cabinet.nsw.gov.au/publications.html*>); cf generally e.g. I. CAMPBELL, Compensation for Personal Injury in New Zealand: Its Rise and Fall (Auckland 1996).

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

45 "New asbestos law no panacea; Rigid criteria mean many lung-disease sufferers will be left out in the cold", The Daily Yomiuri, 17 March 2006; "Asbestos-affected apply for relief; But window narrow for some state funds victims", The Japan Times, 21 March 2006.

46 "New asbestos law no panacea; Rigid criteria mean many lung-disease sufferers will be left out in the cold", *supra* note 45; "Asbestos-affected apply for relief; But window narrow for some state funds victims", *supra* note 45.

47 *Kokka baishô-hô*, Law No. 125/1947.

the social welfare nature of the scheme and encourages compensation claims against firms.

The status was also unclear about payments such as two million yen in "consolation money" initially paid by Kubota to each of 66 victims or their families, followed by its promise in December 2005 to secure additional funds for them equal to that received by its employees afflicted by asbestos-related diseases (totalling 8 billion yen as of end-March 2006), since these are expressly stated to be made out of a sense of moral (not legal) responsibility.[48] In April 2006, Kubota confirmed that it would stop paying two million yen, and instead pay amounts similar to those provided under workers' compensation (25-46 million yen each) to afflicted residents who had lived for a year within one kilometre of its Amagasaki factory (and possibly further afield), as well as those who had worked or gone to school within that radius. However, these payments (of at least 3.4 billion yen for 88 certified victims, but with at least another 20 applications pending) would only be available to those certified as asbestos victims under the Law.[49] Kubota also still insisted that its payments were made out of moral responsibility; but because its actions are seen as at least partly designed to pre-empt tort suits, it seems likely that these payments (but perhaps not the two million yen payments already paid) will be fully offset against the (lower) amounts available to victims certified under the Law. On 2 May 2006, a building materials manufacturer based in Nara (Nichias Corporation) and its subsidiary, with combined asbestos-related deaths of 183 workers, announced a similar but less generous scheme, offering 30 million yen to victims who had lived for at least one year within 400 metres of its plants before 1971.[50]

In sum, further claims against the government under the State Compensation Law remain quite possible, as do tort claims by residents or workers particularly against those who are not direct employers, and even by consumers or others against manufacturers of asbestos products or parts. After all, a METI survey in August 2005 of 20,000 firms making consumer goods found that only 14 firms produced 19 products still containing asbestos, but that 118 firms had previously produced 502 such consumer goods – reportedly without claims of asbestos-related disease, a situation that might change.[51] However, difficulties will remain with prescription periods and evidential burdens, especially in proving a causal link to any diseases recognized by such consu-

48 "Not all asbestos victims to be compensated", The Daily Yomiuri, 21 March 2006.

49 "Kubota offers asbestos redress to neighbours", The Japan Times, 19 April 2006. Kubota's relatively prompt responses occurred in the context of a long history of air pollution around Amagasaki, and a progressive (female) mayor elected in 2002, who in turn influenced the political response at the national level: AWANO, *supra* note 2, 54-8.

50 "Payout set up for asbestos victims", Asahi Shimbun, 3 May 2006.

51 "Asbestos found in kids' bicycle brakes", The Daily Yomiuri, 9 September 2005; "Bill afoot to offer victims of asbestos-caused mesothelioma aid", The Japan Times, 14 September 2005. Some estimate that there were over 3000 uses for asbestos in Japan: NIHON KEIZAI SHINBUN KAGAKU GIJUTSU-BU, *supra* note 2, 11.

mers (or workers, residents or those suing the government for lax regulation).[52] This demonstrates the limits to tort law and product liability in many "toxic torts" situations.[53]

Further refinements or development of this new statutory scheme, as well as the changes to building and environmental regulations culminating in the Response Plan, are therefore quite likely. Nonetheless, they provide insights and experiments for government to begin addressing other widespread and complex safety issues through state compensation or social welfare and "re-regulation", rather than relying primarily on private tort law and self-regulation – even in Japan's brave new world of law, politics and economics.[54] The contemporary relationship between Japanese citizens and their new state remains complex.[55]

III. DEFECTIVELY DESIGNED BUILDINGS

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

52 Compare OZAWA, *supra* note 9, 109-116 with ISHIDA, *supra* note 25, 40-47.

53 See generally e.g. M. REICH, Toxic Politics: Responding to Chemical Disasters (Ithaca 1991); L. NOTTAGE, Product Safety and Liability Law in Japan: From Minamata to Mad Cows (London 2004), especially Chapter 2; GRESSER ET AL., *supra* note 9.

54 Cf generally E.C. SIBBITT, A Brave New World for M&A of Financial Institutions in Japan: Big Bang Financial Deregulation and the New Environment for Corporate Combinations of Financial Institutions, in: University of Pennsylvania Journal of International Economic Law 19 (1998) 965-1027; R.D. KELEMEN / E.C. SIBBITT, The Americanization of Japanese Law, in: University of Pennsylvania Journal of International Economic Law 23 (2002) 269.

55 See also T. TANASE, *Asubesutosu higai hôshô shisutemu no sekkei – kokusai hikaku kara* [Designing a System for Asbestos Disease Compensation – International Comparisons], in: N.B.L. 826 (2006) 20-27; and NOTTAGE, *supra* note 1.

practice), particularly in large-scale incidents (e.g. environmental pollution and product liability).[56]

On 25 October 2005, President Ojima of the now insolvent condominium developer Huser learned from eHomes, designated by the government under 1998 revisions to the Building Standards Law[57] that allowed outsourcing of building inspections, that an architect named Aneha might have fabricated quake-resistance data for some of Huser's buildings. eHomes later alleged that they were pressured not to disclose this disturbing safety risk.[58] Ojima certainly accepted payments from buyers over 25-29 October and on 7 November, for which he was eventually (on 17 May 2006) arrested for fraud as well as failure to comply with disclosure obligations under legislation governing dealings in residential property.[59]

On 9 November, Ojima visited MILT, and began requesting financial support to repair or buy back its defective buildings. He explained that Huser would otherwise risk bankruptcy, and also raised the possibility of the state bearing some responsibility for the situation.[60] Ojima also got Kozuke Ito – a veteran senior government politician supported by Huser, and a former head of the National Land Agency (now part of the Ministry) – to accompany him on 15 November to ask the Ministry why it had halted construction of one of Huser's condos.[61] However, an architect named Watanabe from a design office associated with Aneha had blown the whistle, so a few days later the Ministry made public the extent of the problem. On 17 November it warned residents of buildings at risk (thought to be only 21, at that stage). Following a Cabinet meeting the next day, a senior politician indicated that public funding was unlikely to be forthcoming to resolve the situation, as it involved dealings among private parties. By contrast, on 22 November the MILT Minister contradicted his colleague.[62]

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56 R.B. LEFLAR / F. IWATA, Medical Error as Reportable Event, as Tort, as Crime: A Transpacific Comparison, in: Widener Law Review 12 (2006) 195 (and in this issue); and *supra* note 53.

57 *Kenchiku kinjun-hô*, Law No. 201/1950.

58 R. YOSHIDA / K. SHIMIZU, 8 billion yen outlay eyed to repair shoddy condo fiasco; Buyers would still have to repay loans, in: The Japan Times, 7 December 2005.

59 "Huser's buyback pledge rings hollow; Aneha, four subcontractors face charges", The Japan Times, 22 December 2005; "Huser head held in building scam", The Japan Times, 18 May 2006. See also "Huser president facing criminal investigation", The Japan Times, 18 April 2006. On 27 October 2005, the day before a sale of a condo complex in Yokohama, Huser reportedly received fresh (faked) data from Aneha: "*Hyûzâ: kyôdo dêta sai-nyûshu* [Huser: Strength Data Re-Acquired]", Nihon Keizai Shinbun, 21 May.

60 "18 inspection firms using lax procedures; Residents of Kawasaki condo are ordered to stay out of their homes", *The Japan Times*, 29 November 2005; "Razing of Aneha buildings begins; Three condos in Tokyo, hotel in Aichi start coming down", *The Japan Times*, 11 January 2006.

61 "LDP vet Ito denies arranging Huser meeting with ministry", *The Japan Times*, 20 January 2006.

62 SANKEI SHINBUN SHAKAI-BU, *Mu-sekinin no rensa – taishin gizô jiken* [Chain of Irresponsibility: The Earthquake Resistance Fraud Cases] (Tokyo 2006) especially pp 326-7.

Aneha himself had appeared to come clean, but he blamed companies like Huser and consultancy firms for pressuring him to develop plans using insufficient reinforcement steel in order to reduce construction costs, as well as the government-specified inspection firms for not noticing this. In particular, Aneha alleged pressure from Kimura Construction, a client providing 90 per cent of his business and which had built around 50 out of his 98 defectively designed buildings, and a firm closely linked to the developer.[63] Police later arrested the company's president, Moriyoshi Kimura, for fraud too; but his initial arrest (on 26 April 2006) was for window-dressing a financial report in March 2005 showing large profits for the now-bankrupt firm, in contravention of the Construction Business Law.[64] Aneha was likewise pursued for fraud, after being initially arrested (also on 26 April 2006) for allowing a designer to use his licence in violation of the Architects Law.[65] Executives of eHomes were also arrested that day for fraudulently inflating its capital base, by borrowing the funds from a judicial scrivener (*shihô shoshi*) who recorded the increase, in order to receive accreditation from MILT to check plans for larger-scale buildings. eHomes was found to have approved 37 of Aneha's 98 defectively designed buildings, and he had described it as a "soft touch" (*amae*). Indeed, the whole saga had began when (on 7 October 2005) MILT received an anonymous tip-off that eHomes was failing to comply with record-keeping obligations under the Building Standards Law, and inspected their offices on 24 October.[66]

By June 2006, however, it had emerged that Aneha had lied at parliamentary Transport Committee hearings initiated (quite unusually for Japan) on 29 November 2005, soon after the problems were made public by the MILT. Under cross-examination on 14 December, he had sworn that his data falsifications had commenced in 1998 when he became involved with Kimura. However, after Aneha's initial arrest he indicated that this was false, and that he had also faked data for at least one other unrelated project in 1997.[67] On 24 June 2006 he was re-arrested for perjury, prompting debates about the

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63 K. SHIMIZU, It was cut corners or Kimura axed contract: Aneha to Diet, in: The Japan Times, 15 December 2005. Kimura appears particularly lax in having checks conducted during construction as well, but this has probably been a more pervasive problem under regulations and practices until recently: *"Sekô furyô 'kakuseba ii': hyûzâ, zusan na hinshitsu kanri* [Faulty Construction 'Should Be Hidden' Huser's Shoddy Quality Control]", Nihon Keizai Shinbun, 20 May 2006; O. NAGAJIMA, *Naze "taishin gizô mondai" wa okiru no ka?* [Why Do Earthquake Resistance Fraud Cases Occur?] (Tokyo 2005).

64 *Kensetsugyô-hô*, Law No. 100/1949.

65 *Kenchikushi-hô*, Law No. 202/1950; "Huser head held in building scam", *supra* note 59; see also "Huser president facing criminal investigation", *supra* note 59.

66 SANKEI SHINBUN SHAKAI-BU, *supra* note 62, especially pp 2-5 and (a detailed timeline) pp 326-31. eHomes was deregistered in May 2006, when three out of five others later investigated for improper procedures also had the accreditation suspended: *"4 kensa kikan o shobun e: îhômuzu shitei torikeshi* [4 Organisations under Investigation to Be Dealt With: ehomes to Lose Designated Status]", Nihon Keizai Shimbun, 24 May 2006.

67 "Aneha Lied to Diet About Start of Fraud", The Japan Times, 30 May; "Aneha Faces More Claims of Misdeeds", The Japan Times, 7 June 2006.

proper role and powers of parliamentary inquiries in such situations.[68] Within a week, a taskforce of prosecutors had released the results of their seven-month investigation, concluding that only Aneha had acted fraudulently in this case and dropping the additional fraud charges against Kimura and Ojima.[69]

Nonetheless, it had become clear to the public and the government that problems were more pervasive. A considerable weakness in the present system is the susceptibility to pressure on the part of architects like Aneha. Although they must pass difficult examinations and undergo practical training, there are still around 100,000 including 30,000 "first class" architects like him. Even within his category, there is clear hierarchy between those who concentrate on design work, and those (like Aneha himself) who concentrated more on the drafting and related paperwork. Those like Aneha, for reasons of economics and status, are more likely to come under pressure to cut corners. This problem became potentially more serious when plan inspection work was deregulated, opened up to outsourcing through an amendment to the Building Standards Law in June 1998 (in force from May 1999), without significantly increasing penalties or enforcement mechanisms for the various professionals involved in the planning and construction process.[70]

It came as little surprise, then, when in March 2006 a "second-class" architect named Asanuma confessed that he too had faked quake resistance data, for 33 buildings in Sapporo, although its municipal government stated that residents did not need to evacuate the five worst condo complexes since resistance was not in immediate danger – below 50 per cent of the required level – and refused to divulge their locations.[71] By contrast, from November 2005 other local authorities began ordering demolition or vacating of buildings with even lower quake-resistance, mainly involving Huser and Kimura Construction.[72] Residents who had refused offers from Huser to buy back their condominiums due to concerns about its insolvency got the Tokyo District Court to put

68 "Lawmakers Perplexed over Aneha Perjury", Asahi Shimbun, 24 June 2006.

69 "Aneha Blamed as Defective-Building Probe Ends", Asahi Shimbun, 30 June 2006.

70 SANKEI SHINBUN SHAKAI-BU, *supra* note 62, especially pp 322-24. See also NAGAJIMA, *supra* note 63, and more generally T. HOSONO, *Taishin gizô* [Earthquake Resistance Fraud] (Tokyo 2006). Some of the inspection firms licenced for outsourced inspections, moreover, may well have been sites mainly for *amakudari* ("descent from heaven", i.e. lucrative "private" firm positions for retiring civil servants): cf generally e.g. J.A. AMYX, Japan's Financial Crisis : Institutional Rigidity and Reluctant Change (Princeton, NJ 2004).

71 E. ARITA, Another architect fakes design strength; 33 Sapporo buildings target of investigation, in: The Japan Times, 8 March 2006; see also K. SHIMIZU, Ministry denies 'urgent' safety issue; Fukuoka design firm also faked structural data, in: The Japan Times, 9 February 2006.

72 "18 inspection firms using lax procedures; Residents of Kawasaki condo are ordered to stay out of their homes", *supra* note 60; "Razing of Aneha buildings begins; Three condos in Tokyo, hotel in Aichi start coming down", *supra* note 60.

it into receivership on 16 February 2006.[73] However, this also suspended Huser's suit brought on 30 January claiming 13.9 billion yen from 18 local governments for not properly checking quake-proofing data when allowing developments.[74] More directly, on 2 June, at least one of 46 condo complexes in Tokyo built by a public entity (now known as the Urban Renaissance Agency) was found to have only 58 percent of the required earthquake resistance, after the entity initially claimed it had misplaced the relevant data.[75]

Anticipating such upheaval, in December 2005 the government announced a package to provide 5 billion yen towards rebuilding costs for 212 households in seven condo complexes, as well as 3 billion yen towards inspections for quake resistance. It also said it would examine three more complexes that might obtain public assistance, but the MILT Minister remarked that "this is a matter to be settled in court (by private parties) eventually", so it was unclear if and how funds would be forthcoming.[76] Even if this funding is available to rebuild certain complexes, residents cannot generally just re-enter them upon completion; each must pay on average 20 million yen to have the dwellings subdivided again. Since this extra cost is beyond the means of many residents, their associations have found it difficult to obtain the necessary resolutions to undertake rebuildings. Some therefore describe the public funding scheme as like a "dumpling in a painting (*e ni egaita mochi*)" – you can see it, but you can't eat it![77] The Taskforce's report at the end of June 2006 did not go into the question of what relief might be provided to residents, although (in this area, as well as others in Japan) the determinations from criminal investigations often cast a sharp light on potential civil or public liability issues.[78]

Anyway, problems afflicting many other complexes may generate compensation claims against the government, either by residents themselves or firms themselves suffering compensation claims or other losses. In May 2006, nine hotels forced to close due to faked structural data brought a civil negligence claim against consultants associated with Aneha for 456 million yen, mainly comprising management fees, with the

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73 "Huser's buyback pledge rings hollow; Aneha, four subcontractors face charges", *supra* note 59 "Huser enters bankruptcy procedures", The Japan Time*s*, 17 February 2006; see also "Huser appeals bankruptcy declaration; Seller of shoddy condos mum as administrator says assets have dried up", The Japan Times, 18 February 2006.

74 "Huser sues government for missing falsified data", The Japan Times, 31 January 2006.

75 "Public-Built Condo at 58% of Quake Standard", The Daily Yomiuri, 2 June 2006.

76 R. YOSHIDA / K. SHIMIZU, 8 billion yen outlay eyed to repair shoddy condo fiasco; Buyers would still have to repay loans, in: *Ibid.* 7 December 2005.

77 SANKEI SHINBUN SHAKAI-BU, *supra* note 62, 5-6. Japanese law, especially product liability law (arguably unfairly), has been so described by one of Japan's leading legal sociologists in a Time Magazine feature in 2000: cf L. NOTTAGE, New Concerns and Challenges for Product Safety in Japan, in: Australian Product Liability Reporter 11 (2000) 100-110.

78 "Aneha Blamed as Defective-Building Probe Ends", *supra* note 69; cf SANKEI SHINBUN SHAKAKAI-BU, *supra* note 62, 6-7, and generally *supra* note 56.

expectation of further claims for lost business and rectification costs.[79] In June, 33 residents of a Tokyo condo complex found to have only 30 percent earthquake resistance filed a suit claiming 600 million yen in compensation from Aneha, a design firm (Space One) and two of its former architects, a construction firm (Taihei Kôgyô), and the Kawasaki municipal government.[80] On the other hand, as in Japan's asbestos saga outlined above (Part II), an advisory panel released a report in April that largely absolved the Ministry from failing to detect fabrications and for meeting with Ito, although it urged more disclosure including information about more buildings found to be in breach of the law.[81] Meanwhile, many local governments began offering subsidies and/or technical assistance to owners of houses and buildings for earthquake-resistance tests.[82] In addition, perhaps prompted by the authorities, from February some financial institutions and insurers have allowed deferrals of loan or premium payments owed by residents of the defective buildings.[83]

Changes to "hard" and "soft" law have also been initiated. The Law for Promotion of the Earthquake-proof Retrofit of Buildings[84] was revised with effect from 26 January 2006. The Law was enacted in 1995 after over 6000 ended up dying in the Great Hanshin Earthquake, most crushed under older buildings that collapsed. It called for pre-1981 buildings larger than 1000 square metres and higher than three stories to be checked and strengthened if necessary, but local governments could only recommend such retrofits. The revised Law extends its scope to buildings larger than 500 metres and two stories or more, and allows authorities to disclose names of those buildings with sub-standard quake resistance. It also sets a (still non-binding) target of 90 per cent quake-resistance for buildings by 2015, but this increase from 75 per cent will require about 1 million dwellings and 30,000 large facilities to be reinforced. Separately, from April 2006, the Ministry will release the results of earthquake tests of pre-1981 public primary and middle school buildings. However, 40 per cent have yet to be inspected despite more checks recently; and only 52 per cent of those inspected are deemed earthquake-resistant, although this proportion has grown by 7 percentage points since 2002 as some strengthening has been undertaken.[85]

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79 "Huser head held in building scam", *supra* note 59; see also "Huser president facing criminal investigation", *supra* note 59. For a general analysis of potential civil liability for latent defects in buildings and the like, see K. KAMANO, *Taishin kyôdo gizô jiken to hôritsu mondai* [Legal Issues Raised by the Cases of Earthquake Strengthening Fraud], in: N.B.L. 830 (2006) 15-22.

80 "Kawasaki Condo Residents to Sue Multiple Parties", The Daily Yomiuri, 25 June 2006.

81 "Report clears govt over fake quake-resistance data", The Daily Yomiuri, 8 April 2006.

82 "25 prefectures aid quake checks", The Japan Times, 6 January 2006.

83 H. NAKATA, Lenders, insurers offer relief to Aneha victims, in: *Ibid.*2 February 2006.

84 *Kenchiku-butsu no taishin kaishû no sokushin ni kan suru hôritsu*, Law No. 123/1995.

85 K. SHIMIZU, New nonbinding law to quake-proof the old, in: *Ibid.*27 January 2006.

In another "softer" initiative, from 3 April 2006 the government began accepting registrations from condo management unions for a new free website to be unveiled from July, disclosing information on the architects, original seller, builders and the history of repairs, with the aim of reviving the market for used condos.[86] This strategy is reminiscent of the government's support of quite successful systems to generate information at retail outlets regarding the provenance of local beef, after consumers were scared off by "mad cow disease" discovered in 2001.[87]

On the "hard law" front, on 31 March 2006 the Cabinet approved four Bills that it aimed to have submitted during the legislature's session ending June. First, the Building Standards Law would increase maximum fines on architects and other individuals who have erected unsafe buildings from 500,000 to 3 million yen. Deviant companies would receive a maximum fine of 100 million yen, without going through administrative procedures to correct violations. Secondly, belatedly covering the pre-construction phase, the Architects Law would add a maximum penalty of one million yen or a one-year prison term for architects like Aneha who fabricate structural calculations. (As before, they will also lose their licences.) Thirdly, the Real Property Transactions Business Law would extend a maximum fine of 3 million yen (100 million yen for companies) or two-year prison terms to those individuals lying to clients or deliberately concealing important facts about buildings from them when concluding contracts. Sellers would also need to disclose whether they or the builder has insurance covering the cost of rebuilding or reinforcement if defects are found, although the Ministry of Finance could not yet be persuaded to make such insurance mandatory. Finally, the Construction Business Law would require construction companies to exchange, in writing, details of their insurance policies with builders when signing contracts.[88] Parliament passed the Architects Law amendment on 14 June, extending the novel maximum prison term to three years.[89] Amendments to the Building Standards Law not only increased maximum penalties, but also required independent organizations to double-check structural calculations after checks by inspection agencies (like the disgraced eHomes) and design offices, and required builders to have construction plans verified by intermediate inspections.[90] Alongside such stricter regulations and enforcement, on 27 June the MILT announced that it will introduce licences for qualified structural designers in response to specialist developments in construction work, and as another way to restore public trust in the construction field.[91]

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86 "Ministry to create condo-data Web site", Asahi Shimbun, 3 April 2006; available via <*http://www.mankan.or.jp*>.

87 See generally L. NOTTAGE / M. TREZISE, Mad Cows and Japanese Consumers, in: Australian Product Liability Reporter 14 (2003) 125-136.

88 "Designers, sellers of defective buildings face law with teeth", The Japan Times, 1 April 2006.

89 "Diet Toughens Penalties on Architects", Mainichi Shimbun, 14 June 2006.

90 "Editorial: Aneha Scandal", Asahi Shimbun, 1 July 2006.

91 "More Builder Licences Planned", The Japan Times, 27 June 2006.

In May 2006, moreover, the Ministry initiated a detailed study into compelling insurance against defects in buildings. The Building Quality Promotion Law[92] makes sellers liable for latent defects in major structural parts for at least 10 years, but that does not help when they go bankrupt – as with Huser and Kimura recently. Although the proportion has been growing since 2000, comparatively few dwellings have voluntary insurance covering such an eventuality:[93]

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

Japanese insurance companies remain concerned about the difficulties in pricing such risks and are calling for direct public funding if compulsory insurance is introduced, but the government has pointed out that countries like France do not provide any support. Another issue is whether insurers should be exempt from claims if sellers create building defects intentionally or with gross negligence. Some sellers also object that the extra costs of compulsory insurance will need to be borne by consumers, depressing a still fragile real estate market. The MILT's study group did not include any real estate industry representatives, so strong opposition may emerge depending on the premiums and other terms recommended for any such scheme.

92 *Jûtaku no hinshitsu kakuho no sokushin-tô ni kan suru hôritsu*, Law No. 81/1999, in force since 2000.

93 Translated & adapted from: Nihon Keizai Shinbun, 22 May 2006, 5.

Overall, Japan's long-cosseted construction industry is now being exposed as well to "structural reform" – in a rather different sense to that advanced in other areas of the economy by the Koizumi government over the last five years – and the increasingly harsh glare of public scrutiny. The defectively designed buildings saga has highlighted again other longstanding problems, such as "sick house syndrome".[94] It has led to more revelations, such as illegal renovations (removing barrier-free access and other spaces required by planning laws) in cut-price hotels developed successfully by the Toyoko Inn group throughout Japan, for which its President has abjectly apologized.[95] The public now expects more from the industry and the government particularly regarding illegal modifications, as well as initial construction. Calls have been made for a thorough further review of planning laws and enforcement involving a broad range of stakeholders, leading to public disclosure of designs at the approvals stage (or early inspections, if applicants fear privacy violations), surprise on-site inspections (now commonplace in the financial services industry), and ongoing improvements in generating better information about construction projects.[96] Given broader socio-economic and political trends in Japan in recent years, particularly when the safety of citizens is at stake, more shake-ups of this sector are likely. This continues to create both challenges and opportunities for foreign as well as domestic firms and their legal advisors, along with Japanese citizens and policy-makers.

IV. SECONDHAND ELECTRICAL PRODUCTS

Just as the furore over defectively designed and constructed buildings was winding down, in mid-February 2006 yet another product safety issue attracted widespread attention in Japan. Unlike asbestos and buildings, the concern was about over-regulation rather than under-regulation of electrical goods. Again, however, many criticized the government for seeming to serve certain industry interests – mainly manufacturers of new products, as opposed to resellers of second-hand goods, let alone, optimally, for consumers – and in a disorganized way. Because many of the goods in question are primarily destined for use by consumers, this fiasco more directly raises broader issues about how to regulate generally for consumer product safety in an era still of considerable deregulatory pressures.

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94 T. AKINO, *Saikin no shikku hausu soshô hanketsu* [A Recent Judgment in Sick House Syndrome Litigation], in: N.B.L. 831 (2006) 46-50.

95 M. INAGAKI, Data disclosure vital to deter building fraud, in: Asahi Shimbun, 5 April 2006.

96 Ibid.

In 1999, the Electrical Appliance and Materials Control Law[97] was revised and renamed the Electrical Appliance and Materials Safety Law ("*Den'an*" Law)[98]. The main aim of the revision was to allow more scope for safety checks to be conducted by firms themselves, or (for around 100 "specified" products) by state-accredited inspection organizations (including now several abroad), rather than the government itself. This was consistent with outsourcing of public functions long advocated by certain domestic policy-makers, as well as foreign suppliers and governments often critical of the inflexible and opaque *Dentori* Law.[99] Outsourcing from METI's predecessor in other fields was also introduced more generally in 1999 (Law No. 121), impacting also on the Consumer Product Safety Law (No. 31 of 1973) with effect from October 2000.

Under the new *Den'an* Law, the electrical product safety criteria themselves do not seem have to have been changed much.[100] This was despite the wave of recalls of televisions and other consumer electronics goods (as well as foodstuffs and automobiles) in 2000, although concern had been building about their safety levels over the 1990s and some high-profile product liability (PL) litigation had been brought particularly against manufacturers of defective televisions.[101] Nonetheless, the *Den'an* Law not only required all new electrical products manufactured or imported from April 2001, when the Law mostly came into effect, to be checked as meeting the safety criteria and to have compliance evidenced by affixing a new "PSE" mark before supply; it also envisaged these requirements being extended to other suppliers for older products produced before 2001, when distributed second-hand. However, METI provided the following grace periods for implementing this aspect of the *Den'an* Law, depending the type of electrical products:[102]

97 *Denki yôhin torishimari-hô*, Law No. 234/1961 (abbreviated as *"Dentori"* Law).
98 *Denki yôhin anzen-hô.*
99 Cf e.g. the complaints lodged over the 1990s with the Office of the Trade and Investment Ombudsman: searchable at <*http://www5.cao.go.jp/otodb/english/*>.
100 Y. WIJERS-HASEGAWA / E. ARITA, New rules to doom used electrical goods shops?, in: The Japan Times, 25 March 2006.
101 NOTTAGE, *supra* note 1.
102 Reproduced from: <*http://www.meti.go.jp/english/information/data/denan_grace050217.html*>.

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

Unfortunately, METI failed to widely publicize this aspect around 1999-2001. This resulted in great consternation from 10 February 2006 when its website announced that the first set of products (televisions, refrigerators, etc) would all need to be checked and marked "PSE" if compliant by sellers of second-hand goods wishing to keep trading in those goods from April 2006.[103]

Over 300,000 second-hand shops, whose numbers and sales had proliferated during Japan's "lost decade" of economic stagnation and "price destruction", lobbied directly and through a new advocacy group to postpone implementation. They joined forces with performers and others in Japan's vibrant music industry, who protested that costs and potential failures involved in testing older musical instruments and equipment

103 WIJERS-HASEGAWA / ARITA, *supra* note 100.

(synthesizers etc) would drastically undermine its viability.[104] Concerns were also raised by those in "classic" video games markets.[105] Suppliers and others also emphasized that costs of testing (and forced disposal of non-compliant goods) would have to be passed on to consumers generally, dampening or even preventing supplies of older goods that consumers might wish to purchase even at a higher risk of product safety failure. Cynics also suggested that METI's main motivation for this aspect of the *Den'an* Law was old-fashioned industrial policy to promote those firms manufacturing new goods, sheltering them against the rise of second-hand markets and growing competition from East Asia, rather than genuine concern for consumer safety.[106] An immediate practical problem was a nation-wide shortage of devices – quite expensive anyway – for even willing resellers to use to test for PSE mark compliance.

METI's initial response included setting up 500 inspection stations across the country and lending out devices, for six months.[107] However, most electrical products are bulky and hence could not be easily transported to the stations, and the demand for the testing devices meant they could not be borrowed for long. After further intense pressure, the Ministry decided to turn a blind eye after April 2006 if the shops supplied goods under a "lease", one exception already in the *Den'an* Law. This was subject to (non-binding) "administrative guidance" encouraging them – no doubt over-optimistically – to check later for PSE mark compliance if asked by consumers and when testing devices became more widely available.[108] The Ministry justified this on the basis that ownership under a "lease" would remain with the supplier until it fulfilled its responsibility to test for compliance.[109] Secondly, METI also suggested an expansive interpretation of the Law's exception for sales of goods overseas, allowing business-to-business supplies of goods without PSE marks if they might be exported.[110] Thirdly, widening the scope to apply the Law's exception for private sales between individuals, METI has left vague the definition of "trading", simply stating that anyone "making a living" selling used appliances (e.g. at flea markets) will be subject to the Law.[111] Some fear that traders will disguise themselves as private individuals to sell quantities of non-

104 "Musicians speak out against ban on sale of old electrical appliances", Mainichi Daily News, 23 March 2006.

105 O. BARDER, Secondhand gadgets win reprieve from Japan's "worst law ever", in: The Guardian, 30 March 2006.

106 WIJERS-HASEGAWA / ARITA, *supra* note 100.

107 "Ministry to blame for PSE mark confusion", The Daily Yomiuri, 21 March 2006.

108 "Govt allows compromise on used electrical goods law", The Daily Yomiuri, 25 March 2006; "*PSE: mâku nashi demo hanbai mitomeru, keizai-shô ga 4-gatsu ikô mo* [PSE: METI to allow sales without mark, even after April] ", Mainichi Shimbun, 24 March 2006.

109 "Ministry postpones PSE seal plan", Asahi Shimbun, 27 March 2006.

110 "METI backs off banning sale of used electrical goods", The Japan Times, 25 March 2006.

111 "Tiny PSE marks not necessary in flea markets", Asahi Shimbun, 24 March 2006.

PSE goods on internet auctions.[112] Finally, mainly to mollify the music industry, on 25 March METI brought in a new exception for instruments, amps, movie projectors and certain other "vintage" products made before 1989: high-value discontinued products, for domestic sales, marked in accordance with the old *Dentori* Law.[113]

Second-hand goods markets then staged a remarkable recovery, with prices rebounding from bargain-basement levels to around 80 per cent of pre-February levels. Most shops continued selling similar volumes of pre-2001 goods without checking and affixing PSE marks, apparently without explaining or documenting that these were on a "lease" basis.[114] Few borrowed even the limited numbers of testing units that METI made available.[115] Some claimed that they feared testing will expose them to civil liability under Japan's strict-liability PL Law – presumably under Article 2's definition of "apparent manufacturers" – if they later prove defective (even in other respects) and harm users. METI insisted (more justifiably) that PSE mark compliance testing will not be enough to attract PL exposure, but some firms still did not want to run the risk and are exporting more non-PSE marked goods.[116]

Generally, METI continued to face sharp criticism for its definitions of what is "vintage",[117] for using taxpayers' money to support testing by resellers,[118] and for of its expansive interpretations and poor enforcement of the original exceptions under the *Den'an* Law (particularly "lease" transactions) – making a mockery of legislative provisions,[119] and consumer interests.[120] However, METI and some others are hoping the problem will quietly fade away, particularly since older non-PSE products will begin to reach the end of their usable lives over the next few years.[121]

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112 WIJERS-HASEGAWA / ARITA, *supra* note 100.

113 "*PSE dotan-ba rûru henkô, yûyo kikan enchô wa mitomezu* [PSE last-minute rule change, without permitting an extension of grace period]", Yomiuri Shimbun, 15 March 2006; "Vintage electrical goods get 2nd life", The Daily Yomiuri, 24 March 2006.

114 T. SAKAI, *PSE mâku: seido kaishi, chûko-hin hanbai wa ima made to kawari naku* [PSE mark: the system begins, but used goods sales remain unchanged], in: Mainichi Shimbun, 1 April 2006; T. SAKAI / M. MATSUO, *PSE: 1-nichi sutâto 'ihô hanbai' ôkô no ke'nen mo* [PSE: begins 1 April with apprehensions over brazen 'illegal sales'], in: Mainichi Shimbun, 1 April 2006.

115 *"Chûko kaden 'PSE nashi' zôka* [Used Household Electronic Items without PSE Marks Increases]", Nihon Keizai Shimbun, 23 May.

116 SAKAI / MATSUO, *supra* note 114.

117 BARDER, *supra* note 105.

118 WIJERS-HASEGAWA / ARITA, *supra* note 100.

119 T. SAKAI, *PSE: 'rentaru' yô'nin mo, chûko kaden no jishu kensa nashi* [PSE: neither 'rental' nor independent testing of used electrical goods], in: Mainichi Shimbun, 4 May 2006.

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

121 SAKAI, *supra* note 119.

V. CONCLUSIONS

Nonetheless, several broader lessons can already be drawn from this latest fiasco, as well as the problems with asbestos and buildings exposed since mid-2005. First, consumer product safety cannot be left completely to market forces – reputation effects, insurance and the like – because they often fail to generate optimal safety incentives and outcomes, as shown in the under-regulated asbestos and building design cases. At the other extreme, heavy-handed interventionism runs the risk of over-regulation, or regulation for the wrong reasons (even possibly "capture", by certain industry groups), as shown by the PSE debacle. Instead, carefully balanced and structured "re-regulation" provides a middle way forward to minimize risks and maximize overall gains in increasingly complex industrialized democracies.[122]

The next issue becomes the optimal design and enforcement of a re-regulatory regime. In general consumer product safety, the best model seems to be the revised EU Product Safety Directive.[123] It puts the primary onus on businesses to ensure they do not supply unsafe products, rather than relying on government to intervene – often too late, or sometimes too early – to restrict supplies of products it finds to be unsafe. Firms themselves or their industry associations are often in a better position to monitor and address evolving safety risks, and anyway need to take those into account to minimize exposure under PL or other regimes. However, the "responsive regulation" model allows and requires the government to intervene if firms are betraying such expectations, deliberately or otherwise.[124] This means more information flows, with manufacturers and suppliers devising systems to monitor safety problems and disclose potentially serious problems to the authorities. The latter need to audit such information, and to have credible powers to intervene (often collaboratively) and sanction (if nonetheless necessary, e.g. through compulsory recalls and stiff fines or prison sentences). All this happens to approximate key contours of the revised EU Directive.

That Directive, moreover, is a comprehensive "horizontal" regime, applying to almost all consumer products. Interestingly, Article 2(a) excludes products supplied to be repaired or reconditioned, as well as antiques. However, when implementing the Directive in national Regulations with effect from mid-2005, the UK extended its scope to antiques. Yet, this may be impermissible under EU law, if the European Commission brings proceedings against the UK and the European Court of Justice agrees that the Directive was intended as a "maximal harmonization" instrument. Meanwhile, antique

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122 L. NOTTAGE, Redirecting Japan's Multi-Level Governance, in: K. Hopt et al. (eds.), Corporate Governance in Context: Corporations, State, and Markets in Europe, Japan, and the US, (Oxford 2005) 571-598.

123 2001/95/EEC, in force in most EU member states since 2004.

124 See generally I. AYRES / J. BRAITHWAITE, Responsive Regulation: Transcending the Deregulation Debate (New York 1992).

dealers in the UK may be able to limit their liability by appropriate labelling and warnings.[125] Another useful lesson for Japan, not yet applied in the *Den'an* Law, is that the revised Directive even prohibits the dumping of unsafe products on overseas markets.

More generally, a horizontal regime like the Directive's helps fill in gaps in "vertical" or product/industry-sector product safety regulations. These often still emerge, particularly in Japan, where rivalry among various government agencies has been pervasive, as its asbestos saga shows. Unfortunately, Japan still has a poorly designed and enforced general Consumer Product Safety Law dating back to the 1970s. So do countries like Australia, but the legislation there is currently being openly reviewed in light of the new EU model. It may be more difficult for Japan to follow this lead, but this latest wave of product safety issues has further undermined trust in many parts of the government, even the still mighty METI. Comprehensive revisions to the Consumer Product Safety Law along EU lines should, in turn, underpin better design and implementation of sector-specific regulatory regimes.[126]

At the most theoretical level, these three recent case studies confirm the need to consider safety issues from a holistic perspective. As well as the role of markets and insurance, and regulation setting and enforcement, safety system design and response needs to take into account the potential for damages claims against public authorities for mismanagement, parliamentary inquiries and criminal prosecutions, and civil liability exposure of firms.[127] Japan has tended to rely more on criminal law and public liability, but it has been building up a more functional tort litigation system.[128] Japan has also left much to the private sector, at least sometimes in cahoots with certain regulators or political factions. Yet, how those parts fit in needs readjustment too, as economic reforms and political realignments proceed. Such readjustment will also be affected by the type, extent and timing of product safety problems that will no doubt continue to surface in this industrialised democracy increasingly open to overseas trade,

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125 D. FAIRGRIEVE / G. HOWELLS, General Product Safety – a Revolution through Reform?, in: Modern Law Review 69 (2006) 61.

126 See L. NOTTAGE, Reviewing Product Safety Regulation in Australia – and Japan?, in: Australian Product Liability Reporter 16 (2005) 24; Consumer Product Safety Regulation Reform in Australia: Ongoing Processes and Possible Outcomes, in: 1 Yearbook of Consumer Law (Aldershot 2006) 327; Responsive Re-Regulation of Consumer Product Safety: Hard and Soft Law in Australia and Japan, in: University of Tokyo Soft Law COE Discussion Paper forthcoming (2006) <*http://www.j.u-tokyo.ac.jp/coelaw/outcome.html*>.

127 Cf further generally ZADAN-KAI [Colloquium], *Gendai ni okeru anzen mondai to hô-shisutemu* [Contemporary Safety Issues and the Legal System] in: Jurisuto 1248 (2003); ZADAN-KAI [Colloquium], *Jiko chôsa to anzen kakuho no tame no hô-shisutemu* [Accident Investigations and a Safety-Achieving Legal System], in: Jurisuto 1307 (2006) 8-100.

128 L. NOTTAGE, Product safety and liability law in Japan: from Minamata to mad cows (London 2004); *supra* note 1.

investment and policy-making models.[129] Japan's re-regulation in this field may therefore still end up diverging from the EU, let alone liberal market economies with distinctive legal systems as in the US. Nonetheless, these domestic changes and heightened safety expectations since the 1990s will probably continue to generate powerful forces for considerable convergence.

ZUSAMMENFASSUNG

Australien erwägt den Abschluß eines umfassenden Freihandelsabkommens mit Japan. Daher erhält die Entwicklung der japanischen Produktsicherheitsgesetzgebung und auch des Verbraucherschutzrechts insgesamt besondere Bedeutung. Allgemein trat in Japan in den Jahren der wirtschaftlichen Stagnation ab den frühern neunziger Jahren eine Verschärfung der Haftungsvorschriften, insbesondere hinsichtlich der Aufklärungspflichten, an die Stelle von Ex-ante-Regelungen. Gleichzeitig wurden auch als Reaktion auf entstandene Sicherheitsbedenken in großem Umfang Neuregelungen vorgenommen, insbesondere nach Bekanntwerden von Asbestverseuchungen, Planungsfehlern bei Gebäuden und Sicherheitsdefiziten bei Elektrogeräten. Japan nähert sich so einem globalen wirtschaftlichen Regelungsmechanismen entsprechenden, umfassenderen Regelungsmuster. Möglicherweise ist dies (wie in Australien) auch ein Schritt in Richtung einer Neugestaltung allgemeiner verbraucherschutzorientierter Produktsicherheitsregelungen nach dem Vorbild der jüngst überarbeiteten EU-Vorschriften. Japans Produktsicherheitsregime weicht jedoch immer noch von dem vieler anderen Industrieländern ab, insbesondere was die prominente Rolle der Strafverfolgung und das Schreckgespenst der Staatshaftung betrifft.

(Übersetzung durch die Red.)

129 See also the saga of safety problems in lifts designed by Schindler (headquartered in Switzerland) and manufactured increasingly in China, which unfolded from mid-2006. See e.g. "Teen crushed as elevator abruptly ascends", Asahi Shimbun, 5 June 2006, and the aftermath discussed in NOTTAGE, "ABCs" (opening footnote, *supra*). Subsequent problems revealed with Paloma gas water heaters and a dozen other consumer goods have led, predictably, to METI proposing revisions to the Consumer Product Safety Law to impose comprehensive (European Directive-like) obligations on suppliers to report serious accidents and risks. See L. NOTTAGE, Product Safety Regulation Reform in Australia and Japan: Harmonising Towards European Models?, in: 2 Yearbook of Consumer Law (Aldershot 2007) forthcoming.