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GOVERNMENT LIABILITY FOR REGULATORY FAILURE IN THE FUKUSHIMA DISASTER: A COMMON LAW COMPARISON

Joel Rheuben[†]

Abstract: This article considers the Japanese government's response to the 2011 Fukushima nuclear power disaster, in assisting Tokyo Electric Power Company ("TEPCO") with handling claims for compensation. It argues that in setting guidelines for claims, establishing a government alternative dispute resolution ("ADR") body to deal with disputes, and creating a convoluted funding structure that has led to the effective nationalization of TEPCO, the government has intervened significantly in what are essentially private disputes governed by the Nuclear Compensation Law. This is contrasted with the less interventionist response of the New South Wales government in Australia to mass tort claims for asbestos exposure. This article argues that this difference in approach can be attributed to the respective scope of state liability for regulatory failure in Japan and common law countries. Whereas courts in common law countries have imposed a high threshold for establishing the liability of public authorities, Japanese courts have acknowledged liability more readily, creating an incentive for the Japanese government to divert potential claims against itself from the courts.

I. Introduction

In March 2011 the Fukushima Dai-ichi Nuclear Power Plant in north-eastern Japan attained the nearly unique distinction of experiencing a nuclear disaster measuring level seven on the International Atomic Energy Agency's International Nuclear Event Scale. The events of the disaster are now so well-known that they require only a cursory summary here.¹ In short, the earthquake that devastated much of Japan's north-east (Tōhoku) region on 11 March also succeeded in damaging electricity transmission between the Fukushima Dai-ichi plant and nearby transformers.² Emergency diesel generators were automatically activated onsite, but these too were destroyed when the tsunami that followed less than an hour after the earthquake breached the breakwaters surrounding the coastal plant, cutting off all

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¹ See generally FUKUSHIMA NUCLEAR ACCIDENT INDEPENDENT INVESTIGATION COMMISSION, OFFICIAL REPORT OF THE FUKUSHIMA NUCLEAR ACCIDENT INDEPENDENT INVESTIGATION COMMISSION (2012) for a full overview.

² *Id.* at 12.

electricity to the cooling systems for the plant's six reactors and precipitating a meltdown in three of them.³ As the crisis worsened and radiation leaked from the plant, more than 150,000 people were forcibly evacuated from the surrounding area, and many more left voluntarily.⁴

In the months following the disaster, four separate committees were established to investigate and report on the causes of the disaster.⁵ Several of these committees' reports, and in particular the report of the National Diet's Independent Investigation Commission, attribute the disaster to a systemic lack of safety precautions common throughout the nuclear power industry in Japan, and to a series of costly judgment errors.⁶ The Independent Investigation Commission's report does not limit its criticism to the Fukushima plant's operator, Tokyo Electric Power Company ("TEPCO"); instead, it also sternly rebukes regulators for falling "captive" to the industry—relying on the industry for nuclear know-how and failing to put in place or enforce adequate safety standards.⁷ The report of the "Independent Investigation Commission on the Fukushima Nuclear Accident," a private body, is equally scathing of a bureaucratic culture within the main regulatory bodies that prevented the development of independent technological expertise and was resistant to change.⁸ The reports of both independent investigation commissions categorize the Fukushima disaster as a classic case of regulatory failure.⁹

Under the Nuclear Compensation Law,¹⁰ the main legislation governing civil claims for nuclear accidents, TEPCO alone bears direct liability for compensating the tens of thousands of evacuees and businesses

³ *Id.*

⁴ *Id.* at 19.

⁵ *See id.* TOKYO ELECTRIC POWER COMPANY, FUKUSHIMA NUCLEAR ACCIDENT ANALYSIS REPORT 14-15 (2011); INVESTIGATION COMMITTEE ON THE ACCIDENT AT FUKUSHIMA NUCLEAR POWER STATIONS OF TOKYO ELECTRIC POWER COMPANY, FINAL REPORT OF THE INVESTIGATION COMMITTEE ON THE ACCIDENT AT FUKUSHIMA NUCLEAR POWER STATIONS OF TOKYO ELECTRIC POWER COMPANY 1 (2012); INDEPENDENT INVESTIGATION COMMISSION ON THE FUKUSHIMA NUCLEAR ACCIDENT, FUKUSHIMA GENPATSU JIKO DOKURITSU KENSHŌ IINKAI CHŌSA/KENSHŌ HOKOKUSHO [INVESTIGATION/VERIFICATION REPORT OF THE INDEPENDENT INVESTIGATION COMMISSION ON THE FUKUSHIMA NUCLEAR ACCIDENT] (2012).

⁶ FUKUSHIMA NUCLEAR ACCIDENT INDEPENDENT INVESTIGATION COMMISSION, *supra* note 1, at 10.

⁷ INDEPENDENT INVESTIGATION COMMISSION ON THE FUKUSHIMA NUCLEAR ACCIDENT, *supra* note 5, at 16.

⁸ *Id.* at 288-90.

⁹ *See generally* FUKUSHIMA NUCLEAR ACCIDENT INDEPENDENT INVESTIGATION COMMISSION, *supra* note 1, at 42-45; INDEPENDENT INVESTIGATION COMMISSION ON THE FUKUSHIMA NUCLEAR ACCIDENT, *supra* note 5, at ch. 7.

¹⁰ Genshiryoku songai no baishō ni kansuru hōritusu [The Act on Compensation for Nuclear Damage], Law No. 147 of 1961 (Japan), available at <http://www.oecd-nea.org/law/legislation/japan-docs/Japan-Nuclear-Damage-Compensation-Act.pdf>.

who continue to be affected by radiation.¹¹ Since this liability is estimated to be significantly more than the value of TEPCO's assets, the Japanese government has provided TEPCO with financial assistance to prevent insolvency.¹² As explained in Part II.B. below, the government has also established a mediation center, the Dispute Resolution Center for Nuclear Damage Compensation, under the Ministry of Education, Culture, Sports, Science and Technology ("MEXT") to handle compensation disputes between TEPCO and its victims.¹³ If the government was content to give TEPCO free rein to conduct its business before the accident, it seems that it has taken a far stronger interest in intervening in the aftermath.

This article argues that the mechanisms established for resolving and funding payouts in disputes between claimants and TEPCO in the aftermath of Fukushima should be viewed against the backdrop of the government's own potential liability for the disaster.¹⁴ No doubt there are compelling political and economic reasons for the government to have intervened and to have prevented TEPCO's insolvency.¹⁵ However, from the perspective of the government's own legal liability, the manner in which it has intervened can be explained by the ever-present risk that claimants, dissatisfied with the amount of TEPCO's compensation or the speed of its response, could move their complaints to the courts and sue the government for its failure to prevent the nuclear disaster.

As noted below, there is ample precedent for Japanese courts finding national and local governments liable for regulatory failure.¹⁶ This situation is not unique to Japan: courts in Germany, from which Japan draws much of its public law jurisprudence, have also consistently found against

¹¹ *Id.* at art. 3 (albeit subject to certain exemptions. See *infra*, Part II.B).

¹² See generally Kōji Aribayashi, *Genshiryoku songai baishō shien kikō hō no seitei to gaiyō* [*The Establishment of and an Overview of the Nuclear Damages Liability Facilitation Fund Law*], 1433 JURISUTO (2011) (on file with author).

¹³ See generally Daniel H. Foote, *Japan's ADR System for Resolving Nuclear Power-Related Damage Disputes* (2012) (unpublished manuscript) (on file with author).

¹⁴ See Eric A. Feldman, *Fukushima: Catastrophe, Compensation, and Justice in Japan*, 62 DEPAUL L. REV. 335, 341 (2013) (arguing that there is a weak tradition of direct government compensation in natural and other major disasters in Japan. He points to the fact that there has been no move to provide comprehensive compensation for Tōhoku residents outside of the nuclear-affected area who lost their homes due to the earthquake or tsunami).

¹⁵ See generally Hatsuru Morita, *Rescuing Victims and Rescuing TEPCO: A Legal and Political Analysis of the TEPCO Bailout* (2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2026868.

¹⁶ The author uses the term "regulatory failure" here to refer to the failure to exercise a range of discretionary functions, and not simply functions related to passing regulations (rule-making functions).

government for failure to exercise regulatory functions.¹⁷ However, it does stand in stark contrast with the situation in common law countries, where courts have historically set a high threshold for finding public authorities liable in tort for the exercise of regulatory functions in general, and for regulatory failure in particular.¹⁸

This article compares Japan's approach to liability for regulatory failure with that of courts in common law countries, and Australia in particular. To illustrate the implications of potential liability on structuring government responses to disasters, I use the example of mass tort litigation for asbestos-related diseases in New South Wales ("NSW"), Australia's most populous state.

No common law country has suffered a nuclear accident comparable to the Fukushima disaster.¹⁹ Indeed, Australia does not even have a nuclear power industry. The Fukushima disaster occurred amidst one of the most catastrophic events in Japanese history—namely, the Tōhoku earthquake and tsunami—and had the potential to be even more catastrophic still. Naturally, then, it is difficult to predict how any government or court faced with the same circumstances would respond, and so any comparisons necessarily must be tenuous.

Nevertheless, there are strong parallels between radiation from nuclear power generation and environmental exposure to asbestos. Both involve man-made risks, and, unlike natural disasters, are potentially subject to regulation to minimize harm. Both involve potentially fatal hazards to health, further raising the expectation that any regulatory response will be robust. However, in the specific examples of the Fukushima disaster and the regulation of asbestos in Australia, these expectations have been arguably unmet. The willingness of courts to intrude upon administrative discretion by considering the reasonableness of the regulatory response is therefore instructive. Indeed, it is in the context of asbestos litigation that the Australian principles of government liability for regulatory failure have been most clearly articulated.

¹⁷ See Ralph-Andreas Surma, *A Comparative Study of the English and German Judicial Approach to the Liability of Public Bodies in Negligence*, in *TORT LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE* 355, 364-78 (Duncan Fairgrieve, et al. eds., 2002).

¹⁸ See generally Mark Aronson, *Government Liability in Negligence*, 32 MELBOURNE U. L. REV. 42 (2008); Greg Weeks, *Private Law Litigation Against the Government: Are Public Authorities and Private Actors Really 'the Same?'* (2010) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1604324.

¹⁹ In comparison, the 1979 Three Mile Island accident in the United States was contained before a full reactor meltdown occurred, and although generating a small amount of litigation, did not lead to an indefinite evacuation of large numbers of residents requiring compensation.

The example of asbestos litigation in NSW demonstrates the potential responses available to governments in common law countries in similar circumstances. Both nuclear power facilities and building products containing asbestos are to some degree integrated into daily life in residential areas (unlike, for example, oil spills), raising the potential for large numbers of indeterminate claims by poorly-resourced claimants—whether against the primary tortfeasor or the government. Indeed, as noted below, the rates of asbestos-related diseases in Australia (and NSW in particular) are the highest in the world, and the number of associated claims are proportionally comparable to those arising from the Fukushima disaster. Both have given rise to a need to deal with disputes quickly and to avoid overburdening the ordinary courts. Uniquely among common law countries, the NSW government's response to mass tort litigation for asbestos exposure was the creation of a special tribunal (the Dust Diseases Tribunal),²⁰ allowing comparison with the Dispute Resolution Center for Nuclear Damage Compensation.

Asbestos claims in NSW have also largely been brought against a single defendant, the James Hardie group, whose Australian-based assets have proven insufficient to meet its ongoing liabilities.²¹ The example of mass asbestos litigation in Australia therefore further offers a useful comparison of how governments have faced the problem of ensuring that the primary defendant remained adequately capitalized and sufficiently responsive to claimants.

This article argues that whereas the Japanese approach to the Fukushima disaster has been interventionist, ultimately leading to the effective nationalization of TEPCO, the NSW government in its response to mass tort claims has taken a far less dirigiste approach. This is not to suggest that governments in common law countries never take a more interventionist approach to resolving mass disputes—indeed, depending on political and economic factors they may well do. However, free from concern over their own potential liability, the NSW experience suggests that they do not need to.

²⁰ See John L. O'Meally, *Asbestos Litigation in New South Wales*, 15 J. L. & POL'Y 1209-1213 (2007) (noting that the only other body of this type in the common law world is in Tasmania, another Australian state).

²¹ See generally Edwina Dunn, *James Hardie: No Soul to be Damned and No Body to be Kicked*, 27 SYDNEY L. REV. 339 (2005).

II. THE FUKUSHIMA DISASTER COMPENSATION FRAMEWORK

This Part explains Japan's nuclear disaster compensation scheme. Specifically, this Part posits that A) TEPCO is the sole defendant under Japan's Nuclear Compensation Law, B) the Japanese government guides the TEPCO compensation scheme, and C) financial assistance from the government has effectively nationalized TEPCO.

A. *TEPCO is the Sole Defendant Under the Nuclear Compensation Law*

Compensation for losses arising from nuclear accidents, and hence TEPCO's own liability, is principally governed by the Nuclear Compensation Law, the provisions of which take precedence over the general tort provisions of the Civil Code. The law is aimed at ensuring sufficient access to compensation by victims in the event of a nuclear accident by way of clear principles of liability and the imposition of a mandatory insurance scheme.²² It generally accords with the principles of the 1960 Paris Convention on Nuclear Third Party Liability, insofar as liability under the law is strict and centered exclusively on nuclear power operators.²³ Operators are exempted from liability only where damages have occurred as a result of a major natural disaster of an exceptional character or social unrest.²⁴ Where damages are attributable to a third party, operators still retain primary liability, but can cross-claim against the third party for recovery.²⁵ However, whereas the Paris Convention sets an upper limit on the liability of operators,²⁶ under the Nuclear Compensation Law liability is unlimited.²⁷

The law applies to all claims in respect of "nuclear damage," defined as "damages caused by the effects of fission of nuclear fuel material, the effects of radiation from nuclear fuel material, or the toxic effects of such material."²⁸ On its face, this definition would appear to restrict liability to

²² Genshiryoku songai no baishō ni kansuru hōritsu [The Act on Compensation for Nuclear Damage], Law No. 147 of 1961, art. 1 (Japan).

²³ *Id.* at art. 3. For the Convention's text, see http://www.oecd-nea.org/law/nlparis_conv.html (last visited August 29, 2013).

²⁴ Genshiryoku songai no baishō ni kansuru hōritsu [The Act on Compensation for Nuclear Damage], Law No. 147 of 1961, art. 1 (Japan).

²⁵ *Id.* at art. 5.

²⁶ Convention on Third Party Liability in the Field of Nuclear Energy, art. VII, July 29, 1960, available at http://www.oecd-nea.org/law/nlparis_conv.html.

²⁷ See Genshiryoku songai no baishō ni kansuru hōritsu [The Act on Compensation for Nuclear Damage], Law No. 147 of 1961, art. 1 (Japan). The statute provides the basis for operator liability, but makes no reference to limitation of liability.

²⁸ *Id.* at art. 1(2).

physical damage resulting directly from radiation. However, in the small handful of reported cases under the Nuclear Compensation Law following Japan's previous worst nuclear accident—the radiation leak from a fuel conversion plant in Tōkaimura, Ibaraki Prefecture in 1999²⁹—courts applied a broader, causation-based test.³⁰ A causal relationship was found, for example, between the accident and subsequent reputational damage to vegetable growers in the area.³¹ The scope of damages for which TEPCO alone could potentially be found liable on a strict and unlimited basis is therefore quite wide.

In order to meet the anticipated high costs of a major nuclear accident, the Nuclear Compensation Law obliges operators to purchase insurance up to a minimum indemnification amount of JPY 120 billion per plant, or else to make a deposit of the full amount with the government.³² Beyond this, operators bear the costs of compensation alone, although the law requires the government to “assist” operators where the government “deems it necessary.”³³ The nature of this assistance is not specified and theoretically ranges from free money to low-interest finance, to the acquisition of an equity interest in the operator (which, indirectly, is what has occurred in the case of TEPCO).³⁴

Aside from this vague requirement of assistance, and consistent with the principle of operator-only liability, there is no explicit provision under the Nuclear Compensation Law that assigns liability to the government, nor any right to recourse against the government by either operators or victims. Where operators are excluded from liability as a result of an exceptional natural disaster or social unrest, the government is required to “take

²⁹ See Int'l Atomic Energy Agency (“IAEA”), *Report on the Preliminary Fact Finding Mission Following the Accident at the Nuclear Fuel Processing Facility in Takaimura, Japan* (1999), available at http://www-pub.iaea.org/MTCD/publications/PDF/TOAC_web.pdf.

³⁰ See Mitō Chihō Saibansho [Mito Dist. Ct.] June 24, 2003, Hei 12 (wa) no. 487; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sep. 27, 2004, Hei 14 (wa) 19606 (Japan); Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Apr. 19, 2006, Hei 14 (wa) 6644; Mitō Chihō Saibansho [Mito Dist. Ct.] Feb. 27, 2008, Hei 14 (wa) 513; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Feb. 29, 2008, Hei 19 (wa) 7869 (Japan); Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] May 23, 2008, Hei 16 (wa) 21303 (Japan).

³¹ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Feb. 29, 2008, Hei 19 (wa) 7869; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Apr. 19, 2006, Hei 14 (wa) 6644.

³² Genshiryoku songai no baishō ni kansuru hōritusu [The Act on Compensation for Nuclear Damage], Law No. 147 of 1961, art. 1 (Japan).

³³ *Id.* at art.16.

³⁴ Feldman, *supra* note 14, at 344 (arguing that the government could have taken over the compensation process itself, but chose not to because of its traditional aversion to compensating after natural disasters). However, based on the current wording of the provision, direct government compensation arguably would not be possible, since the government is required to do no more than assist the operator in making payments.

necessary measures to relieve victims and to prevent further damage,³⁵ but this requirement again falls short of an enforceable civil remedy. Early drafts of the law did in fact impose an obligation on the government to compensate victims above the operator's insurance threshold, but this was removed at the insistence of the finance ministries, precisely because of concern over open-ended liability.³⁶

B. The TEPCO Compensation Scheme has been Guided by the Government

TEPCO is, therefore, the first and only port of call for members of the public seeking compensation for the Fukushima disaster under the Nuclear Compensation Law, whether by direct or mediated settlement, or by civil action. There may be arguments that the scale of the Tohoku earthquake and subsequent tsunami were so unforeseeable that the exemption to liability provision applies, absolving TEPCO of liability. However, the bulk of academic opinion in and outside of Japan weighs against this proposition,³⁷ and TEPCO itself has arguably forfeited any right to rely on this exemption by voluntarily making compensation payments.³⁸

At the behest of the Ministry for the Economy, Trade and Industry ("METI"), TEPCO initiated provisional compensation payments of up to JPY one million per household to claimants in the area immediately surrounding the Fukushima Dai-ichi plant from late April 2011.³⁹ At the same time, the government began making provisional payments to affected small and medium-sized businesses in the region, particularly those in the

³⁵ Genshiryoku songai no baishō ni kansuru hōritusu [The Act on Compensation for Nuclear Damage], Law No. 147 of 1961, art. 1 (Japan).

³⁶ Takeshi Hitomi, *Fukushima dai-ichi genshiryoku hatsudensho jiko no songai baishō* [Compensation for Damages from the Accident at the Fukushima Dai-ichi Nuclear Power Plant], 56 HŌGAKU SEMINAA, at 21 (2011) (on file with author); Masatada Akimoto, *Genshiryoku Songai Baishō: Higai Kyūsai Hōri no Kokoromi* [Nuclear Damages Compensation: An Approach for Legal Principles for Victim Relief] 63 JIYŪ TO SEIGI [LIBERTY AND JUSTICE], at 25 (2012) (on file with author).

³⁷ See Eri Osaka, *Corporate Liability, Government Liability and the Fukushima Nuclear Disaster*, 21 PAC. RIM L. & POL'Y J. 443, 444-47 (2012) (arguing that the Tōhoku earthquake and tsunami were well within the range of predictable natural disasters according to the standards set by the Atomic Energy Commission).

³⁸ See Yomiuri Shimbun, *Tōden ni menseki futekiyō wa ayamari . . . kabunushi ga teiso, kuni wa hanron* [Not Applying the Exemption to TEPCO was an Error . . . Shareholders Bring Suit, the State Responds], Oct. 20, 2011 (derivative suit brought by a group of TEPCO shareholders against the national government on this basis) (on file with author).

³⁹ Nikkei Shimbun, *Keikaku hinan mo kari-barai Kin Baishō 1-settai 100-man en (Keisanshō to Tōden chōsei)* [Provisional Compensation of JPY 1 million per Household for Designated Evacuees (METI and TEPCO's agreement)], Apr. 12, 2011 (on file with author).

tourism sector suffering reputational damage by association with “Fukushima.”⁴⁰

The Nuclear Compensation Law anticipates the establishment within MEXT of a Dispute Reconciliation Committee for Nuclear Damage Compensation to oversee resolution of disputes between operators and victims in the event of a nuclear accident.⁴¹ A committee was formed for the first time after the Tōkaimura accident in 1999,⁴² and again after the Fukushima disaster in April 2011.⁴³ In response to the perceived inconsistent approaches taken in judicial decisions arising out of the Tōkaimura accident, the Nuclear Compensation Law was amended to provide the Dispute Reconciliation Committee with the power to issue non-binding guidelines on the appropriate scope for compensation, in order to supplement the vague definition of “nuclear damage” under the law.⁴⁴ Accordingly, the Fukushima Dispute Reconciliation Committee announced its Interim Guidelines on the Scope of Nuclear Damages from the Accident at the TEPCO Fukushima Dai-ichi and Dai-ni Plants on 5 August 2011.⁴⁵ Following the Dispute Reconciliation Committee’s announcement, TEPCO put in place a system to make “permanent” compensation payments, covering the gap between provisional payments and the full amount claimed.⁴⁶ As of August 2013, some 673,000 applications for compensation had been received by TEPCO, of which TEPCO and claimants have reached an agreed compensation amount in 601,000 cases.⁴⁷ Where TEPCO and claimants cannot reach agreement, or where claimants are otherwise

⁴⁰ Heisei 23 nen Genshiryoku jiko niyoru higai ni kakaru kinkyūsochi ni kansuru hōritsu [Law Relating to Emergency Facilities for the 2011 Nuclear Disaster], Law No. 91 of 2011 (Japan).

⁴¹ Genshiryoku songai no baishō ni kansuru hōritsu [The Act on Compensation for Nuclear Damage], Law No. 147 of 1961, art. 18 (Japan).

⁴² Genshiryoku songai baishō funsō chōsei iinkai no setchi no tame no seirei [Cabinet Order for the Establishment of the Dispute Reconciliation Committee for Nuclear Damage Compensation], Cabinet Order No. 332 of 1999 (Japan).

⁴³ Genshiryoku songai baishō funsō chōsei iinkai no setchi no tame no seirei [Cabinet Order for the Establishment of the Dispute Reconciliation Committee for Nuclear Damage Compensation,] Cabinet Order No. 99 of 2011 (Japan).

⁴⁴ Nobuo Kojima, *Fukushima dai-ichi genshiryoku hatsudensho jiko ni kan suru songai baishō to wore ni kanren suru sho-mondai [Damages Compensation for the Fukushima Dai-ichi Nuclear Power Plant Accident and Various Related Problems]*, 62 JIYŪ TO SEIGI [LIBERTY AND JUSTICE], at 36 (2011) (on file with author).

⁴⁵ FUKUSHIMA DISPUTE RECONCILIATION COMMITTEE, INTERIM GUIDELINES ON THE SCOPE OF NUCLEAR DAMAGES FROM THE ACCIDENT AT THE TEPCO FUKUSHIMA DAI-ICHI AND DAI-NI PLANTS, http://www.mext.go.jp/b_menu/shingi/chousa/kaihatu/016/index.htm.

⁴⁶ Press Release, Tokyo Electric Power Company, Permanent Compensation for Nuclear Damages by the Accident at Fukushima Daiichi Nuclear Power Station and Fukushima Daini Nuclear Power Station (Aug. 30, 2011), <http://www.tepco.co.jp/en/press/corp-com/release/11083007-e.html>.

⁴⁷ See Records of Applications and Payouts for Indemnification of Nuclear Damage, <http://www.tepco.co.jp/en/comp/images/jisseki-e.pdf> (excluding almost 1.3 million applications from voluntary evacuees, which are treated separately by TEPCO).

reluctant to approach TEPCO directly, they may refer the dispute to the Dispute Resolution Center for Nuclear Damage Compensation, a newly established alternative dispute resolution body.⁴⁸ In the alternative, claimants may pursue tort litigation on the basis of the Nuclear Compensation Law.⁴⁹

The Dispute Reconciliation Committee's powers formally include the mediation of compensation-related disputes.⁵⁰ The Dispute Resolution Center was set up in August 2011 to assist in mediation between TEPCO and dissatisfied claimants, after it became clear that a larger and more sophisticated body would be required to handle the potentially large volume of disputes.⁵¹ Mediators, as well as investigators, who act as rapporteurs by gathering facts and refining issues of contention, are all lawyers seconded from the Japan Federation of Bar Associations, while the remainder of the Center's staff is made up of secondees from the Ministry of Justice and MEXT.⁵² Nevertheless, the requirement that mediators use the Interim Guidelines as a base for their settlement proposals,⁵³ together with the fact that the Center sits under and is funded by MEXT (notwithstanding initial proposals—and the insistence of the Japanese legal profession—that the Center should be established outside of government), has led to criticisms that the Center is not sufficiently independent.⁵⁴

⁴⁸ DISPUTE RESOLUTION CENTER FOR NUCLEAR DAMAGE COMPENSATION, GUIDE TO THE DISPUTE RESOLUTION CENTER FOR NUCLEAR DAMAGE COMPENSATION, (2011), http://www.mext.go.jp/component/a_menu/science/detail/_icsFiles/afiedfile/2013/07/10/1329118_001_1.pdf.

⁴⁹ Nothing prevents claimants from bringing civil action against TEPCO in tandem with seeking mediation through the Dispute Resolution Center, or even after a completed settlement. Indeed, it may be entirely rational to do so preemptively, given that the limitation period for actions in tort is 3 years and so will expire in March 2014. See MINPŌ [MINPŌ] [CIV. C.], art. 724 (Japan).

⁵⁰ Genshiryoku songai no baishō ni kansuru hōritsu [The Act on Compensation for Nuclear Damage], Law No. 147 of 1961, art. 18(2)(i) (Japan).

⁵¹ Naoki Idei, *Genpatsu jiko songai baishō seikyū to ADR no katsuyō: genshiryoku songai baishō funsō kaiketsu sentaa no katsudō wo chūshin to shite* [The Use of ADR in Nuclear Accident Damages Compensation Claims: Centred on the Dispute Resolution Centre for Nuclear Damage Compensation], 63 JIYŪ TO SEIGI [LIBERTY AND JUSTICE] at 72 (2012) (on file with author).

⁵² See DISPUTE RESOLUTION CENTER FOR NUCLEAR DAMAGE COMPENSATION, GENSHIRYOKU SONGAI BAISHŌ FUNSŌ SENTAA KATSUDŌ JŌKYŌ HŌKOKUSHO – HEISEI 24-NEN NI OKERU JŌKYŌ NI TSUITE [REPORT ON THE ACTIVITIES OF THE DISPUTE RESOLUTION CENTER FOR NUCLEAR DAMAGE COMPENSATION—IN RESPECT OF ACTIVITIES FOR 2012] (2013), http://www.mext.go.jp/component/a_menu/science/detail/_icsFiles/afiedfile/2013/03/05/1329118_010.pdf.

⁵³ Dispute Resolution Center for Nuclear Damage Compensation Mediation Rules, art. 21 (on file with author); see MINISTRY OF EDUC., CULTURE, SPORTS, SCIENCE, AND TECHNOLOGY – JAPAN, http://www.mext.go.jp/a_menu/genshi_baisho/jiko_baisho/detail/1329129.htm (last visited Aug. 29, 2013) (in fact, mediators have expanded on the Interim Guidelines with a series of detailed standards of their own).

⁵⁴ Akimoto, *supra* note 36, at 25; Idei, *supra* note 51, at 72. The Center arguably bears some of the characteristics of the governmental ADR bodies used as examples in Frank Upham's classic work. See

One of the challenges faced by the Center has been a degree of intransigence by TEPCO. A number of disputes have arisen, for example, because of TEPCO's unwillingness to compensate for items not specified under the Dispute Reconciliation Committee's guidelines, notwithstanding the Committee's intention that the guidelines should serve as a minimum only.⁵⁵ The Center has taken a number of measures to discipline TEPCO in egregious cases, including awarding premiums to claimants in its settlement proposals, and "naming and shaming" TEPCO on the Center's website.⁵⁶

The dispute resolution system under the Center is not without its drawbacks for claimants. Mediators were slow to resolve claims during the initial months of the Center's operations,⁵⁷ and the Center continues to have a large backlog of claims.⁵⁸ However, timeframes are still considerably shorter than the average speed of court proceedings.⁵⁹ Claims through the Center arguably provide a greater prospect of success than litigation, where the imbalance with TEPCO is starker for unrepresented litigants in particular.⁶⁰ Indeed, in November 2011 TEPCO announced that it would abide by the Center's settlement proposals.⁶¹ As a free service, it is also considerably cheaper. It is unclear how many claims have been brought by

generally FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* (1987). Upham argues that these bodies were set up to "capture" disputes away from the judiciary, so as to prevent social movements coalescing around litigation and the courts ruling contrary to the preferences of the Japanese elite. Through these ADR bodies, Upham argues, the bureaucracy can keep the resolution of disputes particularized, informal and opaque. UPHAM at 16-27.

⁵⁵ Foote, *supra* note 13, at 16.

⁵⁶ See Tōkyō Denryoku Kabushiki Kaisha no Taiō ni Mondai no aru Kohyō ni tsuite [On Cases in which TEPCO's Response has been Problematic], http://www.mext.go.jp/a_menu/genshi_baisho/jikobaisho/detail/1329350.htm (last visited Aug. 29, 2013).

⁵⁷ Foote, *supra* note 13, at 11.

⁵⁸ The Dispute Resolution Center has only disposed of 5065 of 7545 claims received to date. See Dispute Resolution Ctr. for Nuclear Damage Comp., Wakai Chūkai Tetsudzuki no Jisshi Jōkyō [Enforcement Status of Settlement Mediation Procedures], http://www.mext.go.jp/a_menu/genshi_baisho/jiko_baisho/detail/1329118.htm (last visited Aug. 29, 2013).

⁵⁹ On the basis that the Dispute Resolution Center aims to resolve all claims within four to five months, it averaged around eight months per case in 2012 (DISPUTE RESOLUTION CENTER FOR NUCLEAR DAMAGE COMPENSATION, *supra* note 52, at 1), as opposed to an average of 15.1 months for environmental pollution claims at the district court level. See *generally* SUPREME COURT OF JAPAN, Saiban no Jinsokuka ni kakawaru Kenshō Kekka no Kōhyō (Dai 5-kai) ni tsuite [On the Announcement of the 5th Verification of the Results of the Acceleration of Hearings] (2013), available at http://www.courts.go.jp/about/siryō/hokoku_05_about/index.html.

⁶⁰ Almost three-quarters of claimants do not have legal representation, which has contributed to delays in processing claims. See Foote, *supra* note 13, at 11.

⁶¹ Naoki Idei, *The Nuclear Damage Claim Dispute Resolution Center*, 28 Japan Commercial Arbitration Ass'n Newsletter, 1, 1 (2012), available at <http://www.jcaa.or.jp/e/arbitration/docs/newsletter28.pdf>.

way of litigation, but the number would appear not to be large.⁶² In spite of its limitations, mediation through the Center appears to remain a more attractive option than litigation.

C. Government Financial Assistance has Effectively Nationalized TEPCO

Early on it became apparent that TEPCO would be unable to meet its potential liability above the insured amount of JPY 120 billion alone. TEPCO estimated its total liability at JPY 2.5 trillion,⁶³ a figure that has since been revised up to more than JPY 3.8 trillion.⁶⁴ Against this, the company's net assets are worth no more than JPY 1.14 trillion.⁶⁵ Accordingly, TEPCO requested government assistance pursuant to the Nuclear Compensation Law in May 2011.⁶⁶

The government's response was the creation of the Nuclear Damage Liability Facilitation Fund.⁶⁷ The Fund is organized as a statutory corporation, with half of its units held by the government and the remaining half held by Japan's twelve nuclear power operators, which are required to make annual contributions.⁶⁸ In return, the Fund can render financial assistance to any operator liable for compensation under the Nuclear Damages Act, including through the acquisition of an equity interest in the operator.⁶⁹ Where the potential liability of the operator far exceeds the assets held by the Fund (as is naturally the case with the TEPCO payout), the Fund may request government assistance in the form of a special issue of government bonds.⁷⁰ Operators receiving financial assistance must formulate a "special business plan" together with the Fund, geared towards

⁶² Only two cases that reached judgment seem to have been reported. *See* Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] June 29, 2011, Hei 23 (yo) no. 1099; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] July 19 2012, Hei 23 (wa) no. 19191 (Japan).

⁶³ TEPCO, ANNUAL REPORT 2012 1, 3 (2012), <http://www.tepco.co.jp/en/corpinfo/ir/tool/annual/pdf/ar2012-e.pdf>.

⁶⁴ TEPCO, ANNUAL REPORT 2013 at 39 (2013), <http://www.tepco.co.jp/en/corpinfo/ir/tool/annual/pdf/ar2013-e.pdf>.

⁶⁵ *Id.* at 21.

⁶⁶ NUCLEAR POWER PLANT ACCIDENT ECON. DAMAGE RESPONSE TEAM, TŌKYŌ DENRYOKU FUKUSHIMA GENSHIRYOKU HATSUDENSHO JIKO NI KAKAWARU GENSHIRYOKU SONGAI NO BAISHŌ NI KAN SURU SEIFU NO SHIEN NO WAKUGUMI NI TSUITE [ON THE FRAMEWORK FOR GOVERNMENT SUPPORT IN RELATION TO NUCLEAR DAMAGE COMPENSATION FOR THE ACCIDENT AT THE TEPCO FUKUSHIMA NUCLEAR POWER PLANT] (2013), http://www.meti.go.jp/earthquake/nuclear/pdf/songaibaisho_110513_01.pdf.

⁶⁷ Genshiryoku songai baishō enkatsu-ka kikin-hō [Nuclear Damages Liability Facilitation Fund Law], Law No. 94 of 2011 (Japan).

⁶⁸ *Id.* at art. 38.

⁶⁹ *Id.* at art. 41.

⁷⁰ *Id.* at art. 48.

swift payment of compensation to victims and repayment of the further assistance from the Fund through increased contributions.⁷¹ The relevant minister must approve of the business plan and can order the operator to produce reports and take appropriate measures for its duration.⁷²

The reason for the abstract wording of the law (referring to “operators” rather than TEPCO) and the reason that all nuclear power companies must contribute to the fund—notwithstanding that only TEPCO bears any liability from the Fukushima disaster—is that the Fund is intended to be a permanent body.⁷³ In this sense the Fund is best regarded as an additional layer of insurance rather than a convoluted financing arrangement for TEPCO alone.⁷⁴

At the same time, the law establishing the Fund states that the government is to put in place full measures to ensure that the Fund can fulfill its objectives, in light of the government’s “social responsibility” in having promoted the use of nuclear power in Japan.⁷⁵ This wording almost appears designed to eschew any question of legal responsibility.

TEPCO submitted its business plan and request for financial assistance from the Fund in October 2011 and received approval in November 2011.⁷⁶ The company has made nineteen requests for assistance to date⁷⁷ and has issued new shares to the Fund such that the Fund now holds 54.69% of the shares in TEPCO.⁷⁸ TEPCO has, therefore, in effect been nationalized under the pretense of financial assistance.

III. CONTRAST: ASBESTOS COMPENSATION IN NEW SOUTH WALES

TEPCO has reached a settled agreement in just over 600,000 of the 673,000 of the claims brought by victims of the Fukushima disaster to

⁷¹ *Id.* at art. 45.

⁷² *Id.* at art. 47.

⁷³ Aribayashi, *supra* note 12, at 38.

⁷⁴ Although Morita argues that it is better understood as a loss-sharing scheme. *See* Morita, *supra* note 15, at 8.

⁷⁵ Genshiryoku songai baishō enkatsu-ka kikin-hō [Nuclear Damages Liability Facilitation Fund Law], Law No. 94 of 2011, art. 2 (Japan). This wording comes from a cabinet resolution—Tōkyōdenryoku Fukushima genshiryokuhatsudenshōjiko ni kansuru genshiryoku songai baishō ni kanren suru seifu no shien taisei ni tsuite [Regarding the Government Support Structure in relation to Nuclear Damages in respect of the Accident at the Tokyo Electric Fukushima Nuclear Power Plant].

⁷⁶ Press Release, TEPCO, Approval of the Special Business Plan (Nov. 4, 2011), <http://www.tepco.co.jp/en/press/corp-com/release/11110403-e.html>.

⁷⁷ Press Release, TEPCO, Financial Support from the Nuclear Damage Liability Facilitation Fund (Aug. 21, 2013), http://www.tepco.co.jp/en/press/corp-com/release/2013/1229905_5130.html.

⁷⁸ *See Corporate Information*, TEPCO, <http://www.tepco.co.jp/en/corpinfo/ir/stock/stock-e.html> (last visited Apr. 26, 2013). The Tokyo Metropolitan Government holds a further 1.2% of shares in TEPCO. *Id.*

date.⁷⁹ If TEPCO is unable to settle in even a small proportion of those outstanding claims, prompting claimants to instead turn to civil litigation for redress, the burden on the court system could be tremendous. Consequently, there are incentives for the creation of an alternative dispute resolution model to alleviate this burden.

Government-sponsored mediation is a common form of ADR in Japan.⁸⁰ However, other models of ADR are also available. One such example is the NSW Dust Diseases Tribunal (“DDT”), which hears claims in respect of diseases caused by environmental exposure to asbestos and other silicates.⁸¹

The number of such claims against a small number of Australian asbestos manufacturers has gradually risen in Australia since the use and manufacture of asbestos products was steadily phased out in the 1980s.⁸² Indeed, as a proportion of population, the number of claims now heard by the DDT on an annual basis is comparable with those dealt with by the Japanese Dispute Resolution Center for Nuclear Damage Compensation. As of August 2013, the Dispute Resolution Center had received a total of 7,545 claims since its establishment in 2011, of which 3,896 had been settled.⁸³ In 2012 alone, the DDT, covering a jurisdiction with a population only five percent that of Japan, received 451 claims and finalized 357.⁸⁴

A. *Asbestos Exposure Rates in NSW are Among the Highest in the World*

Governments in Australia as elsewhere were aware of the health hazards associated with asbestos by the middle of the 20th century.⁸⁵ Yet in NSW asbestos was mined until 1979,⁸⁶ while products containing amphibole

⁷⁹ *Records of Applications and Payouts for Indemnification of Nuclear Damage*, TEPCO, <http://www.tepco.co.jp/en/comp/images/jisseki-e.pdf>.

⁸⁰ See Foote, *supra* note 13, at 1-4; see generally UPHAM, *supra* note 54.

⁸¹ See DUST DISEASES TRIBUNAL, <http://www.dustdiseasestribunal.lawlink.nsw.gov.au/> (last visited Aug. 29, 2013).

⁸² The first successful common law damages claims for asbestos-related diseases were made in the late 1980s. See *Pilmer v McPhersons Ltd.* (Unreported, Supreme Court of Victoria, Gobbo J, Sept. 1985) (Austl.); *Barrow & Heys v CSR Ltd.* (Unreported, Supreme Court of Western Australia, Rowland J, Aug. 4, 1988) (Austl.).

⁸³ See MINISTRY OF EDUC., CULTURE, SPORTS, SCI. AND TECH. – JAPAN, http://www.mext.go.jp/a_menu/genshi_baisho/jiko_baisho/detail/1329118.htm (last visited Aug. 29, 2013).

⁸⁴ E-mail from Stephanie Chia, Registry Manager, Dust Diseases Tribunal, to author (Jan. 31, 2013) (on file with author).

⁸⁵ The Division of Industrial Hygiene within the NSW Department of Health, for example, reported on the risks of asbestos exposure in 1927, 1938, and 1948. See *Amaca Pty Ltd. (formerly known as James Hardie & Coy Pty Ltd.) v New South Wales & Anor* [2004] NSWCA 124, 83 (Austl.).

⁸⁶ The state’s sole asbestos mine in Baryulgil, northern NSW, which was operated by the James Hardie Group, was closed in April 1979. See HOUSE OF REPRESENTATIVES STANDING COMM. ON

asbestos were manufactured until the late 1980s.⁸⁷ Sales of asbestos were not outlawed altogether until 2004.⁸⁸ This represents a gap of some several decades during which Australian governments could have regulated to prohibit or restrict the use of asbestos, potentially saving lives.

Mass tort cases for asbestos exposure-related disease are certainly not unique to Australia. However, Australia was historically the highest user per capita of asbestos products, and rates of mesothelioma and other asbestos-related diseases are higher in Australia than in any other country—most of these within the state of NSW.⁸⁹ It is estimated, for example, that there will be a total of 18,000 cases of mesothelioma in NSW by 2020.⁹⁰

Workers' compensation claims for inhalation have been handled for several decades outside of the NSW courts by the Dust Diseases Board, a statutory no-fault compensation body for occupational diseases caused by all forms of silicates.⁹¹ However, an increasing number of negligence claims relate to long-term environmental exposure, such as through asbestos-lined concrete used in commercial and residential buildings, and therefore fall outside of the Dust Diseases Board's jurisdiction.⁹²

B. *The Dust Diseases Tribunal is an Independent Specialist Court*

In 1989 the NSW government recognized the need to create a more streamlined process for handling such claims, as many claimants were dying from disease before judgment could be reached in the state Supreme Court.⁹³ In response, the government created a specialist court in the form of the DDT,⁹⁴ which began hearing its first cases within the year.⁹⁵

Although nominally a tribunal, the DDT is a court of record, meaning that its proceedings are open to the public, governed by the NSW Uniform Civil Procedure Rules, and that its judgments form part of the common

ABORIGINAL AFFAIRS, REPORT ON THE EFFECTS OF ASBESTOS MINING ON THE BARYULGIL COMMUNITY (1984).

⁸⁷ CANCER INST. OF NSW, MESOTHELIOMA IN NEW SOUTH WALES 1, 14 (2010), available at http://www.cancerinstitute.org.au/media/27422/2010-9-22_monograph_mesothelioma_in_nsw.pdf.

⁸⁸ *Id.* Specifically, the sale of all remaining products using chrysotile asbestos was prohibited.

⁸⁹ O'Meally, *supra* note 20, at 1209-10.

⁹⁰ *Id.* at 1210.

⁹¹ *Workers Compensation (Dust Diseases) Act 1942* (NSW) 14 (Austl.).

⁹² See Lee C. Moerman & Sandra van der Laan, James Hardie & the Final Funding Agreement (2010) (unpublished manuscript) (on file with the University of Sydney).

⁹³ O'Meally, *supra* note 20, at 1211-12.

⁹⁴ See *Dust Diseases Tribunal Act 1989* (NSW) 63 (Austl.).

⁹⁵ O'Meally, *supra* note 20, at 1212.

law.⁹⁶ All cases must be heard before a qualified District or Supreme Court judge, who has the same powers of contempt as in the Supreme Court.⁹⁷ Accordingly, and unlike the Dispute Resolution Center, the DDT enjoys the same degree of independence as the ordinary courts.

However, due to the need to process claims quickly, the DDT has been provided with a procedural flexibility that is unique within the NSW judiciary. For example, the DDT can sit at any hour on any day, anywhere in or outside of Australia, and often does so at the bedsides of terminally ill patients.⁹⁸ The DDT's record for hearing a claim is only four hours between filing and judgment,⁹⁹ although the average is naturally longer. Some rules ordinarily applicable to tort claims, such as the general law limitation period, are also not applicable to those before the DDT.¹⁰⁰

The DDT has played an important role in keeping claims out of the ordinary courts. However, its structure is very different from the Dispute Resolution Center.

It is difficult to see any legal or constitutional barriers in Japan to establishing a specialized, informal court capable of dealing with claims quickly, like the DDT. The need to establish a body within a short timeframe is no answer, as the DDT was set up in essentially the same period of time as the Dispute Resolution Center. Nor is the fact that the need for alternative dispute resolution is temporary. Since asbestos production was effectively stopped several decades ago in Australia, the DDT is also, by definition, a temporary dispute resolution body. Given that TEPCO has received more than half of a million claims so far, it is fair to assume that it will take many years to finalize all disputes. The desire to limit the independence of the mediator, and to maximize influence over TEPCO, may be one reason for the delay.

It is worth noting that Japan's own response to increasing asbestos litigation has again been to co-opt the claims process.¹⁰¹ Whereas in Japan, too, laborers in asbestos-intensive industries have been eligible for workers' compensation payments for some time. In 2006, the Diet passed the Law on

⁹⁶ *Dust Diseases Tribunal Act 1989*, *supra* note 94, at pt. 2, ss. 4; *Uniform Civil Procedure Rules 2005* (NSW), sch 1 (Austl.).

⁹⁷ *Dust Diseases Tribunal Act 1989*, *supra* note 94, at ss 7, 10 (Austl.).

⁹⁸ O'Meally, *supra* note 20, at 1215.

⁹⁹ *Id.*

¹⁰⁰ The *Limitations Act 1969* (NSW), which sets a general limitation period of six years in respect of actions in tort, does not apply to proceedings that are brought before the DDT. *See supra* note 94, at s 12A.

¹⁰¹ In respect of asbestos litigation in Japan generally, *see* Eri Osaka, *Asbestos Regulations and Litigations in Japan: Recent Development and the Prospects for the Future* (2011) (unpublished manuscript); Luke Nottage, *The ABCs of Product Safety Re-regulation in Japan: Asbestos, Buildings, Consumer Electrical Goods, and Schindler's Lifts*, 15 GRIFFITH L. REV. 242 (2006).

Relief for Health Damages from Asbestos, applicable to sufferers of asbestos-related diseases caused by environmental exposure.¹⁰² Under this law the Environmental Restoration and Conservation Agency administers a no-fault compensation scheme, funded in part by industry, from which standardized payments are made to any certified sufferer of an asbestos-related disease or their families.¹⁰³ It is again arguable that the government is in part seeking to avoid potential claims where would-be defendants (such as manufacturers of asbestos products) have become insolvent or cannot be identified. In the same year that this law was passed, a well-publicized class action suit was brought against the national government for failing to control working conditions in, and emissions from, an asbestos factory in Sennan, Osaka Prefecture.¹⁰⁴

C. Defendant Funding Arrangements have been at Arm's Length

In a significant proportion of cases brought before the DDT, companies in the James Hardie group, which held a near monopoly on the manufacture of asbestos products in Australia for most of the twentieth century, were among a very small number of defendants.¹⁰⁵ Like TEPCO, therefore, James Hardie as defendant stood as the principal shield against a large volume of claims directly against the government.

As the number of claims mounted over the 1980s and 1990s, James Hardie sought to distance its profit-making activities from its tort liabilities. In 2001 the group established a trust in NSW to administer asbestos compensation claims, while at the same time shifting the James Hardie holding company and most of the group's assets offshore, with the consent of the state Supreme Court.¹⁰⁶ In 2004 a critical judicial enquiry into James Hardie's corporate reorganization found the trust to be significantly underfunded, in breach of its representations to the Supreme Court.¹⁰⁷ James Hardie negotiated with the NSW government, trade unions, and victims' groups, finally agreeing to establish a new trust—the Asbestos Injuries

¹⁰² *Ishiwata ni yoru kenkō higai no kyūsai ni kan suru hōritsu* [Operation of the Asbestos Health Hazard Relief Benefits, Environmental Restoration and Conservation Agency of Japan], Law No. 4 of 2006 (Japan).

¹⁰³ ENV'T RESTORATION & CONSERVATION AGENCY OF JAPAN, OPERATION OF THE ASBESTOS HEALTH HAZARD RELIEF BENEFITS, <http://www.erca.go.jp/asbestos/relief/> (last visited Aug. 29, 2013).

¹⁰⁴ The Osaka District Court found against the government and awarded plaintiffs JPY 435 million, although this was reversed by the Osaka High Court on appeal. *See* Osaka Kōtō Saibansho [Osaka High Ct.] Aug. 25, 2011, Hei 23 (ne) no. 2031 (Japan).

¹⁰⁵ Moerman & van der Laan, *supra* note 92.

¹⁰⁶ *See generally* Dunn, *supra* note 21.

¹⁰⁷ *Id.*

Compensation Fund (“AICF”)—paid for by 35% of James Hardie’s annual cash flow.¹⁰⁸ Under the agreement, the NSW government has the right to appoint only a minority of directors to the board of the trustee.¹⁰⁹

Following the global financial crisis and the consequent slump in James Hardie’s building product sales, the government put in place a standby loan facility for the AICF worth AUD 320 million, in exchange for which the government received security over certain of the AICF’s assets.¹¹⁰ The loan facility agreement gives the government no control over the operations of either the AICF or James Hardie.¹¹¹

It is true that in one sense the NSW government could not have hoped to impose stricter conditions on the AICF’s funding, given that most of James Hardie’s assets were already offshore. However, given that it took the NSW government several decades to concern itself with James Hardie’s funding arrangements, and that it made no move to prevent the group’s move offshore, it is arguable that the government would not have attempted to intervene any further even if it had been possible to do so.

It is again difficult to see why the Japanese government could not have similarly entered into an arm’s length financing arrangement of this nature with TEPCO. Given that TEPCO has a statutory monopoly over the provision of electricity around the capital,¹¹² the likelihood of default is certainly far less than that of James Hardie, the fortunes of which are tied to the global building industry, and which has anyway moved most of its assets outside of Australia. The TEPCO funding arrangements seem instead to be designed to maximize the government’s influence over TEPCO and other plant operators, both by allowing the government to mandate operator contributions and by using the provision of finance to give the government considerable leverage over TEPCO’s operations.

IV. GOVERNMENT LIABILITY FOR REGULATORY FAILURE IN JAPAN

The Japanese government’s concern to maintain control over the dispute resolution process, and over TEPCO, through its funding

¹⁰⁸ ASBESTOS INJURIES COMP. FUND, AMENDED AND RESTATED FINAL FUNDING AGREEMENT, http://www.aicf.org.au/key_docs.php (last visited Aug. 29, 2013).

¹⁰⁹ *Id.* at 50-51 (clauses 5.1 and 5.2 outline the composition of the Trustee Board and the power to appoint directors respectively).

¹¹⁰ Parliament of New South Wales, AICF Facility Agreement (Dec. 9, 2010), [http://www.parliament.nsw.gov.au/prod/la/latabdoc.nsf/0/15e23dae847b31bdca2578010021ac7c/\\$FILE/\(a\)%20AICF%20facility%20agreement.pdf](http://www.parliament.nsw.gov.au/prod/la/latabdoc.nsf/0/15e23dae847b31bdca2578010021ac7c/$FILE/(a)%20AICF%20facility%20agreement.pdf); see also *James Hardie Former Subsidiaries (Winding Up and Administration) Act 2005* (NSW) 105 (Austl.).

¹¹¹ Parliament of New South Wales, *supra* note 110.

¹¹² *Denki jigyō hō* [The Electricity Utilities Industry Law], Law No. 170 of 1964 (Japan).

arrangements, can perhaps be explained by the potential for the government to bear direct liability for the disaster.

A. The State Compensation Act is the Basis for Government Liability in Regulatory Failure Cases

While the Japanese government cannot bear any direct liability for compensation of victims of the Fukushima disaster under the Nuclear Compensation Law, it may nevertheless be possible for victims to bring claims against the government on the basis of the State Compensation Law,¹¹³ which makes special provisions for the tort liability of public authorities. The operator-centered liability principle of the Nuclear Compensation Law arguably cannot preclude claims under the State Compensation Law (cf. the Civil Code), as this would potentially be unconstitutional.¹¹⁴ The question is therefore on what grounds a claim under the State Compensation Law is possible.

Article 1(1) of the State Compensation Law provides that: “[w]here an officer exercising the public functions of the State or of a public authority has, in the course of their duties, unlawfully inflicted damage upon another person whether intentionally or negligently, the State or public authority shall be liable for compensation.”¹¹⁵

As under the general tort provision of the Civil Code,¹¹⁶ there is no separate cause of action for negligence. All “unlawful” conduct occasioning damage—whether negligent or intentional—falls under the heading of “tortious conduct” (*fuhō kōi*).¹¹⁷ “Unlawfulness” (*ihōsei*) equates broadly with the infringement of rights and legally protected interests.¹¹⁸ Whereas in cases under the Civil Code damage itself is usually determinative of

¹¹³ Kokka baishō-hō/kokka wa hōritsu o zesei [State Compensation Law/State Redress Law], Law No. 125 of 1947 (Japan).

¹¹⁴ It would be inconsistent with Article 17 of the Constitution, which provides citizens a right to sue for illegal acts by public officials. See Tadashi Ōtsuka, *Fukushima dai-ichi genpatsu jiko ni yoru songai baishō to baishō shien kikō hō: fuhō kōi hōgaku no kanten kara* [Damages Compensation for the Fukushima Dai-ichi Nuclear Power Plant Accident and the Compensation Facilitation Fund Law: From a Torts Law Perspective], JURISUTO, at 40 (2011).

¹¹⁵ Kokka baishō-hō/kokka wa hōritsu o zesei [State Compensation Law/State Redress Law], Law No. 125 of 1947 (Japan). This is the author’s personal translation of the State Compensation Law/State Redress Law. An alternative translation of the law in full is available online on the Japanese Law Translation website, <http://www.japaneselawtranslation.go.jp>, where the law is referred to as the “State Redress Law.”

¹¹⁶ MINPŌ [MINPŌ] [CIV. C.] art. 709 (Japan).

¹¹⁷ *Id.*

¹¹⁸ RYŌICHI YOSHIMURA, *FUHŌ KŌI* [TORT LAW] 39-42 (Yūhikaku ed., 4th ed. 2009).

unlawfulness,¹¹⁹ under the State Compensation Law the infliction of damage must be unlawful within the context of the public (i.e., regulatory) function contemplated.¹²⁰ As many functions are premised upon the deliberate infringement of rights and interests for the public benefit, something more is required. Unlawfulness is therefore determined in light of the underlying statute in accordance with which the relevant function was exercised, as well as any applicable procedural or organizational rules.¹²¹ The exercise of the function need not necessarily be invalid for administrative law purposes, although a prior judgment of invalidity will be persuasive.¹²²

B. Japanese Courts have Increasingly Recognized Liability in Regulatory Failure Cases

Several omissions on the part of government agencies have been pointed to as possible grounds for liability with respect to the Fukushima disaster. The Nuclear Safety Commission (“NSC”) failed, for example, to keep its *Inspection Guidelines for Seismic Design for Nuclear Power Facilities* up-to-date with new knowledge on the scale of past seismic activity in the Tohoku region.¹²³ According to the Diet’s Independent Commission Report, the Nuclear and Industrial Safety Agency (“NISA”) accepted at face value calculations by the Japan Society of Civil Engineers as to the maximum height of any possible tsunami, and TEPCO’s own calculations as to the probability of a tsunami reaching the Fukushima Dai-ichi plant, without conducting independent analysis.¹²⁴ While inspection guidelines are not binding on operators, the NSC also failed to exercise its rule-making functions to mandate severe accident countermeasures for natural disasters in line with international trends.¹²⁵ The NSC, moreover, failed to make any provision under its disaster prevention guidelines for multiple disasters (such as a station blackout following an earthquake or

¹¹⁹ Indeed, Article 709 does not use the term “unlawful,” although it is widely used in tort law jurisprudence.

¹²⁰ HIDETAKE SATŌ, *JITSUMU HANREI: CHIKUJŌ KOKKA BAISHŌ HŌ* [PRACTICAL CASE LAW: ANNOTATED STATE COMPENSATION LAW] 53 (Sankyō Hōki, 2008).

¹²¹ *Id.* at 57.

¹²² *Id.* at 60.

¹²³ Hitomi, *supra* note 36, at 23. See Noboru Utatsu, *Genshiryoku songai baishō hō ni okeru sekinin shūchū gensoku to kokka hoshō* [The Concentrated Liability Principle Under the Nuclear Damage Compensation Law and State Compensation], 74 *SONGAI HOKEN KENKYŪ* (2012) for a detailed analysis of faults in other NSC guidelines (on file with author).

¹²⁴ FUKUSHIMA NUCLEAR ACCIDENT INDEP. INVESTIGATION COMM’N, *supra* note 1, at 27.

¹²⁵ INDEP. INVESTIGATION COMM’N ON THE FUKUSHIMA NUCLEAR ACCIDENT, *supra* note 5, at 279.

tsunami that disrupts access to the site), regarding the probability of multiple disasters occurring as “extremely low.”¹²⁶

Even on the basis of the existing inspection guidelines, regulators’ oversight appears to have been lax. After revising the *Seismic Design Guidelines* in 2006, NISA and METI chose the softer option of requiring operators with existing facilities to conduct “backchecks” (safety assessments) rather than ordering “backfits” (upgrading of facilities in accordance with specified technical standards).¹²⁷ Given the age of the Numbers one through four reactors at Fukushima Dai-ichi, both TEPCO and NISA were aware that existing safety facilities could not meet the 2006 standards.¹²⁸ Nevertheless, after submitting only partial interim reports in 2008 and 2009, TEPCO repeatedly delayed submitting its final backcheck report.¹²⁹ NISA neither required TEPCO to produce its final report earlier nor ordered it to carry out reinforcement of the Numbers one through four reactors.¹³⁰

The State Compensation Law does not explicitly refer to omissions, and the Japanese courts were traditionally reluctant to recognize the unlawfulness of a failure to exercise a regulatory function—as opposed to the negligent or improper use of a function—due to concern about interfering with administrative discretion. As a general principle of tort law, liability for an omission can only arise where there was a positive duty to act. In the context of the State Compensation Law, courts have more readily recognized such a positive duty on the part of a public authority to exercise non-discretionary regulatory functions¹³¹ but have been hesitant to do so when the function is discretionary,¹³² such as the NSC’s rule-making functions.

Since the 1970s, however, lower courts have increasingly ruled against the government in cases of regulatory failure for discretionary functions also.¹³³ For example, from the 1970s to the 1980s, several district courts found that the Ministry of Health’s failure to withdraw marketing

¹²⁶ *Id.* at 286-87.

¹²⁷ See Utatsu, *supra* note 123 (providing a detailed analysis of the regulatory basis).

¹²⁸ FUKUSHIMA NUCLEAR ACCIDENT INDEP. INVESTIGATION COMM’N, *supra* note 1, at 27.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Claims in such cases are arguably closer to the common law cause of action for breach of statutory duty than negligence.

¹³² See generally Ryō Futagoishi & Kazutaka Suzuki, *Kisei kengen no fukōshi wo meguru kokka baishō hō jo no sho-mondai ni tsuite* [*Various Issues Under the State Compensation Law Surrounding Non-Exercise of Regulatory Functions*] HANREI TAIMUZU [HANTA], at 7 (2011) (on file with author).

¹³³ For a comprehensive list of all reported cases dealing with regulatory failure, see Akira Nishino, *Kokka baishō hō komentaaru* [*State Compensation Law Commentary*] KEISŌ SHOBŌ, at 202-205 (2012) (on file with author).

approvals for stomach medication linked with SMON disorder was unlawful.¹³⁴

The Supreme Court has considered liability for regulatory failure in four principal cases and found against the government in two of them. Each case involved regulatory functions with some degree of discretion: two with respect to ordinary licensing functions,¹³⁵ and two with respect to rule-making functions over matters of health and safety.¹³⁶ Although none of these tests have evinced a clear criterion for unlawfulness, each has employed something close to the main test for invalidity of discretionary functions under ordinary administrative law,¹³⁷ considering whether the relevant regulatory failure “significantly lacked reasonableness” in light of the purpose of the function granted or the nature of the function.¹³⁸ If so, the failure to regulate will exceed the bounds of the discretion, effectively giving rise to a positive duty to exercise the function.

In comparison with the wealth of lower court regulatory failure cases relating to, for example, consumer products,¹³⁹ there is no past precedent with respect to nuclear damage, including among the Tōkaimura litigation, which was directed solely at the nuclear operator. In 2011 a group of TEPCO shareholders sought to recover their losses from the fall in TEPCO’s share price against the government, arguing that the government and not TEPCO was responsible for the Fukushima disaster by promoting nuclear

¹³⁴ *Id.* at 202.

¹³⁵ See *Real Estate Law Case*, Saikō Saibansho [Sup. Ct.] Nov. 24, 1989, no. 43(10), SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1169, 1337 HANREI JIHŌ [HANJI] 48 (Japan); *Chloroquine Medical Harm Case*, Supreme Court Saikō Saibansho [Sup. Ct.] June 23, 1995, 49(6) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1600, 1539 HANREI JIHŌ [HANJI] 32 (Japan).

¹³⁶ See *Chikuhō Pneumoconiosis Case*, Saikō Saibansho [Sup. Ct.] April 27, 2004, 58(4) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1032, 1152 HANREI TAIMUZU [HANTA] 120 (Japan); *Kansai Minamata Disease Case*, Saikō Saibansho [Sup. Ct.] Oct. 15, 2004, 58(7) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1802, 1167 HANREI TAIMUZU [HANTA] 89 (Japan). For concise summaries of each of these and the previous two cases, see KATSUYA UGA ET AL., *GYŌSEI HANREI HYAKUSEN II* [100 SELECT CASES ON ADMINISTRATIVE LAW, VOL II] (Yūhikaku ed., 6th ed. 2012).

¹³⁷ See, e.g., *The MacLean Case*, Saikō Saibansho [Sup. Ct.] Oct. 4, 1978, 32(7) SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1223 (stating that an administrative disposition will be illegal where “the agency’s reasoning had absolutely no basis in fact, or their appreciation of the facts demonstrated a clear lack of rationality, such that it is obvious that the decision *significantly lacked reasonableness in light of social norms*”) (the author’s translation and emphasis).

¹³⁸ See *Real Estate Law Case*, 1337 HANREI JIHŌ [HANJI] 48, 50; *Chloroquine Medical Harm Case*, 1539 HANREI JIHŌ [HANJI] 32, 37; *Chikuhō Pneumoconiosis Case*, 1152 HANREI TAIMUZU [HANTA] 120, 127; *Kansai Minamata Disease Case*, 1167 HANREI TAIMUZU [HANTA] 89, 97.

¹³⁹ See, e.g., a number of recent judgments in respect of government approval of the Iressa anti-cancer drug, the side effects of which led to the premature deaths of a number of patients: Tōkyō Kōtō Saibansho [Tokyo High Ct.] Nov. 15, 2011, 2131 HANREI JIHŌ [HANJI] 35; Osaka Kōtō Saibansho [Osaka High Ct.] May 25, 2004, Hei 23 (ne) no. 1674 (Japan). A number of actions were also brought against the drug’s manufacturer, AstraZeneca PLC, under *Nihon no seizōbutsusekininhō* [Japan’s Product Liability Law], Law No. 85 of 1994 (Japan).

power without setting down sufficient disaster standards, and that it failed to adequately consider whether the exception to liability under the Nuclear Compensation Law could apply.¹⁴⁰ However, this case appears to have been filed before the publication of the Independent Commission Report, and in a terse judgment, the Tokyo District Court found simply that the basis upon which government liability was claimed was unclear and could not be upheld.¹⁴¹ Whether, in the light of the various reports' findings, any of the above omissions could be said to "significantly lack reasonableness" is therefore an open question. The two cases in which the Supreme Court has previously found liability on the part of the government may offer some guidance.

C. *Case Studies: The Chikuhō Pneumoconiosis Case and the Kansai Minamata Disease Case*

This part examines two cases where the Supreme Court found an omission to exercise a regulatory function unlawful: the *Chikuhō Pneumoconiosis Case* and the *Kansai Minamata Disease Case*.

1. *The Chikuhō Pneumoconiosis Case*

The first case in which the Supreme Court found an omission to exercise a regulatory function unlawful was the *Chikuhō Pneumoconiosis Case*.¹⁴² There, former miners at major (but now defunct) coal mines in Chikuhō, Fukuoka Prefecture, brought suits against the national government for failing to exercise regulatory functions under the Mine Safety Law¹⁴³ so as to prevent them from developing coal workers' pneumoconiosis (colloquially known as "black lung"), a type of respiratory disease similar to asbestosis.¹⁴⁴ Specifically, they argued that the relevant minister had sufficient knowledge of the risks of exposure to coal dust at the time that the preventative Pneumoconiosis Law¹⁴⁵ came into force in 1960. However, the minister failed to exercise his powers under the Mine Safety Law to amend existing ministerial ordinances to mandate suitable abatement techniques or to exercise adequate safety supervision of mines.¹⁴⁶ Abatement techniques

¹⁴⁰ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Apr. 25, 2012, Hei 23 (wa) no. 13288 (Japan).

¹⁴¹ *Id.* That the plaintiffs also argued that their constitutional rights had been infringed suggests that they were somewhat grasping at straws.

¹⁴² *Chikuhō Pneumoconiosis Case*, 1152 HANREI TAIMUZU [HANTA] 120, at 123 (Japan).

¹⁴³ Kōzan hoan-hō [Mine Safety Law], Law No. 70 of 1949 (Japan).

¹⁴⁴ *Chikuhō Pneumoconiosis Case*, *supra* note 142, at 123-24.

¹⁴⁵ Jinpai-hō [Pneumoconiosis Law], Law No. 30 of 1960 (Japan).

¹⁴⁶ *Chikuhō Pneumoconiosis Case*, *supra* note 142, at 126.

such as the use of water flushing rock drills had been mandatory in Japanese gold mines since 1952 but were resisted in coal mining, it was argued, because of the importance of cheap coal for the country's economic policy.¹⁴⁷

The Supreme Court found that such a failure was contrary to the purpose of the Mine Safety Law—to safeguard the health and safety of miners—and therefore “significantly lacked reasonableness,” rendering it unlawful.¹⁴⁸ Although not explicitly applying the discretion reduction theory, the Supreme Court found relevant as part of the “general considerations” surrounding the failure to regulate that the risk to health was foreseeable and could have been avoided by exercise of the function.¹⁴⁹

2. *The Kansai Minamata Disease Case*

In the *Kansai Minamata Disease Case*, decided only a few months after the *Chikuhō* case, the Supreme Court again found a minister liable for failing to intervene earlier to minimize the effects of Minamata disease in Minamata Bay, Kumamoto Prefecture.¹⁵⁰ By the late 1950s it was widely suspected that poisonous mercury compounds released from a local plant of Chisso, a chemical manufacturer, and ingested via fish caught in the bay, were responsible for the outbreak of the disease.¹⁵¹ However, the government delayed taking action for more than a decade before finally regulating emissions into Minamata Bay.¹⁵² In this case, the Supreme Court found that even if the Minister did not have actual knowledge of the source of the poisonous mercury compounds in the 1950s, the source could have been discovered if a more thorough investigation had been made, and the number of disease sufferers minimized if the appropriate functions under relevant water safety laws had been exercised to prohibit further releases of mercury.¹⁵³

The Court found that the failures both to carry out this investigation and consequently to take appropriate regulatory measures from the point at which the hypothetical investigation could have occurred again

¹⁴⁷ *Id.* at 124.

¹⁴⁸ *Id.* at 127.

¹⁴⁹ *Id.* at 126-27.

¹⁵⁰ See UPHAM, *supra* note 54 (providing a detailed overview of the Minamata Bay disaster, including of earlier mass tort litigation against Chisso).

¹⁵¹ *Id.* at 31.

¹⁵² MINISTRY OF THE ENV'T ENVTL HEALTH DEP'T, MINAMATA DISEASE: THE HISTORY AND MEASURES (2002), <http://www.env.go.jp/en/chemi/hs/minamata2002/>.

¹⁵³ UPHAM, *supra* note 54.

“significantly lacked reasonableness” and were unlawful.¹⁵⁴ So too was the failure of the Kumamoto prefectural government to take equivalent action under the prefectural Fisheries Ordinance,¹⁵⁵ notwithstanding that the prefecture had fewer resources than the national government and that the relevant ordinance was not directly related to industrial pollution.¹⁵⁶ Again, the court stressed foreseeability and avoidability as part of the “general considerations” leading to unlawfulness.¹⁵⁷

3. *Analyzing the Chikuhō Pneumoconiosis Case and the Kansai Minamata Disease Case*

The *Chikuhō* and *Minamata Disease* cases appear to suggest that failure to exercise discretionary regulatory functions will “significantly lack reasonableness” where 1) there is a risk of significant harm, 2) the government is aware or should be aware of the risk of harm, and 3) it is within the government’s power to prevent harm by exercising its regulatory function.

To some extent, all three conditions are met by the facts of the Fukushima disaster. As noted above, the independent commissions’ reports found that the NSC and NISA could have kept themselves informed of the potential for a tsunami the size of that which struck the Fukushima plant if they had sought independent advice. At the very least, NISA was aware that the Fukushima plant did not meet the NSC’s existing (out-of-date) standards. It was certainly within the power of the NSC to issue more stringent standards or of NISA to enforce backfits of the Fukushima plant, although there are genuine causal questions as to whether either alone could have prevented the disaster.

Other factors may also point to potential liability. One common observation is that courts are more likely to find that a failure to regulate was significantly unreasonable and hence unlawful where the interest affected was personal safety or health rather than property.¹⁵⁸ Thus the Supreme Court found against the government in the *Chikuhō* and *Minamata Disease* cases, but not in the *Real Estate Law* case, where a defrauded property buyer sought to claim against a local government for failing to prevent his loss by

¹⁵⁴ *Id.*

¹⁵⁵ Kumamoto ken jōrei [Kumamoto Prefectural Ordinance], no. 31 of 1951 (Japan).

¹⁵⁶ See UPHAM, *supra* note 54 (providing a detailed overview of the Minamata Bay disaster, including of earlier mass tort litigation against Chisso).

¹⁵⁷ *Id.*

¹⁵⁸ See Futagoishi & Suzuki, *supra* note 132, at 22; Nishino, *supra* note 133, at 207.

withdrawing the registration of the defrauding realtor.¹⁵⁹ While any litigation arising from the Fukushima disaster would presumably relate mainly to property damage, the potential, if not actual, harm from radiation that could have occurred may push the government's inadequate oversight of TEPCO into the same category.

It can also be observed that in both the *Chikuhō* and *Minamata Disease* cases, the government had actively sided with the primary tortfeasors—coal mining companies in the *Chikuhō* case, and Chisso in the *Minamata Disease* case—to avoid imposing an economic burden on them. This no doubt also informed the court's finding as to the reasonableness of the decision not to regulate. As noted above, in the case of TEPCO, too, the independent investigation commissions were critical of government regulators for falling captive to industry and for failing to exercise independence in setting or enforcing seismic safety standards.

On the other hand, one significant issue raised by the Fukushima accident, which to date has not been resolved by the Supreme Court, is the relationship between the scope of intended beneficiaries of a given public function and the existence of a positive duty to exercise it. While some functions relate to only a narrow class of parties, the scope of others—particularly broad rule-making functions, such as those exercised by NISA and the NSC—are quite wide.

Some lower courts have sought to resolve this question by borrowing from administrative law the “reflexive interest principle” (*hanshateki rieki ron*) of standing. Under this modified principle, the failure to exercise a function will not be unlawful unless plaintiffs can demonstrate a legal right that an authority is bound to protect in light of the objectives for which the function is granted, and not simply a “reflexive” interest as an ordinary member of the public.¹⁶⁰ Where the scope of potential beneficiaries is broad, it is less likely that an individualized right will be made out.

The Supreme Court has not made its position clear. Although not explicitly referred to, the reflexive interest principle appears to have been relevant to the decision in the *Real Estate Law* case.¹⁶¹ The Supreme Court held that the purpose of registration of realtors under the Real Estate Law was not to protect every individual party to a real estate transaction from loss, and therefore the failure to protect could not be unlawful.¹⁶²

¹⁵⁹ *Real Estate Law Case*, Saikō Saibansho [Sup. Ct.] Nov. 24, 1989, no. 43(10), SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1169, 1337 HANREI JIHŌ [HANJI] 48 (Japan).

¹⁶⁰ See Nishino, *supra* note 133, at 208-09.

¹⁶¹ See *Real Estate Law case*, *supra* note 159.

¹⁶² *Id.*

However, the use of the reflexive interest in State Compensation Law cases has been widely criticized,¹⁶³ and the principle does not appear to have been referred to at all in either the *Chikuhō* or *Minamata Disease* cases. In any event, in the *Monju Reactor Case*, an administrative law case in which local residents sought to void the construction permission for the Monju reactor in Fukui Prefecture, the reflexive interest principle was considered and found not to act as a bar to bringing suit.¹⁶⁴

V. GOVERNMENT LIABILITY FOR REGULATORY FAILURE: A COMMON LAW COMPARISON

Compared to the response of the Japanese government to the Fukushima disaster, the less interventionist response of the NSW government to mounting asbestos claims may relate to the potential for the government to be held directly liable for failure to adequately regulate the use and sale of asbestos products. In contrast with the Japanese position described above, courts in Australia, as in other common law countries, have been reluctant to impose liability for the exercise or non-exercise of discretionary regulatory functions (as opposed to private law functions). Again, this is not to suggest that common law governments never take a stronger hand in responding to mass tort situations. However, their own potential liability need not act as a determining factor.

A. *The Common Law Position Makes it Difficult to Establish a Duty of Care*

Unlike Japan, most common law jurisdictions do not have a separate body of law governing state liability in negligence.¹⁶⁵ Indeed, the starting point at common law is total sovereign immunity from tort liability, although this has been largely waived by statute in most jurisdictions.¹⁶⁶ To this extent, in theory the ordinary common law tort rules apply to public authorities, consistent with the Diceyan view of the rule of law, where the State stands on equal footing to ordinary members of the public before the

¹⁶³ Futagoishi & Suzuki, *supra* note 132, at 13-14.

¹⁶⁴ Saikō Saibansho [Sup. Ct.] Sept. 22, 1992, 46(6) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 571 (Japan).

¹⁶⁵ It is worth noting that similar factual circumstances to the Fukushima disaster in common law countries could give rise to a claim of nuisance, insofar as residents surrounding the Fukushima Dai-ichi Plant have been deprived of enjoyment of their property through forced evacuation. However, only the rules for negligence are considered here.

¹⁶⁶ See, e.g., *Judiciary Act 1903 (Cth)* s. 64 (Austl.); 28 U.S.C. § 2674 (2013).

courts.¹⁶⁷ In practice, however, the courts have tended to apply a higher threshold in determining the existence of a duty of care towards members of the public. The different approaches of courts in the United States, England and Australia vary to some degree and are considered in turn below.

1. *The Anglo-American Approach: “Planning” vs. “Operational” Decisions*

Courts in both the United States and England have focused on the character of the regulatory function in question when determining the existence of a duty of care. In the United States, state liability for torts is primarily governed by statute, particularly the Federal Tort Claims Act (“FTCA”), which provides a right of action for any negligent or wrongful act or omission by an employee of the federal government where a private person would be liable for the same conduct.¹⁶⁸ This broad right is qualified by several exceptions including, most importantly, the “discretionary function exception,” which excludes liability for:

[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.¹⁶⁹

The discretionary function exception thus can limit the government’s liability in many instances.

In the early case of *Dalehite v. United States*,¹⁷⁰ the Supreme Court drew a distinction between functions at the “planning” level of administrative activity, which tend to be highly discretionary in nature and so are automatically immune, and functions at the “operational” level, which are not.¹⁷¹ The Supreme Court later clarified that the administrative level at which decisions are made will not alone be determinative of the operation of the exception, focusing its attention on the discretionary character of the

¹⁶⁷ See Weeks, *supra* note 18.

¹⁶⁸ 28 U.S.C. § 1346(b) (2013).

¹⁶⁹ 28 U.S.C. § 2680(a) (2013).

¹⁷⁰ *Dalehite v. U.S.*, 346 U.S. 15 (1953).

¹⁷¹ *Id.* at 42.

function.¹⁷² The Court instead extended the exception to any functions that involve the exercise of discretion and which are “susceptible to policy analysis” (whether or not the ultimate decision was actually informed by policy considerations),¹⁷³ potentially greatly expanding the range of administrative decisions to which the exception applies. A 2002 study found that government agencies had successfully relied upon the discretionary function exception in 72% of its cases.¹⁷⁴

The FTCA explicitly includes omissions within the scope of the discretionary function exception.¹⁷⁵ Courts have held that the exception applies where an omission results from a policy decision based on the need to balance competing factors. For example, the exception has been applied on several occasions to failures to adequately signpost hazards within national parks.¹⁷⁶ Although not a highly political function, decisions as to whether or not to erect a signpost involve a balancing between safety on the one hand, and the need to minimize disturbance to the natural environment on the other, as well as to manage finite resources.

While state liability in England is a matter of common law, the English courts have also adopted an approach close to the discretionary function exception. In *Anns v. Merton London Borough Council*, where the planning/operational distinction was imported from the American jurisprudence, the court held that public authorities would be immune from liability for the exercise of functions with respect to “policy” matters, provided that the exercise was *intra vires*.¹⁷⁷ In the case of *X (Minors) v. Bedfordshire County Council*, the public law test of *ultra vires* was abandoned as a condition, and it was held that any decision involving an assessment of policy matters (such as social policy or the allocation of limited financial resources) would be non-justiciable.¹⁷⁸

More recently, however, courts have moved away somewhat from the planning (or “policy”) or operational distinction, noting that the distinction is not always helpful or reliable.¹⁷⁹ Instead, courts have begun to emphasize

¹⁷² U.S. v. Gaubert, 499 U.S. 315 (1991).

¹⁷³ *Id.* at 324-25.

¹⁷⁴ William G. Weaver & Thomas Longoria, *Bureaucracy that Kills: Federal Sovereign Immunity and the Discretionary Function Exception*, 96 AM. POL. SCI. REV. 335, 343 (2002).

¹⁷⁵ 28 U.S.C. § 2680(a) (2013).

¹⁷⁶ See e.g., Elder v. U.S., 312 F.3d 1172 (10th Cir. 2002); Soldano v. U.S., 453 F.3d 140 (9th Cir. 2006).

¹⁷⁷ *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) 737 (appeal taken from Eng). Cf. the FTCA, under which the discretionary function exception will apply “whether or not the discretion involved be abused.”

¹⁷⁸ *X (Minors) v. Bedfordshire County Council*, [1995] 2 A.C. 633 (H.L.) 646 (appeal taken from Eng.).

¹⁷⁹ *Stovin v. Wise*, [1996] A.C. 923 (H.L.) 950 (appeal taken from Eng.).

the question of reasonableness for the purpose of breach of duty, rather than the existence of a duty of care.¹⁸⁰ Nevertheless, the distinction continues to be influential.¹⁸¹

It seems likely that many of the omissions to exercise regulatory functions with respect to TEPCO as identified by the independent commissions could be characterized as “planning” or “policy” functions, or “susceptible to policy analysis.” This is particularly so for highly discretionary rule-making functions, such as the NSC’s powers to set safety standards. Therefore, based on this strict distinction alone, equivalent omissions in the United States or England would arguably be unlikely to attract liability.

As noted above, however, courts in Japan have increasingly intruded upon discretionary functions. It did not seem to matter to the Supreme Court in either the *Chikuhō* or *Minamata Disease* cases that the functions complained of included highly discretionary rule-making functions, and moreover, were those exercised by a minister. Indeed, in other State Compensation Law cases plaintiffs have even succeeded in holding the Diet liable for failure to pass legislation beneficial to their interests.¹⁸²

2. *The Australian Approach: “Special Control”*

The High Court of Australia has also considered the planning/operational distinction,¹⁸³ but to date has not adopted it. The High Court has, however, suggested that the exercise or otherwise of a function will be for example, where it touches on “core policy” matters,¹⁸⁴ or is of a “quasi-legislative” (i.e., rule-making) character.¹⁸⁵

Instead of the character of the function itself, Australian courts tend to focus on the conduct of the relevant public authority surrounding the exercise of the function. With respect to regulatory failure, it is settled that the mere existence of a regulatory power will not give rise to a common law duty of care to exercise that power in order to avert harm.¹⁸⁶ Nor is it

¹⁸⁰ *Phelps v. Hillingdon LBC*, [2010] 2 A.C. 619 (H.L.) (appeal taken from Eng.).

¹⁸¹ WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* 654 (10th ed. 2009).

¹⁸² *The Overseas Voters Case*, Saikō Saibansho [Sup. Ct.] Sept. 14, 2005, 59(7), SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2087 (Japan).

¹⁸³ See e.g., *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 68 (Austl.); *Crimmins v Stevedoring Comm.* (1999) 200 CLR 1, 292 (Austl.); *Graham Barclay Oysters Pty Ltd. v Ryan* (2002) 211 CLR 540, 12 (Austl.).

¹⁸⁴ *Crimmins v Stevedoring Comm.* (1999) 200 CLR 1, 87 (Austl.).

¹⁸⁵ *Id.* at 291-96; *Graham Barclay Oysters Pty Ltd v Ryan*, *supra* note 183, at 14 (Austl.).

¹⁸⁶ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 23; *Graham Barclay Oysters Pty Ltd v Ryan*, *supra* note 183, at 91.

sufficient that the public authority is aware in a general sense of the potential risk of harm if it fails to exercise its power.¹⁸⁷ Rather, a duty of care will only arise where some positive act by the authority has created the risk of harm or has specifically encouraged individuals to rely on the authority for ensuring their safety.¹⁸⁸ Recent cases have also emphasized that a duty of care may arise where a public authority enjoys a “significant and special measure of control” over an individual’s safety or the safety of his/her property.¹⁸⁹ “Control” does not exist simply because the authority has the power to regulate certain conduct; rather, the authority must be directly responsible for the source of the risk of harm.¹⁹⁰

Moreover, the existence of an actionable duty to exercise a function must be consistent with and anticipated by the relevant legislation granting the power to exercise it. This will most commonly be the case where the subject of the power is an identifiable individual or class of persons, rather than the public at large.¹⁹¹

Two relatively recent cases in the context of asbestos litigation demonstrate the degree of “special control” required to establish a duty of care to exercise a regulatory function.

The first of these is *Crimmins v Stevedoring Industry Finance Committee*.¹⁹² Between 1961 and 1965, Mr. Crimmins was a stevedore on the docks of the Port of Melbourne.¹⁹³ Under the system in place, stevedores were registered with the Australian Stevedoring Industry Authority, a public body that maintained a presence in the port and directed stevedores to work for particular employers on a casual basis (often for only hours at a time), loading and unloading ships.¹⁹⁴ While the Authority never directly employed stevedores, it was nevertheless responsible for paying the stevedores, including “attendance pay” where stevedores were assigned no

¹⁸⁷ *Graham Barclay Oysters Pty Ltd v Ryan*, *supra* note 183, at 28, 95.

¹⁸⁸ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 23-25 (Austl.). In *Sutherland Shire Council v Heyman*, Justice Mason proposed that in rare cases a duty of care could also be grounded on “general reliance,” where all members of the public rely on an authority to perform a task that is the sole reason for its existence: *e.g.*, air traffic control. *Id.* Subsequent cases have disapproved of a test of general reliance.

¹⁸⁹ See *e.g.*, *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 102 (Austl.); *Crimmins v Stevedoring Committee* (1999) 200 CLR 1, 166 (Austl.).

¹⁹⁰ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 93 (Austl.).

¹⁹¹ *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 326 (Austl.); *Graham Barclay Oysters Pty Ltd v Ryan*, *supra* note 190, at 79. In England, see *Stovin v. Wise* [1996] A.C. 923 (H.L.) 950 (appeal taken from Eng.).

¹⁹² *Crimmins v Stevedoring Indus. Finance Comm.*, 200 CLR 1, 87 (Austl.). As a case arising in the state of Victoria, rather than NSW, this matter was not heard in the DDT.

¹⁹³ See *id.* at 52-60 for a full summary of the relevant facts.

¹⁹⁴ *Id.* at 56.

work, and could exercise certain disciplinary powers over them.¹⁹⁵ It could, for example, suspend or deregister a stevedore who refused to comply with work assignments.¹⁹⁶ The Authority could also direct employers with respect to workplace safety.¹⁹⁷ Although aware of the risk of exposure to asbestos products loaded and unloaded by stevedores, the Authority did not direct employers to provide the stevedores with protective respiratory equipment, which contributed to the development of Mr. Crimmins's mesothelioma.¹⁹⁸

A majority of the High Court found that the Authority had a duty of care towards Mr. Crimmins and other stevedores.¹⁹⁹ In a leading majority judgment, Judge McHugh noted that a duty could not ordinarily arise where a power was directed toward the benefit of the public at large,²⁰⁰ but that in this case, the relevant powers related very specifically to the stevedores.²⁰¹ The Authority's disciplinary powers enabled it to compel Mr. Crimmins to work in circumstances in which there was a risk of harm, placing him at a "special vulnerability" to the Authority.²⁰² Moreover, the Authority had a greater incentive to ensure workplace safety than the employers, which had usually employed Mr. Crimmins for only short periods of time.²⁰³

However, *Crimmins* should be best understood as a unique case highlighting the exceptional degree of control by a public authority required to establish a duty of care. The NSW case of *Amaca v NSW* also considered the liability of a public authority for failure to mandate workplace safety standards for handling asbestos, but was distinguished from *Crimmins* on the basis of the degree of control enjoyed by the authority.²⁰⁴

The victim in *Amaca*, Mr. Hay, worked in the construction of a power station in NSW in the 1950s and 1960s, where he handled asbestos products without adequate respiratory equipment.²⁰⁵ The government inspector regularly visited the worksite and investigated workplace safety, among other things, but made no specific directions regarding asbestos.²⁰⁶ After developing mesothelioma, Mr. Hay brought an action against his employer

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 57.

¹⁹⁸ *Id.* at 58.

¹⁹⁹ *Id.* at 3, 46, 133, 236, and 342.

²⁰⁰ *Id.* at 99.

²⁰¹ *Id.* at 130.

²⁰² *Id.* at 44-46 and 104-33.

²⁰³ *Id.* at 108.

²⁰⁴ *Amaca Pty Ltd. v NSW & ANOR* [2004] NSWCA 124, 83 (Austl.)

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 75-78.

and the owner of the power plant in the DDT.²⁰⁷ Both defendants successfully cross-claimed against James Hardie, the manufacturer of the products used on the site, who in turn cross-claimed against the state of NSW.²⁰⁸ James Hardie argued that the NSW government had been generally aware of the dangers of asbestos, and was particularly aware of dangerous levels of asbestos dust onsite at Mr. Hay's workplace as a result of a key inspection report.²⁰⁹ Therefore, it argued, the state should have mandated the use of respiratory equipment.²¹⁰ The NSW Court of Appeal rejected those arguments, noting that in contrast to the Australian Stevedoring Industry Authority in *Crimmins*, the state through its inspectors exercised no day-to-day control over Mr. Hay's working conditions.²¹¹ Nor did it have any greater knowledge of or incentive to eliminate the risk of harm than the other parties.²¹² Consequently, no duty of care arose.²¹³

The degree of control exercised by Japan's nuclear regulators over residents surrounding the Fukushima plant arguably falls well short of the high watermark for control exercised by the stevedoring authority in *Crimmins*. The NSC may have set general safety standards and NISA conducted inspections, but TEPCO remained responsible for the day-to-day operation of the Fukushima plant. Other than at the initial stage of approval for the plant's location, the government also had no control over residents proximity to the plant. Indeed, NISA's inspection powers are somewhat analogous to those of the government inspector in *Amaca*. It therefore seems unlikely that either the NSC or NISA would be regarded as exercising "special control" over the victims of the disaster.

By contrast, as noted above, the *Chikuhō* and *Minamata Disease* decisions appear to stand for the proposition that in Japan the mere knowledge of potential harm (or constructive knowledge, in the case of the *Minamata Disease* case) and the capacity to have exercised a regulatory power to prevent that harm can be sufficient to render the failure to regulate unreasonable.

Given that to date more than half of a million claims have been received by TEPCO under its voluntary compensation program, there is also a question as to whom a duty to exercise regulatory functions over TEPCO may have been owed. The Australian courts have adopted a principle not

²⁰⁷ *Id.* at 4.

²⁰⁸ *Id.* at 5-7.

²⁰⁹ *Id.* at 75-106.

²¹⁰ *Id.* at 116.

²¹¹ *Id.* at 144.

²¹² *Id.* at 147.

²¹³ *Id.* at 162.

unlike the Japanese reflexive interest principle, declining to impose a duty where a regulatory power is for the benefit of the public at large. However, the applicability of the reflexive interest principle in regulatory failure cases in Japan is unclear, particularly where the relevant harm relates to personal health and safety. The Supreme Court's failure to rely on the principle in the *Chikuhō* and *Minamata Disease* cases suggests that the principle may not apply. Indeed, whereas the subject of the minister's power to regulate mine safety in the *Chikuhō* case arguably related to an identifiable class of persons to whom a duty could be owed (i.e., coal miners), the same could not be said for the very general powers in the *Minamata Disease* case to regulate water quality in public waterways.

VI. JUDICIAL POLICY CONSIDERATIONS

The case law in Australia points to a number of reasons why courts hesitate to recognize a duty of care in regulatory failure cases. Courts in Australia, as in Japan and elsewhere, have been concerned to varying degrees about the degree to which it is constitutionally appropriate for them to judge the reasonableness of exercises of administrative discretion. However, as alluded to by Chief Justice Gleeson, as part of the majority in *Graham Barclay Oysters Pty Ltd v Ryan*, the position in Australia is that the question of whether to regulate a field of activity or not in the first place, or to leave industry to self-regulate in the shadow of private damages suits, is a highly political one, and often not suitable for resolution by the judiciary.²¹⁴

Relatedly, in cases where the impugned failure is a failure to regulate so as to prevent a third party from causing harm, Australian courts have found it particularly significant if the primary tortfeasor was not a public authority but rather a commercial actor with a self-interest in minimizing risk of harm.²¹⁵ Requiring the government to take positive steps to prevent another party's negligence is both inconsistent with the general common law's reluctance to find a duty of care for omissions, and arguably reduces the moral culpability of the primary tortfeasor. As Justice of Appeal Ipp noted in the leading judgment in *Amaca*, such arguments, when made by a primary tortfeasor, are "less than compelling from a social point of view."²¹⁶ Japanese courts, on the other hand, have tended to regard public authorities

²¹⁴ *Graham Barclay Oysters Pty Ltd v Ryan*, (2002) 211 CLR 540, 6 (Austl.).

²¹⁵ *Id.* at 145; *Amaca Pty Ltd v NSW & ANOR* [2004] NSWCA 124, 145 (Austl.).

²¹⁶ *Amaca Pty Ltd v NSW & ANOR*, *supra* note 215, at 156.

as less deserving of protection from liability than private defendants, precisely because they are compelled to act in the public interest.²¹⁷

Requiring public authorities to regulate to prevent third party negligence also potentially puts the government in the position of being an insurer of last resort whenever the primary tortfeasor cannot be identified or is insufficiently capitalized to pay damages, simply because the government has “deeper pockets.” Judgments in several Australian cases have pointed to the “massive obligation” that could be borne by the state if it were liable for every missed opportunity to prevent harm.²¹⁸ It is telling that the *Chikuhō* case was the first pneumoconiosis compensation case brought against the Japanese government, and only after most of Japan’s coal mining companies were closed.²¹⁹

Another more practical reason for denying liability is the difficulty of proving a counterfactual in order to demonstrate a causal relationship between the regulatory failure and the damage suffered.²²⁰ Courts run the risk of realizing too late which regulatory steps could have prevented harm, which in the case of the Fukushima disaster became clear only after months of detailed investigations. Moreover, determining the precise point at which liability arose in the absence of a specific positive act can have arbitrary results, as seen by the *Chikuhō* case, where the Supreme Court held that the minister’s failure to regulate had only been unreasonable from the day of the passage of the Pneumoconiosis Law on March 31, 1960, thereby rejecting several claims predating the law.²²¹

VII. CONCLUSION

In contrast with the Japanese government’s ostensibly inadequate regulation of TEPCO and other nuclear operators prior to the meltdown at the Fukushima Dai-ichi Nuclear Power Plant, its response in facilitating the resolution and funding of claims related to the disaster demonstrates a significant degree of government intervention. The government successfully convinced TEPCO to begin compensating victims only weeks after the disaster, thereby seriously impairing TEPCO’s ability to disclaim liability under the Nuclear Damages Compensation Law. It then used its powers

²¹⁷ SATŌ, *supra* note 120, at 69; *see also* Surma, *supra* note 17, at 398.

²¹⁸ *Amaca Pty Ltd. v NSW & ANOR*, *supra* note 215, at 159; *Graham Barclay Oysters Pty Ltd v Ryan*, *supra* note 214, at 324.

²¹⁹ *See Chikuhō Pneumoconiosis Case*, Saikō Saibansho [Sup. Ct.] Apr. 27, 2004, 58(4) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1032, 1152 HANREI TAIMUZU [HANTA] 120 (Japan).

²²⁰ *Graham Barclay Oysters Pty Ltd. v Ryan*, (2002) 211 CLR 540, 10 (Austl.).

²²¹ *Chikuhō Pneumoconiosis Case*, *supra* note 219, at 121.

under the law to set the terms for compensation and to put in place an ad hoc body under MEXT to mediate disputes in accordance with those terms. It established a mandatory provider of financial assistance to TEPCO in the form of the now-permanent Nuclear Damages Liability Facilitation Fund, coercing all nuclear operators into participating in its funding. The legislation establishing the Fund gives the government the power to direct TEPCO's business conduct, effectively nationalizing the company and removing any possibility of independence.

Whether or not this level of intervention is desirable, it was arguably not necessary to achieve the aims of smoothly administering large volumes of claims against TEPCO and ensuring TEPCO's solvency in order to pay them. So much is clear from the response of the NSW government to mass tort claims for asbestos exposure. The Japanese government could have established a specialized court in the same manner as the NSW Dust Diseases Tribunal, with the ability to quickly and flexibly resolve disputes but with the independence and enforcement powers of an ordinary civil court. Similarly, to ensure TEPCO's solvency, the government could have entered into a simple financing agreement with a priority charge over TEPCO's assets, as did the NSW government with James Hardie.

From a legal perspective, the sharply differing responses of the Japanese government to claims arising from the Fukushima disaster and of the NSW government to the high volume of asbestos exposure cases can in part be explained by the desire of the Japanese government to minimize the risk of its own liability for damages to those affected by the disaster. In contrast with jurisprudence on state liability for regulatory failure in common law countries, the approach taken in Japan means that there is a good possibility that the government would be found liable.

The first reported claims against the government for its handling of the Fukushima disaster have now begun to emerge,²²² but the government could face a deluge if TEPCO is allowed to fold or is too slow and unresponsive to claims. Unlike TEPCO, which is limited in the amount it can pay to victims by the value of its assets, the Japanese government could be liable for an almost unlimited amount of damages. The earlier Tōkaimura cases show that the potential scope of "nuclear damages" under the Nuclear Compensation Law is to be interpreted broadly, and a similar approach would no doubt be taken by courts, which are not bound by the Dispute

²²² See Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Apr. 25, 2012, Hei 23 (wa) no. 13288 (Japan). It has also been reported that a class action suit will be brought against the government by Fukushima residents, although as of this publication, the legal basis for these claims is unclear. See Mizuho Aoki, *Evacuee Suits Target TEPCO, Government*, THE JAPAN TIMES, Feb. 9, 2013.

Reconciliation Committee's *Institutional Guidelines*, to any claims with respect to the Fukushima disaster. Such large-scale litigation could also institutionalize actions against the government as a legitimate response to third party torts wherever the government was a more attractive defendant, thereby opening the floodgates to the "massive obligations" that have concerned the Australian courts. The incentives for the government to intervene in and manage the claims resolution process are clear.